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LAW AND PROCEDURE OF RECEIVERS

WITH FORMS

BEING A GREATLY ENLARGED, NEWLY CLASSIFIED, AND ENTIRELY RE-WRITTEN

SECOND EDITION OF SMITH ON RECEIVERS

BY

HENRY G. TARDY

OF THE CALIFORNIA BAR AND FOR MANY YEARS ASSOCIATE EDITOR OF THE AMERICAN STATE REPORTS

VOLUME ONE

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PREFACE TO SECOND EDITION

When the preparation of this edition was commenced, it was intended to make it an ordinary new edition of the work of Mr. John W. Smith on the Law of Receivers, but it was soon found that the body of law on the subject had so grown since the first edition of Mr. Smith's work and so many new questions had arisen by reason of the large and complex commercial problems involved in receivership cases that to treat the law on the subject adequately an entirely new work was necessary, using Mr. Smith's work as a basis for the earlier decisions. Hence the entire text has been re-written and the matter re-classified to meet the needs of the immense number of new decisions rendered since the first edition by Mr. Smith. The law of receivership is a branch of equity jurisprudence which is a product of American courts, although based on original principles derived from the earlier English cases. The evolution of the law of receivership as declared by the American courts is one of the greatest achievements of the equity courts of this country, both federal and state, and has been applied to the complexities of modern commercial life, suiting the remedy to the evils to be overcome or the protection to be afforded to the litigants and the public.

The vast amount of business conducted under corporate form during the past quarter of a century has required a statement of the principles of receivership law as applied to corporations, both private and quasi-public, and a harmonizing or distinguishment of the variant decisions on many of the problems presented to the courts. In our treatment of the subject we have deemed it essential to a

clear statement of the law to give the reasons for the law, and especially so when the decisions are variant. This task has involved an immense amount of work by the writer, especially in view of the large number of decisions on the subject. It has been the aim to make the footnotes sufficiently ample to show their support of the text and their application to the concrete problems presented to the practitioner in his use of the work. The profession will appreciate the broad-mindedness of the publishers in not limiting the writer to any specific number of pages in treating this big subject. Accordingly the treatment has not been curtailed in order to conform the book to a limited size, and those topics requiring an extended discussion have been treated with such length as their importance deserves. The writer has not shirked the consideration of the vast number of difficult problems by glossing them over with generalities, which would not be useful to the practitioner, nor has he failed to criticize decisions which he has deemed unsound, but always giving his reasons for so doing. And where the decisions have been variant the writer has suggested what, in view of the large bird's-eye view which has been afforded him of the whole subject, he has deemed the sounder rule, with his reasons therefor.

The topics have been so sectioned as to give a quick idea of the general contents of the section and the index has been prepared with a view to not overburden the user with useless cross-references or non-essential titles.

The writer desires to acknowledge gratefully the valuable assistance rendered him by Mr. Francis Dunn of the San Francisco Bar in the preparation of a number of important chapters.

It is hoped that this book will be found as useful to the profession as the amount of work put upon it should justify.

HENRY G. TARDY.

OAKLAND, CAL., July, 1920.

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CHAPTER I.

ORIGIN AND GENERAL NATURE OF THE LAW OF RECEIVERS AND ITS GROWTH.

§ 1. General Origin of Receiverships.

The power to appoint receivers is one referable solely to the powers exercised by courts of chancery. Courts of law, as such, do not have or exercise such powers unless specially conferred upon them.[1] The power to appoint a receiver *pendente lite* has been exercised by courts of chancery as incidental to their jurisdiction. It has not been deemed to depend upon statute.[2] It is a power which the Court of Chancery of England frequently exercised long before the establishment of the United States, and the leading principles in relation to it were established in that court in ancient times and have always been considered as powers of great utility and necessity.[3] The earlier English cases concerning receivers generally relate to real estate, and the office and duty of the receiver were not extended further than to exclude trespassers, to make such repairs as were indispensably necessary, and to collect and account for the rents and profits. But where the preservation of personal property was the object of the appointment, the receiver was, in many respects, invested with the authority of a *curator bonis* of the Roman law. Following the rules of the English Chancery Court the remedy of receiverships has been applied by the chancery courts of this country from early days. In one of the early leading cases,[4] Chancellor

1 Folsom v. Evans, 5 Minn. 418; Miller v. Perkins, 154 Mo. 629, 55 S. W. 874.

2 Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814.

3 Peacock v. Peacock, 16 Ves. 49; Harding v. Glover, 18 Ves. 281.

4 Williamson v. Wilson, 1 Bland's Ch. (Md.) 418.

Bland, in answering the argument that the remedy might be used for the most pernicious purposes, said: "That this court should have the power in unusual and pressing emergencies, at the instance of a party interested, effectually and without delay to put its hand upon property, so far as to prevent waste, inextricable confusion, or total destruction, seems to be admitted by all to be clearly right, or at least highly beneficial."

The growth of the law of receivership has been along the lines of evolution. Receivers are regarded as instrumentalities of the court and hence the law in respect to receiverships has kept pace with the extension and development of the general rules of law in respect to the complex conditions arising out of modern business methods and having for its purpose the protection and preservation of the property which forms the subject matter of the litigation until the final adjudication of the rights of the litigating parties. In its original exercise the appointment of a receiver was purely an incidental power of the Court of Chancery, put into operation as part and parcel of the great body of equitable jurisprudence, intended to secure justice by more complete and adequate remedies where the strict and unelastic rules and practice prevailing in the common law courts were insufficient.[5]

[5] Chancellor Bland in 1826 says: "It is a power of the court of chancery of England which appears to have been frequently called into action during more than a century past. All the leading principles in relation to it were well established there long before our revolution; and it was then, and has ever since been considered, there and here, as a power of as great utility as any which belongs to a court of chancery. And that it is so will appear very evident from a review of the nature and the variety of the exigencies in which it has been called into action, either to prevent fraud, to save the subject of litigation from material injury, or to rescue it from inevitable destruction." Williamson v. Wilson, 1 Bland Ch. (Md.) 418. See also Myers v. Estell, 48 Miss. 401; Beverley v. Brooke, 4 Gratt. (Va.) 187 (208). Vice Chancellor Giffard, in Hopkins v. Worcester & B. Canal Co., L. R. 6 Eq. 437,

Much of the modern law relative to receiverships has been the result of the extraordinary growth of corporations and of the immense railway systems of the country during the past quarter of a century. Following the principle that a mortgagee in possession will be allowed his expenses for making such repairs as are necessary for the maintenance of the mortgaged property and for the doing of such things as are necessary for the protection of the mortgagor's title,[6] and in accordance with the principle that a court deems it to be part of its duty to protect and preserve trust funds in its possession,[7] the courts of this country have developed to its greatest efficiency the issuance of receivers' certificates by means of which insolvent properties, especially those concerned with public utilities, have been enabled to recuperate and re-establish themselves as going concerns. It must, however, be admitted that in some cases it may be questioned whether the rehabilitation of a public utility by means of a receivership proceeding is a proper proceeding, although in most cases receiverships as a method of refinancing defunct or failing corporations have proved advantageous in the long run to both stockholders and creditors, whether secured or unsecured. It is, however, a power which must be exercised with great caution on account of the liability of its being abused.[8]

Recognizing the dangers of using receivership proceed-

447, says in regard to the appointment of receivers: "That is one of the oldest remedies in this court," and is a remedy which a court of chancery will always grant ex debito justitiæ, upon a proper showing.

[6] Sandon v. Hooper, 6 Beav. 246; 2 Jones on Mortgages, § 1126.

[7] Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895.

[8] Meyer v. Johnston, 53 Ala. 237, 349.

"But it is a power to be sparingly exercised. It is liable to great abuse, and while it is usually resorted to under the pretext that it will enhance the security of the bondholders, it not infrequently results in taking from them the security they already have and appropriating it to pay debts contracted by the court." Credit Company v. Arkansas Central Ry. Co., 15 Fed. 46, 5 McCrary 23.

ings for purposes of refinancing private corporations the tendency of the courts has been to limit such use of receiverships to transportation and other *quasi* public corporations.[9] The general attitude now maintained by our courts of last resort toward using a receivership as a means of rehabilitating a failing public utility and running it as a going concern through a receiver, was shown by Mr. Justice Peckham in a leading case[10] in which, in upholding the right of a simple contract creditor to have a receiver appointed over a street railway company in a case in which the defendant company admitted the allegations in the petition and consented to the appointment, he said: "While so holding we are not unmindful of the fact that a court is a very unsatisfactory body to administer the affairs of a railroad as a going concern, and we feel that the possession of such property by the court through its receivers should not be unnecessarily prolonged. There are cases—and the one in question seems a very strong instance—where, in order to preserve the property for all interests, it is a necessity to resort to

9 American Brake etc. Co. v. Pere Marquette Ry., 205 Fed. 14, 123 C. C. A. 322.

"The cessation of business for a day would be a public injury. A railroad is authorized to be constructed more for the public good to be subserved than for private gain. As a highway for public transportation it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserve this public convenience and economy." Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672.

"If the junior creditors of an insolvent corporation, could do what has been attempted in this case, every private corporation operating a sawmill, gristmill, mine, factory, hotel, elevator, irrigating ditches, or carrying on any business pursuit, would speedily seek this protection of a chancery court, and those courts would soon be conducting the business of all the insolvent private corporations in the country." Hanna v. State Trust Co., 70 Fed. 2, 30 L. R. A. 201, 16 C. C. A. 586.

In this connection see the excellent article of Thomas A. Thacher, Esq., on "Some Tendencies of Modern Receiverships" in Vol. IV, California Law Review, p. 32.

10 Matter of Reisenberg (Metropolitan St. R. R. Case), 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. 219.

such a remedy. A refusal to appoint a receiver would have led in this instance almost inevitably to a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims, and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives."

The main purposes of receivership proceedings, however, remains that of preserving and protecting property which is the subject of litigation until the final determination of the litigation.

§ 2. Receiver Defined.

A receiver is a person appointed by the court, as its representative, for the purpose of taking into his control, custody, and management property which is the subject matter of or involved in litigation for the purpose of preserving it pending the ultimate determination of such litigation, when it appears to the court to be unreasonable that it should remain in possession of the litigants.[1]

1 Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 34 So. 216; Hall v. Stulb, 126 Ga. 521, 55 S. E. 172; Baker v. Administrator of Backus, 32 Ill. 79; Wiswall v. Kunz, 173 Ill. 110, 50 N. E. 184; Nevitt v. Woodburn, 190 Ill. 283, 60 N. E. 500; Hay v. McDaniel, 26 Ind. App. 683, 60 N. E. 729; Hunter v. Peaks, 74 Me. 363; State v. Ross, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947; St. Louis etc. Ry. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49; Gardner v. Caldwell, 16 Mont. 221, 40 Pac. 590; Lattimer v. Lord, 4 E. D. Smith 183; Libby v. Rosekrans, 55 Barb. 202; Devendorf v. Dickinson, 21 How. Pr. 275; Waters v. Carroll, 9 Yerg. (Tenn.) 102; Beverley v. Brooke, 4 Gratt. (Va.) 187, 208; Harman v. McMullin, 85 Va. 187, 7 S. E. 349; Booth v. Clark, 58 U. S. (17 How.) 331, 15 L. Ed. 167; Davis v. Duke of Marlborough, 2 Swanst. 125; Ex parte Jay, L. R. 9 Ch. 133.

A "receiver" is a person appointed by a court or judicial officer to take charge of property pending a civil action, suit, or proceeding, or upon the entry of a judgment, decree, or other order, and to manage and dispose of it in accordance with the directions of the court. Egan v.

He is regarded as an officer of the court appointing him and whatever he does under the orders of the court in

North American Loan Co., 45 Or. 131, 76 Pac. 774, 775.

A "receiver" is a person appointed by a court to take into his custody, control, and management the property or funds of another pending judicial action concerning them. John C. Orr Co. v. Cushman, 54 Misc. Rep. 121, 104 N. Y. S. 510.

"The conception of a receiver is some one to take manual possession, for the court, of property, to take it out from the possession of others, and hold it for the better security of those who may be ultimately entitled thereto." Harrigan v. Gilbert, 121 Wis. 127, 99 N. W. 909.

A receiver is an officer of the court, and its representative in administering trust estates. He acts by order of the court. His powers come from the court. He has no individual status. His duty is to bring all the property belonging to his trust into possession, familiarize himself with the details of the estate and its business, keep accurate accounts, and make detailed reports with his recommendations to the court, so that the estate may be closed by the court as soon as the best interests of the owner and creditors will justify. Decker Bros. v. Berners Bay Min. & Mill. Co., 2 Alas. 504.

A receiver is a person authorized to take possession of property in litigation for the purpose of preserving it for whichever of the litigants the court may finally determine is entitled to it. Cook v. Terry, 19 Cal. App. 765, 127 Pac. 816, 817.

"The 'receiver' is the representative of the court and of all parties in interest, and can neither surrender to others nor divide with them the management of the prosecution or defense of such suits or the responsibility therefor." A receiver is appointed upon a principle of justice for the benefit of all concerned. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. Atlantic Trust Co. v. Dana, 128 F. 209, 223, 62 C. C. A. 657 (quoting and adopting Davis v. Gray, 16 Wall. (83 U. S.) 203, 217, 21 L. Ed. 447; citing and adopting Doggett v. Florida R. Co., 99 U. S. 72, 78, 25 L. Ed. 301; Southern Exp. Co. v. Western North Carolina R. Co., 99 U. S. 191, 199, 25 L. Ed. 319; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Gray v. Davis, 1 Woods 420, 10 Fed. Cas. 1006, 1009; Ames v. Union Pac. Ry. Co., 60 F. 966; High, Rec. (3d ed.), secs. 134, 135, 650; Jones, Railroad Securities, sec. 495).

A receiver is "the officer of the court, appointed on behalf of all parties, to take the possession and hold (the property) for the benefit of the party ultimately entitled." Town of Vandalia v. St. Louis etc. Co., 209 Ill. 73, 70 N. E. 662.

Where property is the subject of litigation and is liable to clear equities in a party out of posses-

respect to the property over which he is appointed receiver is the act of the court itself. His custody is that

sion the court may appoint a receiver for it when it seems just and necessary to keep the property in dispute from the control of either party until the controversy is decided. Skinner v. Maxwell, 66 N. C. 45.

A "receiver" is an indifferent person between parties, appointed by the court to receive the rents, issues, and profits of land or other thing in question, pending the suit, where it does not seem reasonable to the court that either party should do it. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant, or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. It is the court itself which has the care of the property in dispute. The receiver is but he creature of the court. He has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. The trustee in a mortgage of the property of a canal and irrigation company, who brings a suit for foreclosure and sale, and obtains the appointment of a receiver to take charge of and manage the property pendente lite, does not, by reason of such action, become personally liable for money borrowed, expenses incurred, and certificates issued by the receiver under orders of the court, in keeping the corporation on its feet as a going concern, which the proceeds of the sale proved insufficient to pay. Atlantic Trust Co. v. Chapman, 28 Sup. Ct. 406, 409, 208 U. S. 360, 52 L. Ed. 528, 13 Ann. Cas. 1155 (citing Booth v. Clark, 58 U. S. (17 How.) 221, 322, 15 L. Ed. 164, 167; Porter v. Sabin, 13 Sup. Ct. 1008, 1010, 149 U. S. 473, 479, 37 L. Ed. 815, 818).

Under Ballinger's Ann. Codes & St., sec. 5455, defining a "receiver" as a person appointed by a court to take charge of property pending a civil action or proceeding, and to manage and dispose of it as the court may direct, a person appointed by the court to take charge of mortgaged chattels and retain them pending foreclosure proceedings is a "receiver," regardless of whether he be appointed under section 5486, providing generally when receivers may be appointed, or under sections 5877 and 5878, relating to the case of a chattel mortgagee having reasonable cause to believe the debt to be insecure.

of the court and he can not act save as he is directed

Libert v. Unfried, 47 Wash. 182, 91 Pac. 774.

One of the main objects of a receivership is to conserve the property for the benefit of creditors and owners, and it should not be dissipated by fees and expenses. Goodman v. Wilder, 234 Ill. 362, 84 N. E. 1025.

A receiver is an officer of the court which appoints him and is its immediate representative in the custody and administration of the property which it has taken into possession. Ridge v. Manker, 132 Fed. 599, 67 C. C. A. 596.

Inasmuch as the main purpose of a receiver is to preserve the property which is the subject of the litigation, danger of its loss or injury is one of the principal grounds for his appointment. Hastings v. Tousey, 121 App. Div. 815, 106 N. Y. S. 639.

A receiver pendente lite is appointed to prevent injury to the property or thing in controversy, and to preserve it for the security of all parties in interest, for the purpose of disposition as the court may finally direct. Gray v. Council of Town of Newark (Del. Ch.), 79 Atl. 739.

A "receiver" is an officer of the court from which he receives his appointment. He is sometimes described as an impartial and indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or funds in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it. He is in no sense an agent or representative of any party to the action. He exercises his function in the interests of no individual interested in the litigation, but for the common benefit of all concerned. He is frequently spoken of as the "hand of the court," and has been called the "executive hand of the court" (citing High, Rec. sec. 2; Beach, Rec. sec. 2). Hence the compensation of a receiver and the party or parties to be charged with the payment of the same are matters to be determined by the court from which the receiver derives his appointment. Hall v. Stulb, 126 Ga. 521, 55 S. E. 172.

A receiver in an action is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues, and profits of land, or the produce of personal estate or things in question, which it does not seem reasonable to the court that either party should collect or receive, or where a party is incompetent to do so, as in the case of an infant. A receiver can only be properly granted for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the person or persons entitled thereto. Evans v. Coventry, 3 Drew. 80.

Receiver, in English law, an officer or manager appointed by a court to administer property for its protection, to receive rent or other income and to pay authorized outgoings. Receivers may be either appointed pendente lite or by way of equitable execution, e. g., for the purpose of enabling

by the court.[2] He is very frequently characterized as a judgment creditor to obtain payment of his debt, when the position of the real estate is such that ordinary execution will not reach it. Formerly receivers were appointed by the court of chancery, but by the Judicature Act 1873 it is now within the power of all divisions of the High Court to appoint receivers. Their powers and duties are exhaustively set forth by Kerr on Receivers (5th ed., 1905), who classifies the cases in which they may be appointed under the following heads: (a) Infants, (b) executors and trustees, (c) pending litigation as to probate, (d) mortgagor and mortgagee, (e) debtor and creditor, (f) public companies, (g) vendor and purchaser, (h) covenanter and covenantee, (i) tenant for life and remainderman, (j) partners, (k) lunacy, (l) tenants in common, (m) possession under legal title, and (n) other cases. The appointment of receivers is entirely within the discretion of the courts, and the power may be exercised "in all cases in which it shall appear just and convenient." Application for a receiver is usually made by motion, and the court will appoint the fittest person, without regard to who may propose him, the appointment of a receiver being for the benefit of all parties. Under the Conveyancing Act, 1881, when a mortgagee has become entitled to exercise his powers of sale, he may, by writing under his hand, appoint such person as he sees fit to be receiver. In bankruptcy practice a receiver, termed official receiver, is an officer of the court who in this capacity takes possession on the making of a receiving order, of all a debtor's assets. He is also an officer of the board of trade with the duty of taking cognizance of the conduct of the debtor and administering his estates (see Bktcy.). Vol. 22, Encyclopedia Britannica 951.

[2] State v. Reynolds, 209 Mo. 161, 123 A. S. R. 468, 15 L. R. A. (N. S.) 963, 14 Ann. Cas. 198, 107 S. W. 487.

Eichert v. Eichert, 28 Ohio Cir. Ct. R. 795, judgment affirmed 74 Ohio St. 512, 78 N. E. 1124.

The property or funds coming into the hands of the receiver are regarded as in the custody of the court. State v. Hubbard, 58 Kan. 797, 39 L. R. A. 860, 51 Pac. 290; State ex rel. Fichtenkamm v. Gambs, 68 Mo. 289; Farmers Loan etc. Co. v. Oregon etc. Co., 31 Ore. 237, 38 L. R. A. 424, 65 Am. St. Rep. 822, 48 Pac. 706; Wilder v. New Orleans, 87 Fed. 843, 31 C. C. A. 249; Rothschild v. Hasbrouck, 65 Fed. 283; Fallon v. Egberts Woolen Mill Co., 31 Misc. 523, 64 N. Y. S. 466; Battle v. Davis, 66 N. C. 252.

A "receiver" is but an officer of the court, whose tenure of office is indeterminate. Screven v. Clark, 48 Ga. 41; National Exchange Bank v. Woodside, 107 Mo. App. 47, 80 S. W. 715; Hubert v. New Orleans, 130 Fed. 21, 64 C. C. A. 389.

A receiver is an officer of the court having certain statutory duties to perform but at all times subject to the court's jurisdiction. Denver City Waterworks Co. v.

the arm or hand of the court.[3] Being an officer of the court and exercising his functions for the benefit of

American Waterworks Co., 81 N. J. Eq. 139, 85 Atl. 826.

A receiver is an officer of the court appointing him, and his power does not extend beyond the jurisdiction of that court, and will not be recognized by the courts of another state, except upon considerations of comity. Choctaw Coal & Mining Co. v. Williams-Echols Dry Goods Co., 75 Ark. 365, 87 S. W. 632, 5 Ann. Cas. 569; Malone v. Johnson, 45 Tex. Civ. App. 604, 101 S. W. 503, 505.

A "receiver" is but an officer of the court by whom he is appointed—as it is sometimes said, the right hand of the court. His custody is that of the court, and he can not act, save as he may be specially authorized. He may not enter into litigation respecting property in his possession, save by consent of the court. And the law of comity among courts, whether of the same or a different state or jurisdiction, requires that leave should be asked and granted before suit against a receiver. Manker v. Phoenix Loan Assn. of St. Joseph (Iowa), 96 N. W. 982, 983 (citing Smith v. St. Louis & S. F. Ry. Co., 151 Mo. 402, 52 S. W. 378, 48 L. R. A. 368; Keen v. Breckinridge, 96 Ind. 69; Central Trust Co. v. East Tenn. Ry. Co., 59 Fed. 523; Haag v. Ward, 89 Mo. App. 186).

In general, a "receiver" by virtue of his appointment is clothed with only such rights of action as may have been maintained by the person over whose estate he has been appointed and whose rights, for purposes of litigation, he has succeeded. The "receiver" is the officer, the agent, and hand of the court, and therefore his powers are limited, and are derived from the order of appointment, if a common-law receiver, and from statute, if a statutory receiver. In re National Mercantile Agency, 128 Fed. 639, 640 (quoting and adopting High, Rec. (3d ed. 1894) sec. 201; Beach, Rec. (Alderson's ed. 1897) sec. 650).

A "receiver" is a mere officer of the court whose first duty is to obey the orders of the court. He has no discretion, speaking generally, as to the application of funds which are in his hands by virtue of the receivership, and he holds them strictly subject to the order of the court, to be disposed of as the court may direct. Being a mere agent of the court he has no authority to appeal from orders made by it in the pending proceeding, except as it may authorize him so to do, and with the further exception that he has the right to appeal in all matters relating to his official conduct or his accounts and credits, or from judgments rendered against him in other proceedings. Polk v. Johnson (Ind.), 76 N. E. 634 (citing Herrick v. Miller, 123 Ind. 304, 24 N. E. 111; Smith v. Harris, 135 Ind. 621, 629, 35 N. E. 984; How v. Jones, 60 Iowa 70, 14 N. W. 93; Dorsey v. Sibert, 93 Ala. 312, 99 South. 288; People v. Troy Steel & Iron Co., 31 N. Y. Supp. 337, 82 Hun 303; Smith on Receiverships, sec. 417).

3 The order appointing him does not affect the title to property.

all parties concerned in the litigation, he is not to be regarded as an agent of either the plaintiff or defendant.[4] He acts for the common benefit of all parties inter-

He holds the property merely as a custodian. So. Granite Co. v. Wadsworth, 115 Ala. 570, 22 So. 157; Jackson v. King, 9 Kan. App. 160, 58 Pac. 1013; State ex rel. Fichtenkamm v. Gambs, 68 Mo. 289; Wilder v. New Orleans, 87 Fed. 843, 31 C. C. A. 249; Harrison v. J. J. Warren Co., 183 Mass. 123, 66 N. E. 589; Union Bank v. Kansas City Bank, 136 U. S. 223, 34 L. Ed. 341, 10 Sup. Ct. 1013.

The property though temporarily in the keeping of the court is sheltered by the same rights of ownership as before being so placed. State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; Sullivan Timber Co. v. Black, 159 Ala. 570, 48 So. 870; Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699; State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 468, 14 Ann. Cas. 198, 107 S. W. 487; Vila v. Grand Island etc. Co., 68 Neb. 222, 63 L. R. A. 791, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 94 N. W. 136, 97 N. W. 613; American Trust etc. Bank v. McGettigan, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793; International Trust Co. v. Decker Bros., 152 Fed. 78, 11 L. R. A. (N. S.) 152, 81 C. C. A. 302; Coy v. Title Guarantee & Trust Co., 198 Fed. 275.

Receiver is arm of the court and not representative of either party to suit. Dietrich v. O'Brien, 122 Md. 482, 89 Atl. 717; Bird v. People's Gas etc. Co., 158 Fed. 903.

A receiver is an arm of the court and represents the debtor and creditors as well as the court. Harvey v. Gartner, 136 La. 411, 67 So. 197, Ann. Cas. 1916D, 900.

A "receiver" is "the mere right arm of the court appointing him, to obey its orders in matters of administration within its jurisdiction, and as such is entirely subject to its control. He executes bond for the faithful performance of his duties, to account alone to the court appointing him; and the funds coming to his hands as such receiver are in custodia legis, held by him for distribution and application by the court whose commission he holds." Fowler v. Osgood, 141 Fed. 20, 21, 72 C. C. A. 270, 4 L. R. A. (N. S.) 824.

A receiver is but an arm of the court to take care of and administer the property, assets, and estate in suit, to do with it as the law may direct for the benefit of the parties concerned; and, while in theory he can do nothing without the court's order or sanction, he has, in matters of management and manner of disposition of the estate, a large discretion. Coy v. Title Guarantee & Trust Co., 198 Fed. 275.

"The appointment of a receiver does not determine any right or affect the title of either party, in any manner whatever. He is the officer of the court, and truly the hand of the court." Ellicott v. Warford, 4 Md. 85.

[4] Kreling v. Kreling, 118 Cal. 421, 50 Pac. 549; Hay v. McDaniel, 26 Ind. App. 683, 60 N. E. 729;

ested in the litigation.[5] In view of his duties toward all

Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Rumsey v. People's Ry. Co., 154 Mo. 215, 55 S. W. 615; Daube v. Philadelphia etc. Co., 77 Fed. 713, 23 C. C. A. 420; Hale v. Hardon, 95 Fed. 747, 37 C. C. A. 240; Baltimore Building etc. Assn. v. Alderson, 99 Fed. 489, 39 C. C. A. 609.

Receivers being officers of the court are not agents of the party for whom they are appointed receivers, in the sense that they have authority to bind such party by any act or omission on their part. Stannard v. Robert H. Reid & Co., 118 App. Div. 304, 103 N. Y. Supp. 521.

A receiver of a railroad is not the agent of the company, nor its representative, nor in any sense under its control. He is a person who comes into possession of the equipment and business in invitum, placed there by the court which virtually sequestrates the property for the time being to preserve it from ruin for the benefit of creditors primarily and other parties interested secondarily. Eckels v. Farley, 131 Ill. App. 557.

A receiver of a railroad is not a representative of the company, but is rather an officer or representative of the court. His relation to the company is analogous to that of a sheriff holding its property under judicial order or process. Fountain v. Stickney, 145 Iowa 167, 139 Am. St. Rep. 410, 123 N. W. 947.

"A 'receiver' does not become a litigant in the action, nor does he represent one more than the other of any of the parties of the litigation. He merely takes possession of the property as the right arm of the court for the benefit of the party ultimately entitled to it." Vila v. Grand Island Electric Light, Ice & Cold Storage Co., 68 Neb. 222, 63 L. R. A. 791, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 97 N. W. 613.

Receivers are officers of the court, and not agents of the party for whom they are appointed receivers, in the sense that they have authority to bind such party by any act or omission on their part. Stannard v. Robert H. Reid & Co., 118 App. Div. 304, 103 N. Y. Supp. 521.

A "receiver" is an officer of the court and not in any sense an agent or representative of either party; he is not such a general agent as has any implied power, and he can not make effectual contracts unless they are authorized or ratified by the court. Lazear v. Ohio Steel Foundry Co., 65 W. Va. 105, 63 S. E. 772.

A receiver of property appointed by court is not an agent. He is an indifferent person holding the property for those ultimately entitled to it, and his possession is that of the court. Wilderberger v. Hartford Fire Ins. Co., 72 Miss. 338, 48 Am. St. Rep. 558, 28 L. R. A. 220, 17 So. 282.

It has, however, been held in Louisiana that where a receiver was appointed for a partnership with the consent of the partners in a suit for the dissolution of the partnership, he would not be regarded as the officer of the court but merely the agent of the parties. Kellar v. Williams, 3 Rob. (La.) 321.

[5] McGarrah v. Bank, 117 Ga. 556, 43 S. E. 987; Hooper v. Winston,

parties to the litigation, he naturally should be a person who is impartial as between the litigants and parties interested in the outcome of the controversy.[6] A receiver has also been characterized as a *quasi* trustee holding the fund for the benefit of whoever may eventually establish title to it.[7]

24 Ill. 353; Baker v. Backus, 32 Ill. 79; Kaiser v. Kellar, 21 Iowa 95; Williamson v. Wilson, 1 Bland (Md.) 418; Ellicott v. Warford, 4 Md. 80; Osborn v. Heyer, 2 Paige (N. Y.) 342; Brown v. Northrup, 15 Abb. Pr. N. S. 333; Corey v. Long, 43 How. Pr. 497, 12 Abb. Pr. N. S. 427; King v. Cutts, 24 Wis. 627; Meier v. Kan. Pac. R. Co., 5 Dill. 476, Fed. Cas. No. 9394; Booth v. Clark, 58 U. S. (17 How.) 331, 15 L. ed. 167.

He is bound to act for the equal benefit of all the parties and hence can not agree to place the property in his custody under the control and management of one of the parties to the litigation. Shadewald v. White, 74 Minn. 208, 77 N. W. 42.

A receiver is appointed on behalf of all the parties to the action and not on behalf of the complainant or defendant only. Atlantic Trust Co. v. Chapman, 208 U. S. 360, 13 Ann. Cas. 1155, 52 L. ed. 528, 28 Sup. Ct. 406.

He is a ministerial officer of the court appointing him and his possession is not adverse to either party, but for the benefit of all the parties to the suit according to their respective rights. Chicago etc. Co. v. Kenney, 29 Ind. App. 506, 68 N. E. 20.

[6] Coy v. Title etc. Co., 157 Fed. 794.

A "receiver" is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit, and he holds the property for the benefit of all the parties interested, and his title and possession is that of the court. State v. Norfolk & S. Ry. Co., 152 N. C. 785, 26 L. R. A. (N. S.) 710, 21 Ann. Cas. 692, 67 S. E. 42.

Receivers are instrumentalities of the court, and are required to be impartial as between the parties litigant, and should have authority from the court, either express or implied, for all of their acts. Metropolitan Trust Co. of City of New York v. North Carolina Lumber Co., 162 Fed. 170; American Box Co. v. North Carolina Lumber Co., 162 Fed. 170.

A receiver should be in a large sense indifferent as between the various interests involved. He should have no such personal interest as would interfere with an unbiased and impartial exercise of his duties as a receiver. Farmers Loan etc. Co. v. Northern Pac. R. Co., 61 Fed. 546.

[7] King v. Goodwin, 130 Ill. 102, 17 Am. St. Rep. 277, 22 N. E. 533.

§ 3. Different Kinds of Receivers.

A chancery receiver is but the hand of the court which has taken over the administration of the affairs of the person whose property has been placed under a receiver. The ownership of the property does not pass to the receiver but continues in the defendant, although his control over it is vested in the court acting through its receiver. The property by being placed in the hands of a receiver is protected against the interference of others. No action can be taken by or against the owner of the property without the sanction of the court. If anything is done in respect to the property it must be done through and by the receiver.[1] Such a chancery receiver derives his authority to deal with the property from the court and not the parties.[2]

The term "temporary receiver" should be confined to the mere custodian receiver, who is often appointed, upon the filing of the bill, under the general equity power of the court, in order to preserve the assets from waste until the hearing can be had which will determine whether the defendant assets are in such condition as to require being placed under a receiver.[3] A "permanent receiver" is one appointed by or pursuant to a final judgment or a temporary receiver who is continued by the final judgment.[4] A receiver acting as the arm of the court is frequently termed an "equitable receiver," and as such is a mere custodian without title and without any power excepting

1 Kelly v. Dolan, 218 Fed. 966.

2 Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503, reversing decree (C. C.); In re New York City Ry. Co., 188 Fed. 339, and (C. C.); Pennsylvania Steel Co. v. New York City Ry. Co., 188 Fed. 343, modifying decrees (C. C.); Pennsylvania Steel Co. v. New York City Ry. Co., 189 Fed. 661, 190 Fed. 609, and (D. C.) 189 Fed. 661, 194 Fed. 543.

3 Gallagher v. Asphalt Co. of America, 67 N. J. Eq. 441, 58 Atl. 403.

4 So defined by the General Corporation Law of New York which is merely a codification of the general rule. Strauss v. Casey Machine & Supply Co., 68 Misc. 474, 124 N. Y. Supp. 32.

that conferred upon him by the order of appointment.[5] An "auxiliary receiver" is a custodian of the property within the state where he is appointed for the purpose of preserving the assets belonging to the party proceeded against within the state, in order that creditors may reach them without being compelled to go to a foreign jurisdiction to prove their claims.[6]

A "special receiver" is simply an officer of the court and as such has no right even in the cause in which he is appointed, without leave of the court, to intermeddle in questions affecting the rights of the parties.[7] An "ancillary receiver" is one appointed by a court of one jurisdiction in aid of a primary appointment by the court of another jurisdiction. Such an appointment is often made where property belonging to the receivership exists in several states.[8] A receiver to be appointed pursuant to

5 Cogan v. Conover Mfg. Co., 69 N. J. Eq. 358, 60 Atl. 408.

6 Frowert v. Blank, 205 Pa. 299, 54 Atl. 1000.

7 Whyel v. Jane Lew Coal & Coke Co., 67 W. Va. 651, 69 S. E. 192.

8 Scaife v. Scammon Inv. etc. Assn., 71 Kan. 402, 80 Pac. 957; Eisenhart v. Scammon Inv. etc. Assn., 71 Kan. 855, 80 Pac. 960; Reynolds v. Stockton, 140 U. S. 254, 35 L. Ed. 464, 11 Sup. Ct. 773.

When a receiver has been appointed for a corporation by a court of the state where it is domiciled, a federal court of another jurisdiction has power to appoint the same person as ancillary receiver in such jurisdiction. Shinney v. North American Savings, Loan & Building Co., 97 Fed. 9.

When application is made for the appointment of a receiver for a foreign corporation which is already in the hands of a receiver at the place of its domicile, the court in which the application is made can do one of three things: First, it can refuse to appoint a receiver in the state and let the domiciliary receiver bring suits in this state to collect all debts of the insolvent corporation within its limits; second, it can appoint the domiciliary receiver as ancillary receiver; third, it can appoint some one other than the domiciliary receiver. Irwin v. Granite State etc. Assn., 56 N. J. Eq. 244, 38 Atl. 680.

The purpose and practice in appointing ancillary receivers are similar to those obtaining in respect to ancillary letters of administration. The rules of comity existing between the courts of different states and courts of different jurisdiction in the same state are followed in such cases.

An ancillary suit may be instituted in the courts of any juris-

the stipulations contained in a mortgage or deed of trust is not considered in the light of a technical receiver to be appointed by a court. Such a receiver could be termed a contract receiver.[9] Where an instrument such as a mortgage provides for the appointment of a receiver under certain contingencies the receiver is to be regarded and treated as the agent of the mortgagor, although it is in fact the mortgagee who has nominated him.[10] The receiver of a national bank is different in character from the receivers appointed by the courts. The matter of such appointments is regulated entirely by the National Banking Act, and the Comptroller in making the appointment of such a receiver is not regarded as performing a judicial act. It is the decision of the head of department of the federal government over which the courts have ordinarily no control.[11] A receiver appointed pursuant to a statute providing for the appointment of a receiver under certain conditions and circumstances is the legislative agency to be named by the court and has only such powers as are granted by the legislative act. He is sometimes called a "statutory receiver."[12] The powers of receivers appointed under statutes providing for such appoint-

diction where property of the debtor may be found, and the local court of equity on such application will take the debtor's local property into its own custody by the appointment of its own receiver. This jurisdiction is freely exercised by state courts in aid of proceedings pending in the courts of other states or in the federal courts of other states. National Trust Co. v. Miller, 33 N. J. Eq. 155; Buswell v. Supreme Sitting, 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065; Baldwin v. Hosmer, 101 Mich. 119, 25 L. R. A. 739, 59 N. W. 432.

9 Rice v. St. Paul etc. R. Co., 24 Minn. 464.

10 Jefferys v. Dickson, L. R. 1 Ch. 183; Law v. Glen, L. R. 2 Ch. 634; Owen v. Cronk (1895), 1 Q. B. 265; Gosling v. Gaskell (1897), A. C. 575.

11 Price v. Abbott, 17 Fed. 606; Washington Nat. Bank v. Eckels, 57 Fed. 870; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. 209.

12 Gallagher v. Asphalt Co. of America, 67 N. J. Eq. 441, 58 Atl. 403.

ments are, however, construed in the light of the settled doctrines of courts of equity in respect to receiverships.[13]

Although receivers are sometimes designated as general receivers, receivers *pendente lite*, special receivers, interim receivers, managers, ancillary receivers, and, in England, liquidators, the purposes in all cases being the same, though the methods of accomplishment may differ, and though the functions of the receiver may vary in different cases, no good result, but confusion rather, follows the application of the several names to the receiver, and so far as the general treatment of the subject is concerned, no nominal distinction will be observed. Receivers may be general as to property and special as to power, or *vice versa*. Nearly all receivers are *pendente lite*, and with equal propriety might be called interim, while a manager is only in the exercise of an enlarged power, with the accomplishment of the same end.[14]

§ 4. Receivership as Distinguished from Other Remedies.

The law of receiverships is peculiar in its nature in that it belongs to that class of remedies which are wholly ancillary or provisional, and the appointment of a receiver does not affect, either directly or indirectly, the nature of any primary right, but is simply a means by which primary rights may be more efficiently preserved, protected, and enforced in judicial proceedings. It adju-

13 Cogan v. Conover Mfg. Co., 69 N. J. Eq. 358, 60 Atl. 408; Boonville Nat. Bank v. Blakey, 107 Fed. 891, 47 C. C. A. 43; Marion Trust Co. v. Blish, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 84 N. E. 814 (rehearing denied 85 N. E. 344).

14 A receiver pendente lite is a mere temporary officer and does not possess the power of a permanent receiver, or any legal power except such as is specifically conferred upon him by the court. His functions are limited to the care and preservation of the property. Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814; Herring v. New York, L. E. & W. R. Co., 105 N. Y. 340, 12 N. E. 763; Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60.

dicates and determines the rights of no party to the proceeding and grants no final relief directly or indirectly. In this respect its effects are analogous to the law in relation to injunction and interpleader, and sometimes, as will be seen, an injunction will afford an adequate remedy without interfering with the possession of the property. It leaves the parties as they have placed themselves, as determined by the final judgment or decree of the court.

Hence a receivership can only be resorted to in a pending action for specific relief which is within the jurisdiction of the court to grant.[1]

Although proceedings for the appointment of a receiver are regarded as extraordinary in character[2] and the duty of a court of equity to appoint a receiver *pendente lite* to prevent injury to the thing in controversy is a delicate and responsible duty, it nevertheless should be used unhesitatingly in a proper case.[3] The power of a court of equity in a proper case to appoint a receiver is one which exists independent of any statute.[4] But the power to make such an appointment is never exercised if the petitioner has a full and adequate remedy at law. A receiver will not, however, be denied for this reason alone, unless it is made to appear that the legal remedy

1 Red River Potato Growers' Assn. v. Bernardy, 126 Minn. 440, 148 N. W. 449; Davis v. Alton etc. Ry. Co., 180 Ill. App. 1; Miller v. Bowles, 58 N. Y. 253.

2 Smith v. Brown, 50 Wash. 240, 96 Pac. 1077; Prudential Securities Co. v. Three Forks etc. V. R. Co., 49 Mont. 567, 144 Pac. 158; Strum v. Blair, 182 Ill. App. 413.

The power to appoint a receiver is a delicate one and should be exercised sparingly and with extreme caution. Sage v. Memphis etc. R. Co., 125 U. S. 361, 31 L. ed. 694, 8 Sup. Ct. 887.

Unless the power to appoint a receiver is exercised carefully it has a tendency to run into uncontrolled and arbitrary action on the part of a single judge. Hutchinson v. American Palace Car Co., 104 Fed. 182, 187.

3 Ellis v. Penn Beef Co., 9 Del. Ch. 213, 80 Atl. 666.

4 State v. Farmers & Merchants' Ins. Co. of Lincoln, 90 Neb. 664, Ann. Cas. 1913B, 643, 134 N. W. 284.

is equally as complete, efficient, and effective as that in equity.[5]

The power to appoint a receiver is a stronger measure than that of injunction inasmuch as the effect is to transfer the custody of the property in controversy from a litigant to a third party under the direction of the court during the litigation. It is not so much in the nature of an attachment as of a sequestration.[6]

A receiver differs from an assignee in bankruptcy in that the latter is vested with the legal title to property held by the bankrupt, such as a lease or the like, while a receiver has no estate in such property, but is a mere custodian for the court.[7]

The appointment of a receiver for a corporation has been likened to the remedy of an "equitable execution," the court thereby obtaining absolute control of the corporation's property with full power to adjust claims, determine priorities, order sale, and fix the distribution of funds in accordance with procedure in equity, so that claimants thereafter need not litigate their claims in plenary suits, but may have the same determined in the receivership proceedings.[8]

Under the provisions of section 92, chapter 89 of the Companies Act of 1862 provision is made in England for the appointment of a liquidator or liquidators, for the purpose of the winding up of companies and associations thereunder: (1) When the company has passed a resolution requiring the company to be wound up; (2) when the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (3) when its members are reduced in number to less than seven; (4) when the com-

5 Robbins v. Reed, 174 Ind. 291, 91 N. E. 921.

6 Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 78.

7 Dietrick v. O'Brien, 122 Md. 482, 89 Atl. 717.

8 Randall v. Wagner Glass Co., 47 Ind. App. 439, 94 N. E. 739.

pany is unable to pay its debts; (5) whenever the court is of the opinion that it is just and equitable that the company should be wound up. The powers of the official liquidator under the above act are: (a) To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company; (b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same; (c) power to sell the company's assets and effects; (d) to do all acts and to execute in behalf of the company all deeds, receipts, and other documents, and if necessary to use the company's seal; (e) and, generally, to do and perform all other acts and things that may be necessary for winding up the affairs of the company and distributing its assets.[9]

It is also provided by the act (§ 96) that the liquidator may exercise the above enumerated powers without the sanction or intervention of the court where the order for his appointment so provides. While it is true that the appointment of a liquidator, under the provisions of the above act, does not abolish the office of a receiver, and under peculiar circumstances receivers are still appointed by the courts, yet so far as corporations and associations embraced in the act are concerned, the official liquidator, with largely increased powers and duties, has superseded the receiver in England, but the functions of his office are such, and the decisions of the courts relating thereto so highly instructive and important, that they may be regarded and are treated herein as contributions to the general and growing body of the law of receiverships. Under the Winding-Up Act of 1890, after an order has been made for winding up the company, the court has no power to appoint a provisional liquidator

[9] Ch. 89, Vol. XIV. Rev. Stat. 202 (25 and 26 Victoria to 28 and 29 Victoria, A. D. 1862-1865).

other than the official receiver.[10] As to the general power to appoint receivers, see Judicature Act of 1873.

§ 5. Necessity to Resort to the Code Provisions of Each State.

In most of the states statutory provisions have been enacted which prescribe the functions, powers, and duties of receivers and especially in respect to receivers relating to the assets of corporations. As a general rule these statutory provisions have enlarged the scope of the powers of receivers, although in most instances they are mere codifications of the powers always exercised by courts of equity in respect to receiverships. And frequently they adopt the practice of the High Court of Chancery of England on the subject of receivers. It would serve no useful purpose to set out or refer to the code sections of the various states on the subject. Whenever the court in its decision has based its rule of action upon a specific statute we will in our review of the case state that fact.

10 Re North Wales Gunpowder Co. (1892), 2 Q. B. 220; under the Judicature Act of 1873, § 25, cl. 8, the court has most ample power in the appointment of receivers, and may do so whenever it is just or convenient, or as construed by the court, just and convenient. North London Railway v. Great Northern Railway, L. R. 11 Q. B. Div. 30.

A liquidator is a statutory receiver, with enlarged powers conferred by Act of Parliament, and may be appointed generally or for a special purpose. Re Langham Skating Rink Co., L. R. 6 Ch. Div. 102.

In cases of danger or loss the court may appoint an interim receiver until such time as a receiver may be appointed in due course of law. Taylor v. Eckersley, L. R. 2 Ch. Div. 302, 45 L. J. Ch. 527, 34 L. T. 637.

A manager appears to be a person appointed to carry on a business pendente lite. Smith v. New York Consol. Stage Co., 18 Abb. Pr. 419, 433. The purpose is to enable the company's business to be sold as a going concern, the current expenses, wages, etc., being provided for by the plaintiff. Makins v. Ibotson (1891), 1 Ch. 133, 60 L. J. Ch. 164, 63 L. T. 515; Peek v. Trinsmaran Iron Co., L. R. 2 Ch. Div. 115. And it seems that such a manager will be appointed where it is necessary to preserve the security though the business is not mortgaged. Campbell v. Lloyd's Bank, 58 L. J. Ch. 424.

CHAPTER II.

GENERAL GROUNDS AND CIRCUMSTANCES IN WHICH A RECEIVER IS APPOINTED.

§ 6. General Principles Applicable.

The rules of law applicable to receiverships are very similar to the rules followed from time immemorial by courts of equity in dealing with the remedy of injunction, the remedy of a receivership being, however, more drastic in its effects upon the defendant in that it takes property which is in his possession and places it in the hands of a receiver to be administered pending the outcome of some litigation concerning it or its owner. The injunctive character of the remedy consists in the object of the court being to prevent injury to the thing in controversy and to preserve it for the benefit of all the parties to the litigation. The great object of the court in such cases is to secure the property or thing in controversy so that it may be subjected to such order or decree as the court may ultimately make in the case. The possession of the receiver is not adverse to or in hostility to the rights of the defendant. His possession is that of the court. The Supreme Court of Mississippi, in an early case,[1] in laying down the general rules which should obtain in receivership cases, said: "These principles are: That the plaintiff must show, first, either that he has a clear right to the property itself or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and, secondly, that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger

1 Mays v. Rose, Freem. Ch. (Miss.) 703.

of loss from the neglect, waste, misconduct, or insolvency of the defendant."

The act of appointing a receiver is in the nature not of an attachment, but a sequestration. It operates prospectively upon the rents and profits which may come to the hands of the receiver as a lien in favor of those who may ultimately be found to be entitled to or have priorities in the principal subject out of which the rents and profits issue. In the exercise of this summary and extraordinary jurisdiction, it may be said that a court of equity reverses, in a great measure, its ordinary course of administering justice by beginning at the end and levying upon the property a kind of equitable execution, by which it makes a general instead of a specific appropriation of the issues and profits, and subsequently determining who is entitled to the benefits of the property so sequestrated. Acting, however, as it must of necessity, before the merits of the cause have been fully developed, and not infrequently when the proper parties in interest are not all before the court, it proceeds with much caution and circumspection, in order to avoid disturbing unnecessarily or injuriously legal and equitable rights and priorities.[2]

§ 7. General Class of Cases in Which Receiver Is Appointed.

There are four general classes of cases in which a court will appoint a receiver, namely: First, where there is no person competent by reason of interest or otherwise to take the custody and management of the property which constitutes the subject-matter of the litigation; second, where, although all of the parties may be equally entitled to the possession and control of the property or fund, still it is not proper, owing to the nature of the litigation or of the relation of the parties, that either of them should have such possession or control;

2 Beverley v. Brooke, 4 Gratt. (Va.) 187.

third, where the person holding the property occupies a position of trust or *quasi*-trust relation and is violating his fiduciary duties in that connection by waste, misuse, or misapplication; and, fourth, where, after the rendition of a judgment or decree, the ordinary processes of the court or its legally constituted officers can not efficiently act or properly perform the duties required to carry the judgment or decree into effect.

The different circumstances illustrating the application of these different classes of cases will be taken up in detail under their appropriate headings.

§ 8. Applicability of General Rules of Equity.

The appointment of a receiver, on account of the serious consequences arising from an improvident exercise of this power, is hedged with all of the rules formulated by courts of equity as guides in the exercise of the powers which must necessarily be inherent in a court of equity. The similarity of the appeals to the conscience of the court in cases of receiverships and of injunctions has made applicable many of the well known rules which apply to cases in which injunction is sought. As has been already suggested, the principal purpose of a receivership is to preserve and protect the property which is the subject of the litigation for the benefit of the party who will be ultimately found by the court to be entitled to it,[1] and the receiver is merely a ministerial officer of the court holding the property in trust for that purpose.[2] Such being the main purpose of the remedy, it naturally follows that, in order to warrant the appointment of a receiver over property or a fund in litigation, there must be a showing of a danger that it may become lost, materially injured, or destroyed before the termination of such

1 Sullivan Timber Co. v. Black, 159 Ala. 570, 48 So. 870; Blakeney v. Dufaur, 15 Beav. 42.

2 Northern Brewery Co. v. Princess Hotel, 78 Or. 453, 153 Pac. 37.

litigation.[3] So, also, if it be shown that the property in litigation is in danger of being removed beyond the jurisdiction of the court, it is a sufficient ground for the appointment under the general rules applicable to the subject and also under the statutory provisions prevailing in most of the states, which are generally mere codifications of the chancery rules.[4] In view of the purpose of a receivership to prevent the loss or material

3 Smith v. Lusk, 119 Ala. 394, 24 So. 256; Hastings v. Tousey, 106 N. Y. Supp. 639, 121 App. Div. 815; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Lenox v. Notrebe, Hempst. 225, Fed. Cas. No. 8246b; Wilson v. Hawker Lumber Co., 74 W. Va. 65, 81 S. E. 568; White v. Smole, 22 Beav. 73; White v. James, 26 Beav. 191.

Under Comp. Laws 1909, § 5772, thus where the rents and profits of land in litigation are being removed, a receiver will be appointed without regard to the probable insolvency of the defendant. Hughes v. Garrelts, 35 Okla. 321, 129 Pac. 43.

A receiver will not be appointed over personal property merely for the asking, but facts must be alleged showing a necessity therefor in order to render effectual a final judgment in plaintiff's favor for the relief demanded in the complaint in the event of his recovery. Ketcham v. Provost, 132 N. Y. Supp. 120, 147 App. Div. 777.

And where an insolvent foreign corporation has property in New York which was being attached by resident creditors, and there was danger that it would be wasted and dissipated in litigation, the supreme court may appoint a receiver of its property in order to secure an equitable distribution of its assets in this state among its resident creditors. Popper v. Supreme Council of Order of Chosen Friends, 70 N. Y. Supp. 637, 61 App. Div. 405.

The danger of loss of the property may arise "from neglect, waste, misconduct or insolvency of the defendant." Mays v. Rose, Freem. Ch. (Miss.) 703.

If there is no danger to the property, and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed, unless there be some equity in the case to support the application. Whitworth v. Whyddon, 2 Macn. & G. 55; Wright v. Vernon, 3 Drew. 121; Micklethwaite v. Micklethwaite, 1 D. & J. 530.

But the mere allegation of danger to the property is not sufficient, if the court is satisfied that no loss need be apprehended. Whitworth v. Whyddon, 2 Macn. & G. 55.

4 Rappaport v. Otten, 120 N. Y. Supp. 461, 135 App. Div. 386; Pomerantz v. Mintz Realty Co. (Hartman), 126 N. Y. Supp. 649, 141 App. Div. 864; Bond-Reed Hardware Co. v. Walsh (Tex. Civ.), 181 S. W. 248.

change of the condition of the property from that obtaining at the time of the litigation, it has been said by Lord Lindley that the appointment of a receiver in itself operates as an injunction.[5] But it is the rule, based upon the idea that a receiver will not be appointed except under very necessitous circumstances, that a receiver will not be appointed when the plaintiff can be awarded an equal protection by the issuance of an injunction and there is no element of fraud or insolvency involved in the matter.[6] Following the principles appertaining to equity jurisprudence, it is a fundamental rule that a receiver will not be appointed if the plaintiff has a full and adequate remedy at law in respect to his alleged rights,[7] or

5 Tyrell v. Painton [1895], 1 Q. B. 206.

An order for an injunction is always in a sense included in an order for a receiver. It is not necessary, if a receiver be appointed, to go on and grant an injunction in terms; but in cases where persons in a fiduciary character have misconducted themselves, the court will often grant an injunction as well as a receiver, not because an injunction is necessary to prevent a party from receiving when a receiver is once appointed, but for the purpose of marking its sense of the conduct of the parties who have misconducted themselves. Evans v. Coventry, 3 Drew. 82.

In a proper case a receiver may be appointed where the application of the plaintiff was for an injunction. Parker v. Parker, 82 N. C. 165.

And it has been held that the appointment of a receiver, when necessary for the preservation of the property, pending an injunction suit, is a necessary incident to the power of this court to grant an injunction. Gray v. Council of Newark, 9 Del. Ch. 171, 79 Atl. 735, 739.

6 Dabney Oil Co. v. Providence Oil Co. of Arizona, 22 Cal. App. 233, 133 Pac. 1155; Cass v. Realty Securities Co., 129 N. Y. Supp. 400, 144 App. Div. 916.

7 Wright v. Wright, 180 Ala. 343, 60 So. 931; Sylvester's Admr. v. Willson's Admrs., 2 Alaska 325; First Nat. Bank v. Superior Court of Lassen County, 12 Cal. App. 335, 107 Pac. 322; Bush v. Mattox, 110 Ga. 472, 35 S. E. 640; Griffin v. Henderson, 116 Ga. 310, 42 S. E. 482; Winkler v. Winkler, 40 Ill. 179; Coughron v. Swift, 18 Ill. 414; Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598; Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 104 N. E. 579; Speights v. Peters, 9 Gill (Md.) 472, 473; Rice v. St. Paul & P. R. Co., 24 Minn. 464; Blades v. Billings Mercantile Co., 154 Mo. App. 350, 134 S. W. 579; Sherman v. Clark, 4 Nev. 138, 97 Am. Dec. 516; Wooden v. Wooden, 3 N. J.

where the court can find another and less stringent means for protecting the rights of the parties.[8] But a receiver will not be denied on the ground that the plaintiff has an adequate remedy at law unless it also appears that the legal remedy is as equally efficient and effective as that in equity.[9] The fact, however, that his remedy at law may be difficult to enforce will not be sufficient ground to aid him in having a receiver appointed,[10] and the fact that he has lost his remedy at law by his own laches will not place him in a position to ask for a receiver.[11] He is not, however, required to exhaust his

Eq. 429; Mullen v. Jennings, 9 N. J. Eq. 192; Corey v. Long, 43 How. Pr. (N. Y.) 492, 497; Parmly v. Tenth Ward Bank, 3 Edw. Ch. (N. Y.) 395; Morrison v. Buckner, Hempst. 442; Slover v. Coal Creek etc. Co., 113 Tenn. 421, 106 Am. St. Rep. 851, 68 L. R. A. 852, 82 S. W. 1131; Webster v. Couch, 6 Rand. (Va.) 519; Poage v. Bell, 3 Rand. (Va.) 586; Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485; Sollory v. Leaver, L. R. 9 Eq. 22; Orphan Asylum Soc. v. McCartee, Hopk. Ch. (N. Y.) 429.

The appointment of a temporary receiver, before a trial, can not be justified merely because plaintiff shows he is apparently entitled to some recovery, especially where the defendant is engaged in a going business, and apparently solvent and able to satisfy any judgment obtained against him. Joseph v. Herzig, 115 N. Y. Supp. 330, 130 App. Div. 707.

The fact that notes secured by a deed of trust have been issued ultra vires, is no ground for a recovery since the invalidity of the notes could be set up collaterally against any sale. Price v. Bankers Trust Co. (Mo.), 178 S. W. 745.

The fact that plaintiff has recovered a money judgment in a simple action at law does not authorize the appointment of a receiver under a code section (Rev. Codes, § 6698) allowing a receiver to be appointed to carry judgments into effect, as the creditor can take the necessary steps to enforce the judgment. Forsell v. Pittsburg & Montana Copper Co., 113 Pac. 479, 42 Mont. 412.

8 Blades v. Billings Mercantile Co., 154 Mo. App. 350, 134 S. W. 579.

9 Robbins v. Reed, 174 Ind. 291, 91 N. E. 921; Twin City Power Co. v. Barrett, 126 Fed. 302, 61 C. C. A. 288; Columbia etc. Dredging Co. v. Washed etc. Co., 136 Fed. 710. The rule set forth in the text is merely the well known rule applied in injunction suits.

10 Cremen v. Hawkes, 2 Jo. & Lar. 674.

11 Drewery v. Barnes, 3 Russ. 94.

remedies at law before applying for the appointment of a receiver.[12]

§ 9. Necessity for Danger of an Irreparable Injury.

The appointment of a receiver being a remedy of such a harsh nature, the power of appointment is exercised by the courts only in cases where the failure to do so would place the petitioning party in danger of suffering an irreparable loss or injury.[1] This generally means that,

12 It is not requisite that a party applying for a receiver should have exhausted his remedies at law. Chicago etc. Ry. Co. v. Kenney, 159 Ind. 72, 62 N. E. 26; Sallee v. Soules, 168 Ind. 624, 81 N. E. 587.

1 Randle v. Carter, 62 Ala. 95; Wright v. Wright, 180 Ala. 343, 60 So. 931; Gray v. Council of Town of Newark, 9 Del. Ch. 171, 79 Atl. 739; Price v. Bankers Trust Co. of St. Louis (Mo.), 178 S. W. 745; Aldrich v. Union Bag and Paper Co., 81 N. J. Eq. 244, 87 Atl. 65; Cleveland etc. Ry. Co. v. Jewett, 37 Ohio St. 649; People's Inv. Co. v. Crawford, (Tex. Civ.) 45 S. W. 738.

Where a defendant in fieri facias has delayed the lawful sale of land the subject of the action for seven years, through claims interposed by himself and wife in forma pauperis without merit, which sometimes were withdrawn and sometimes were decided against them, and through the interposition by himself of different affidavits of illegality also without merit, during which time he has remained in possession and received the rents and profits of the land, and the amount of the executions had increased by accruing interest, and the value of the land has diminished by the method employed in cultivating it, and there was danger of the interposition of another affidavit of illegality and an exception to an adverse ruling thereon, on affidavit in forma pauperis, a receiver ad interim was held to be properly appointed. Smith v. Zachry, 128 Ga. 290, 57 S. E. 513.

A receiver for a building in course of erection is proper, where it appears that it is likely to be the subject of protracted litigation, and unless completed will deteriorate and go into dilapidation. Chicago Title & Trust Co. v. Chapman, 132 Ill. App. 55.

A receiver pending litigation of a going concern should not be appointed, unless it appears that otherwise the interests of the parties or at least some of them will be jeopardized. Cohn v. Wahn, 132 App. Div. 849, 117 N. Y. Supp. 633.

A receivership being a violent and costly remedy, interfering with the rights of persons in possession, in order to obtain the appointment of a receiver, a plaintiff must show a clear right to the property in litigation or a lien thereon, or a right to resort to it for the satisfaction of a debt, and if the allegations of the bill are fully denied by the answer, and not sustained

in order to show cause for the appointment of a receiver, the petitioner must show either a clear legal right in himself to the property in controversy, that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand, and it must appear that possession of the property was obtained by defendant through fraud, or that the property or income from it is in danger of loss from the neglect, waste, or misconduct of defendant, and applicant must have a present, existing interest in the property over which he seeks to have the receiver appointed.[2]

As was said by the Supreme Court of Georgia,[3] in discussing this subject: "The high prerogative act of taking property out of the hands of one, and putting it in pound, under the order of a judge, ought not to be taken, except to prevent manifest wrong, imminently impending."

The object of a receivership being to preserve the property for the party who may be ultimately found to be entitled to it at the termination of the litigation, a danger that the property may be wasted, destroyed, dissipated, or suffer deterioration or be removed from the jurisdiction of the court is always such a condition of affairs as will bring the matter to the favorable consideration of the court.[4] In fact, there is no other single

by the evidence, the receivership should be denied. Sult v. A. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307.

Where a plaintiff, suing to set aside a transfer of property made by her deceased husband to defendant, who is financially irresponsible, showed an interest in the property, and that it was in the possession of the defendant, and that there was great danger of a disposition of it pending the action, the court will appoint a receiver pendente lite. Morse v. Van Ness, 155 App. Div. 633, 140 N. Y. Supp. 1043.

2 Gilbert v. Block, 51 Ill. App. 516; Golden Valley Land etc. Co. v. Johnstone, 21 N. D. 101, Ann. Cas. 1913B, 631, 128 N. W. 691; International Trust Co. v. Decker Bros., 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152.

3 Crawford v. Ross, 39 Ga. 44.

4 Myers v. Estell, 48 Miss. 372, 401; Lyon v. United States etc. Co., 48 Mont. 591, Ann. Cas. 1915D 1036, 140 Pac. 86; Allen v. Cooley,

ground upon which the appointment of a receiver is more often resorted to and for which the appointment results more beneficially than that of loss or danger to the parties in interest, and especially to the plaintiff who by his action puts the machinery of the court into motion. Where the fund or property constituting the subject of contention is of such nature as to be most likely subject to waste, deterioration, or serious injury if left in the possession of the defendant; or where the party in possession is guilty of careless management, or wantonness; or where by reason of improper care and attention from any one the property is liable to be lost or damaged from any cause, the court in the exercise of its undoubted right will, by its receiver, take the property or fund into possession, and preserve the same until such time as the rights of the litigants are determined. It frequently happens that property and assets are charged with the payment of debts and equitably belong to creditors who, by reason of inadequacy of common law remedies, or otherwise, are not afforded complete protection, and are in danger of losing the benefit of the security to which in equity they are entitled. In all such cases a receiver is proper.[5] Sometimes the plaintiff may have a lien, or an

53 S. C. 414, 31 S. E. 634; Folk v. United States, 233 Fed. 177.

A receiver may be appointed in a suit by a judgment creditor, over stock standing in the name of the debtor's wife, where there is reasonable ground to apprehend that it will be removed beyond the jurisdiction of the court, or will be lost. State Bank v. Gill, 23 Hun (N. Y.) 410.

The appointment of a receiver for a railroad will not be made merely for a default in payment of interest. Loss must be shown. Union Trust Co. v. St. Louis, I. M. & S. R. Co., 4 Dill. 114, Fed. Cas. No. 14402; Buffalo Chemical Works v. Bank of Commerce, 79 Hun (N. Y.) 93; Drought v. Percival, 2 Molloy 502.

A receiver should not be appointed of a fund in the hands of the Sheriff, on which a lien is claimed, unless it appears, as required by Ky. Civ. Code, sec. 298, that there is danger of its loss or removal. Combs v. Breathitt County, 20 Ky. L. Rep. 1247, 49 S. W. 2.

5 Hughes v. Hatchett, 55 Ala. 631; Ft. Payne Furnace Co. v. Ft. Payne Coal & I. Co., 96 Ala. 472, 38 Am. St. Rep. 109, 11 So. 439; Corcoran v.

equitable claim to the property, or other interest therein, and in either case the right to a receiver is enforced where loss is imminent.

The danger of loss here spoken of may be occasioned by the peculiar nature of the subject-matter of the litigation itself, or by reason of the acts or conduct of the person in custody or possession. It may also result from the insolvency or bankruptcy of the defendant in possession and his inability to financially respond for any damage or loss of the property or funds. It will not be availing, however, if the threatened danger is remote, or if the danger is past.[6]

Doll, 35 Cal. 476; West v. Chasten, 12 Fla. 315; Harrup v. Winslet, 37 Ga. 655; Powell v. Quinn, 49 Ga. 523; Orton v. Madden, 75 Ga. 83; Baker v. Backus, 32 Ill. 79; Haight v. Burr, 19 Md. 130; Voshell v. Hynson, 26 Md. 83; Thomson v. Diffenderfer, 1 Md. Ch. 489; Mays v. Rose, Freem. Ch. (Miss.) 703; Rathbone v. Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570; Kennedy v. St. Paul & P. R. Co., 2 Dill. 448, Fed. Cas. No. 7706; Parkhurst v. Kinsman, 2 Blatchf. 78, Fed. Cas. No. 10760; Peck v. Trimsaran Coal, Iron & S. Co., L. R. 2 Ch. Div. 115.

On a bill filed by a stockholder of a company against a director, to take charge of moneys alleged to have been improperly received and retained by such director, no apprehension of loss being alleged in the bill, and the answer alleging that the money was loaned to the director by the board of directors, a receiver will be refused. Hager v. Stevens, 6 N. J. Eq. 374.

A fund will not be taken from one entitled to its custody and transferred to a receiver, unless there is imminent danger of loss. Rheinstein v. Bixby, 92 N. C. 307; Clark v. Dew, 1 Russ. & M. 103.

Pending the litigation, unless there is some evidence that the property is in danger or there is clear proof of fraud in obtaining possession thereof, a receiver will be refused. Willis v. Corlies, 2 Edw. Ch. 281.

[6] Kean v. Colt, 5 N. J. Eq. 365; Beecher v. Binniger, 7 Blatchf. 170, Fed. Cas. No. 1222. The court in Mays v. Rose, Freem. Ch. (Miss.) 703, say the danger of loss may arise "from neglect, waste, misconduct or insolvency of the defendant."

Courts do not appoint receivers as a punishment for past derelictions or because of past dangers. Thus, for instance, in passing upon the appointment of a receiver for a solvent and prosperous corporation, something more must be shown than past misconduct. Original Vienna etc. Co. v. Heissler, 50 Ill. App. 406.

But the appointment of a receiver is never made on the mere anticipation of something that may

The court has no power to appoint a receiver merely because under the circumstances of the case it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution, although otherwise, if there is a threatened fraudulent conveyance to make way with the judgment debtor's property.[7]

§ 10. Caution and Discretion to Be Exercised by Courts.

The power to appoint a receiver is always regarded as a delicate one and should be exercised with great caution and not in doubtful cases,[1] and bearing in mind the rule that the injury caused by making the appointment should not be greater than the injury sought to be averted.[2] The court before granting the relief should be convinced that the appointment is needful and proper under the circumstances of the case.[3] Whether or not

happen. Chadron Bkg. Co. v. Mahoney, 43 Neb. 214, 61 N. W. 594.

A receiver will not be appointed because an officer of a corporation is in a position to betray it, where there is no evidence to establish any probability that he will so act. Young v. Rutan, 69 Ill. App. 513; Dozier v. Logan, 101 Ga. 173, 28 S. E. 612; Boston Invest. Co. v. Pacific Short-Line Bridge Co., 104 Iowa 311, 73 N. W. 839.

7 Harris v. Beauchamp [1894], 1 Q. B. 801, 63 L. J. Q. B. 480.

1 Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596; Lehman v. Trust Co. of America, 57 Fla. 473, 49 So. 502; Crawford v. Ross, 39 Ga. 44; Furlong v. Edwards, 3 Md. 99, 112; Blades v. Billings Mercantile Co., 154 Mo. App. 350, 134 S. W. 579; Virginia-Carolina Chemical Co. v. Hunter, 84 S. C. 214, 66 S. E. 177; Chisolm v. Carolina Agency Co., 88 S. C. 438, 70 S. E. 1035; Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485; Curtiss v. Dean, 85 Wash. 435, 148 Pac. 581; Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307; Latham v. Chafee, 7 Fed. 525.

"The appointment of a receiver is a harsh proceeding and should be resorted to only in extreme cases." Jenks v. Horton, 96 Mich. 13, 55 N. W. 372.

2 Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 133 Pac. 1155.

3 "The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion. The court must be convinced that it is needful and is the appropriate means of securing a proper end. Such an appointment is a strong measure, and not to be exercised doubtingly." Chicago etc. Mining Co. v. United States Petroleum Co., 57 Pa. St. 83.

the court will appoint a receiver is regarded as a matter within its sound discretion[4] subject, of course, to the general rule that such discretion should not be abused,[5]

4 Ex parte Walker, 25 Ala. 81, 104; Micou v. Moses, 72 Ala. 439; Ashurst v. Lehman, 86 Ala. 370, 5 So. 731; Albritton v. Lott-Blacksher Commission Co., 167 Ala. 541, 52 So. 653; Sylvester's Adm. v. Wilson's Adm., 2 Alaska 325; La Société Française D'epargenes v. Fifteenth Judicial Dist. Ct., 53 Cal. 495; Reid v. Reid, 38 Ga. 24; Gore v. Illinois Bldg. etc. Assn., 56 Ill. App. 642; Benneson v. Bill, 62 Ill. 408; Mays v. Rose, Freem. Ch. (Miss.) 703; Davis v. United States Electric P. & L. Co., 77 Md. 35, 25 Atl. 982; Lowell v. Doe, 44 Minn. 144, 46 N. W. 297; Myers v. Estell, 48 Miss. 372, 404; Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537; Brent v. B. E. Brister Sawmill Co., 103 Miss. 876, Ann. Cas. 1915B, 576, 43 L. R. A. (N. S.) 720, 60 So. 1018; Hartnett v. St. Louis Min. etc. Co., 51 Mont. 395, 153 Pac. 437; Syracuse City Bank v. Tallman, 31 Barb. 201; Rider v. Bagley, 84 N. Y. 461; Denike v. New York & R. Lime & C. Co., 80 N. Y. 599; Verplank v. Caines, 1 Johns. Ch. 57; Jacobs v. Gibson, 9 Neb. 380, 2 N. W. 893; Oakley v. Paterson Bank, 2 N. J. Eq. 173; Hamburgh Mfg. Co. v. Edsall, 8 N. J. Eq. 141; Nichols v. Perry Patent Arms Co., 11 N. J. Eq. 126; Hanna v. Hanna, 89 N. C. 68; Chicago & A. Oil & Min. Co. v. United States Petroleum Co., 57 Pa. 83; Beaumont v. Beaumont, 166 Pa. 615, 31 Atl. 336; Simmons Hardware Co. v. Waibel, 1 S. D. 488, 36 Am. St. Rep. 755, 11 L. R. A. 267 47 N. W. 814; Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781; Cone v. Paute, 12 Heisk. 506; Morrison v. Buckner, Hempst. 442; Lenox v. Notrebe, Hempst. 225; Toomey v. First Mortgage Trust Co., (Tex. Civ.) 177 S. W. 539; Williamson v. Washington City, V. M. & G. S. R. Co., 33 Gratt. 624; Norris v. Lake, 89 Va. 513, 16 S. E. 663; Lyle v. Commercial Nat. Bank, 93 Va. 487, 25 S. E. 547; Grantham v. Lucas, 15 W. Va. 425; Sales v. Lusk, 60 Wis. 490, 19 N. W. 362; Lamp v. Homestead Bldg. Ass'n, 62 W. Va. 56, 57 S. E. 249; Vose v. Reed, 1 Woods 647, Fed. Cas. No. 17011; Milwaukee & M. R. Co. v. Soutter, 94 U. S. (2 Wall.) 510; Whelpley v. Erie R. Co., 6 Blatchf. 271, Fed. Cas. No. 17504; Williamson v. New Albany etc. R. Co., 1 Biss. 198, Fed. Cas. No. 17753; Pullan v. Cincinnati & C. A. L. R. Co., 4 Biss. 35, Fed. Cas. No. 11461; Tysen v. Wabash R. Co., 8 Biss. 247, Fed. Cas. No. 14315; Union Trust Co. v. St. Louis, I. M. & S. R. Co., 4 Dill. 114, Fed. Cas. No. 14402; Owen v. Homan, 3 Macn. & G. 378, 20 L. J. N. S. Ch. 314, 15 Jur. 339, affirmed in 4 H. L. Rep. 997; Greville v. Fleming, 2 Jones & L. 335 (Sugden's Dec.); Skip v. Harwood, 3 Atk. 564; Smith v. Port Dover & L. H. R. Co., 12 Ont. App. 288, 25 Am. & Eng. R. Cas. 639; Farmers' Loan & T. Co. v. Chicago & A. R. Co., 27 Fed. 146; Pennsylvania Co. v. Jacksonville, T. & K. W. R. Co., 55 Fed. 131 [2 U. S. App. 606].

5 Ex parte Smith, 23 Ala. 94; Wilcoxon Mfg. Co. v. Atkinson, 73

or that the court has not exceeded its jurisdiction in the matter.[6] The discretion to be exercised by the court must not be arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice and of protecting the rights of all the parties interested in the controversy and subject-matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.[7]

In other words, the exercise of judicial discretion in the appointment of a receiver is governed by the same general rules applicable to the use of judicial discretion in any other class of cases coming within the domain of equitable jurisdiction. Such discretion is not the mere will or caprice of the chancellor who is called upon to act, but is broader and more comprehensive. It means, in this connection, the judicial action of the chancellor, based upon a careful consideration of the facts and circumstances of the particular case, the rights and interests of the respective parties, and the general principles of equity jurisprudence applicable thereto. Some courts have gone to the extent of holding that the appointment of a receiver rested so largely in the determination of the appointing court that the action was not a matter of review in the upper courts except where there appeared to be an abuse of the discretion. Judicial discretion, in the restricted sense in which it is sometimes used, in its logical results, places the court in a position of respon-

Ga. 338; Sanders v. Slaughter, 89 Ga. 34, 14 S. E. 873.

Though the power of circuit courts to appoint receivers is discretionary, such discretion is governed as to the exercise thereof by legal and equitable principles, violation of which amounts to an abuse thereof. Sult v. A. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307.

6 Stone v. Wetmore, 42 Ga. 601; Tappan v. Gray, 9 Paige 507; Falk v. United States, 233 Fed. 177.

7 Fort Payne Furnace Co. v. Fort Payne Coal etc. Co., 96 Ala. 472, 38 Am. St. Rep. 109, 11 So. 439.

sibility which, in most cases, it will not willingly assume, and in some cases it should not be permitted to assume.[8]

[8] The discretion is to be governed by a view of the whole circumstances of the case. Williamson v. Wilson, 1 Bland Ch. 418; Hamburgh Mfg. Co. v. Edsall, 8 N. J. Eq. 141; Vose v. Reed, 1 Woods 647, Fed. Cas. No. 17011; Perry v. Oriental Hotels Co., L. R. 5 Ch. App. 420; Cookes v. Cookes, 2 DeG. J. & S. 526; Owen v. Homan, 3 Macn. & G. 378, 412 (4 H. L. Cas. 1033).

Judicial discretion has been defined to be a discretion to be exercised in discerning the course prescribed by the law; never the arbitrary will of the judge. Tripp v. Cook, 26 Wend. 152; Platt v. Munroe, 34 Barb. 293. According to Coke, "discernere per legem, quid sit justum"; perceiving by or through (or according to) the law what would be just. Anderson's Dictionary, p. 363. Judicial discretion as contradistinguished from the private discretion of the judge is wholly different. Of the latter Lord Camden says: "The (private) discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worse it is every vice, folly, and passion to which human nature can be liable."

While the appointment of a receiver rests in the discretion of the court, yet it is such discretion as will be subject to review by a higher court. La Société Française D'epargenes v. Fifteenth Judicial Dist. Ct., 53 Cal. 495; Emmons v. Garnett, 7 Mackey 52; Wilson v. Davis, 1 Mont. 98; Grantham v. Lucas, 15 W. Va. 425; Milwaukee & M. R. Co. v. Soutter, 69 U. S. (2 Wall.) 510, 17 L. Ed. 900.

In Simpson v. Ottawa & P. R. Co., 1 Ont. Ch. Chamb. 126, the court say: "I agree that where the court can not interpose usefully it should not interfere at all, and that it should interfere only so far as it can interfere usefully."

In Orphan Asylum Soc. v. McCartee, Hopk. Ch. 435, the court say: "It is said that the appointing of a receiver rests in discretion. This proposition does not teach much. A receiver is proper if the fund is in danger, and this principle reconciles the cases found in the books. There is no case in which the court appoints a receiver merely because the measure can do no harm. . . . As this case now stands before the court the fund appears to be entirely safe in the hands of the trustee."

Although such an appointment is to a large extent within the discretion of the chancellor, still there are rules that should be observed in exercising such discretion, which are that the power of appointment is to be exercised with great circumspection, that complainant must have title to or a lien upon the property and a receiver must be necessary to its preservation, that a receiver will not be appointed merely because his appointment can do no harm, that fraud or imminent danger must be clearly shown, and that, unless the necessity is of the most

A very safe and sound rule for the appointment of receivers was set forth in an early case[9] in Michigan, wherein the court said: "The appointment of receivers is, like many other judicial functions, governed in part by discretion and in part by rules of right. No court could have unlimited discretion to put private estates into the hands of receivers. There are many cases of

stringent character, a receiver will not be appointed until defendant is heard. Lehman v. Trust Co. of America, 57 Fla. 473, 49 So. 502.

In exercising its discretion the court proceeds with caution, and is governed by a view of all the circumstances of the case. No positive or unvarying rule can be laid down as to whether it will or will not interfere by this kind of interim protection of the property. Where the property is as it were in medio, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble. Such is the case where the receiver of property of a deceased person is appointed pending a litigation as to the right to probate or administration. No one is in the actual enjoyment of property so circumstanced, and no wrong can be done to any one by taking and preserving it for the benefit of a successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case is necessarily involved in further questions. The court by taking possession at the instance of the plaintiff may be doing wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the court interferes by appointing a receiver of property in the possession of the defendant, before the title of the plaintiff has been judicially established, it exercises a discretion to be governed by all the circumstances of the case. Where the evidence on which the court is to act is very clear in favor of the plaintiff, there the risk of eventual injury to the defendant is very small, and the court does not hesitate to interfere. Where there is more of doubt, there is more of difficulty. The question is one of degree, as to which, therefore, it is impossible to lay down any precise or unvarying rule. Owen v. Homan, 4 L. L. Cas. 1032, per Lord Cranworth.

9 Barry v. Briggs, 22 Mich. 201.

While the duty of a court of equity to appoint a receiver pendente lite to prevent injury to the thing in controversy is a delicate and responsible duty, it should be used unhesitatingly in the proper case. Ellis v. Penn Beef Co., 9 Del. Ch. 213, 80 Atl. 666.

recognized equity jurisprudence where receivers may be appointed at a preliminary stage of the cause on bill and affidavits. But there are also many cases where the appointment of a receiver would be entirely beyond the legitimate power of the court. It would be a very strange thing if, because some such orders of appointment are entirely within the discretion of the court and not appealable, the same immunity could be extended to palpable usurpation of power or excess of power. It is one of the fundamental principles of jurisprudence that rights can not be divested without legal authority, and when a right is divested by the order of a court of chancery an appeal lies to determine whether it is legal or unauthorized."

The following principles laid down in an early case in Mississippi have generally been regarded as a concise statement of the general principles to be followed by the courts in the appointment of receivers, namely, that the applicant must show that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim, but that in addition to these conditions he must show that the possession of the property was obtained by the defendant through fraud or that the property itself, or its income, is in danger of loss or great depreciation.[10]

§ 11. Character of Title to Be Shown by Plaintiff.

In order to authorize the appointment of a receiver it is essential that the applicant show either a clear legal right in himself to the property in controversy or that he has some lien upon or property right in it, or that it constitutes a special fund out of which he is entitled to satisfy his demand. He must also show that he has a present existing interest in the property;[1] and where the

10 Mays v. Rose, Freem. Ch. (Miss.) 703.

1 Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596; State v. Union Nat. Bank, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; Steele v.

question of title is involved in the issue the plaintiff must show in himself a strong presumptive title[2] or a

Aspy, 128 Ind. 367, 27 N. E. 739; Smith v. Wells, 20 How. Pr. (N.Y.) 158.

Independently of the Judicature Act, 1873, when a plaintiff has a right to be paid out of a particular fund, the court will appoint a receiver to protect that fund from being dissipated, so as to defeat his rights. Cummins v. Perkins (1899), 1 Ch. 16.

Relief by appointment of receiver and granting of an injunction before trial should not be given where petitioner has no lien on, interest in, or claim to the property of the adverse party. Gartrell v. McCravey, 144 Ga. 249, 86 S. E. 932. See also Atlanta etc. Ry. Co. v. Carolina etc. Cement Co., 140 Ga. 650, 79 S. E. 555.

The appointment of a receiver does not affect the title or involve a determination of it, but it can only be made on the application of one having an acknowledged interest. But a claim of the whole title is unnecessary to authorize a party to make application for the appointment of a receiver; hence, a widow claiming dower in the premises may make the application. Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277.

Hence a receiver will not be appointed over a mere allowance to the defendant which amounts to a mere gratuity in which he has no property right. Timothy v. Day (1908), 2 L. R. Ir. 26.

A bill is insufficient for an injunction and the appointment of a receiver, if it alleges only that the defendant is indebted to the complainants, and that he is disposing of his property, collecting money due him, and secreting the same, with intent to defraud the complainants, and that they are informed and believe that he intends to abscond and defraud his creditors; it does not show that the complainants have any lien as judgment creditors or otherwise upon the defendant's property. Uhl v. Dillon, 10 Md. 500, 69 Am. Dec. 172.

[2] Ashurst v. Lehman, 86 Ala. 370, 5 So. 731; Steele v. Aspy, 128 Ind. 367, 27 N. E. 739; Mapes v. Scott, 4 Ill. App. 268; Cofer v. Echerson, 6 Iowa 502; Elwood v. First Nat. Bank of Greenleaf, 41 Kan. 475, 21 Pac. 673; Cole v. O'Neill, 3 Md. Ch. 174; Clark v. Ridgely, 1 Md. Ch. 70; Vause v. Woods, 46 Miss. 120; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Smith v. Wells, 20 How. Pr. (N. Y.) 158; Willis v. Corlies, 2 Edw. Ch. (N. Y.) 281, 287; Gregory v. Gregory, 1 Jones & S. (N. Y.) 1; Durant v. Crowell, 97 N. C. 367, 2 S. E. 541; Levenson v. Elson, 88 N. C. 182; Horton v. White, 84 N. C. 297; McNair v. Pope, 96 N. C. 502, 2 S. E. 54; Bryan v. Moring, 94 N. C. 694; Twitty v. Logan, 80 N. C. 69; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Emerson's Appeal, 95 Pa. 258; Schlecht's Appeal, 60 Pa. 172; Chicago & A. Oil & Min. Co. v. United States Petroleum Co., 57 Pa. 83; De Walt v. Kinard, 19 S. C. 286; Norris v. Lake, 89 Va. 513, 16 S. E. 663; Beecher v. Bininger, 7 Blatchf. 170, Fed. Cas. No. 1222; Lloyd v. Pass-

strong presumption against the defendant's title.[3] But in such cases there should be also a showing of a danger of loss or injury or insolvency. And where it appears that the title to the property is in dispute and this is an issue in the case, and the rights of all parties therein are threatened, or where the property is *in medio*, a receiver should be appointed.[4]

But where the case involves simply a dry legal title, a court of equity will refuse to interfere and leaves the plaintiff to his remedy at law,[5] and this, too, though the property may be vacant.[6]

ingham, 16 Ves. Jr. 59; Bambrigge v. Boddeley, 3 Macn. & G. 413; Owen v. Homan, 3 Macn. & G. 378, 4 H. L. R. Cas. 997; Lancashire v. Lancashire, 9 Beav. 120; Talbot v. Hope Scott, 4 Kay & J. 96; Parkin v. Seddons, L. R. 16 Eq. 34.

A receiver pendente lite will not be appointed in an action to recover possession of real property, where plaintiff's title is put in issue, in the absence of some special circumstances rendering such an appointment necessary to preserve plaintiff's rights. Sengfelder v. Hill, 16 Wash. 355, 58 Am. St. Rep. 36, 47 Pac. 757.

[3] Mapes v. Scott, 4 Ill. App. 268; Stilwell v. Williams, 6 Madd. 49; Hugnonin v. Bosely, 13 Ves. Jr. 105.

[4] Graham v. Fuller Electrical Co., 75 Ga. 878; Hamberlain v. Marble, 24 Miss. 586; Mills v. Pittman, 1 Paige Ch. (N. Y.) 490; Rollins v. Henry, 77 N. C. 467; United States v. Church of Jesus Christ of L.D.S., 5 Utah 361, 15 Pac. 473; Hlawacek v. Bohman, 51 Wis. 92, 8 N. W. 102; Owen v. Homan, 4 H. L. Cas. 997, 17 Jur. 861.

Where a dispute exists between members of an unincorporated library association and an incorporated library association organized by some of the officers and members of the former association, who claim to be its successor, as to which party was entitled to the property of the original association, an order appointing a receiver without expense pending the determination of the dispute will not be disturbed, where the property and the affairs of the associations were not such that a loss could occur as a consequence of such appointment. Ladies' Library Ass'n of Greenville, Unincorporated, v. Ladies' Library Ass'n of Greenville, Incorporated, 155 Mich. 663, 119 N. W. 1098.

[5] Mapes v. Scott, 4 Ill. App. 268; Lenox v. Notrebe, Hempst. 225, Fed. Cas. No. 8246b.

A receiver will be appointed to take possession of property pendente lite only where the circumstances require summary relief or where there is imminent danger of loss without an adequate remedy at law, but not ordinarily where title is merely in dispute. Bacon

The rule has sometimes been stated as follows: Where the issue is simply a question of title between the plaintiff and defendant and in the absence of fraud, serious injury, or imminent danger of loss, the court will refuse to interfere until the plaintiff has first established in a common law proceeding his legal right.[7] In other cases the general rule has been stated that to entitle the plaintiff to relief he must show a reasonable probability of

v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537.

The appointment of a receiver for the purpose of preserving the future rents of real property, to abide the result of an action concerning the same, is not authorized where the action proceeds on the assumed ownership by plaintiff of the land and the profits thereof and involves merely legal, as distinguished from equitable, rights. San Jose Safe-Deposit Bank v. Bank of Madera, 121 Cal. 543, 54 Pac. 85.

6 Carrow v. Ferrior, 37 L. J. Ch. 569, L. R. 3 Ch. 719; Talbot v. Hope Scott, 4 Kay & J. 96, 4 Jur. N. S. 1172, 27 L. J. Ch. 273; Lancashire v. Lancashire, 9 Beav. 120, 15 L. J. Ch. N. S. 54; Mordaunt v. Hooper, Ambl. 311; Dobbin v. Adams, 8 Ir. Eq. 157; Clark v. Dew, 1 Russ. & M. 103; Knight v. Duplessis, 2 Ves. Sr. 360; Toldervy v. Colt, 1 Young & C. 621, 5 L. J. Exch. Eq. 25.

7 West v. Chasten, 12 Fla. 315; Harrup v. Winslet, 37 Ga. 655; Callanan v. Shaw, 19 Iowa 183; Vause v. Woods, 46 Miss. 120; Pignolet v. Bushe, 28 How. Pr. (N. Y.) 9; Kipp v. Hanna, 2 Bland (Md.) 26; Davis v. Reaves, 2 Lea. (70 Tenn.) 649; Lloyd v. Passingham, 16 Ves. Jr. 59; and see specially Talbot v. Hope Scott, 4 Kay & J. 96; Earl of Fingal v. Blake, 2 Moll. 50; Smith v. Smith, 2 Younge & C. 351, 10 Hare Appx. lxxi; Silver v. Bishop of Norwich, 3 Swanst. 112n.

Where the plaintiff had repudiated the authority of defendants to act for it in making certain contracts and denied liability thereunder, and made no claim to own the property acquired by defendants under the contracts, it is not entitled to a receiver to hold the property pending a determination of its litigation with other parties to the contracts. Red River Potato Growers' Ass'n v. Bernardy, 126 Minn. 440, 148 N. W. 449.

The court will not appoint a receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person against whom the demand is made is fencing off the claim. Greville v. Fleming, 2 J. & L. 335.

In an action to recover the possession of real property to which the title is disputed and of which both parties claim to be owners in fee, a receiver will not be appointed to take possession of the property from the defendant or to receive the rents and profits thereof. Sengfelder v. Hill, 16 Wash. 355, 58 Am. St. Rep. 36, 47 Pac. 757.

recovery, based on a strong title in himself, and this must be coupled with imminent danger of loss[8] and suit be brought within a reasonable time.[9]

But the court will not allow a receivership suit to be used as a substitute for that of ejectment. The rule in this respect was very clearly and succinctly set forth by Judge Sanborn, sitting as a Judge of the Circuit Court of Appeals, in a recent case,[10] in which he said: "The possession and use of real estate by those actually in possession have always been jealously protected by English and American courts. Strangers without title may not eject those in possession, although the latter have no title. The possessors have the right to a trial of the issue between legal titles by a jury and to continue in possession until the plaintiff by the strength of his own title, not through the weakness of his adversaries', establishes his right thereto. This suit is a confession that the plaintiffs can not recover possession of this land on the strength of their title. If they could they would have an adequate remedy at law and their suit must fail. When a plaintiff brings ejectment on a paramount legal title and the defendant in possession sues in equity on the ground that he has the superior equity, the established rule and general practice are to stay the

8 Mayo v. McPhaul, 71 Ga. 758; Cofer v. Echerson, 6 Iowa 502; Gregory v. Gregory, 1 Jones & S. (N. Y.) 1; Chicago & A. Oil & Min. Co. v. United States Petroleum Co., 57 Pa. 83; and see a clear statement of the doctrine of the text by Lord Erskine in Hugnonin v. Basely, 13 Ves. Jr. 105; and see Lord Truro in Bainbrigge v. Baddeley, 3 Macn. & G. 414; Owen v. Homan, 3 Macn. & G. 378; Fingal v. Blake, 2 Moll. 78; Lloyd v. Trimleston, 2 Moll. 78; Mordaunt v. Hooper, Ambl. 311.

In a suit involving a contest between conflicting titles, a receiver can not be appointed to take possession from the defendant, when the right is doubtful, and no danger as to the security of the plaintiff is alleged, and no special circumstances are shown. Freer v. Davis, 52 W. Va. 35, 94 Am. St. Rep. 910, 43 S. E. 172.

9 Skinner's Co. v. Irish Soc., 1 Myl. & C. 162; Commissioners etc. v. Lockhart, Ir. R. 3 Eq. 515.

10 Folk v. United States, 233 Fed. 177.

action at law and hold the defendant in possession until the validity of the defendant's claim in equity is adjudged. And when, as in this case, a plaintiff out of possession brings a suit in equity to avoid the legal title of a defendant in possession which is admittedly superior, it is likewise the general rule and the established practice in equity to refuse to appoint a receiver to deprive the defendant of the possession or of the product of the property until after a full trial of the equitable claim and the legal titles on their merits.

"A court of equity is not without jurisdiction to appoint a receiver of real estate and of its proceeds in the possession of a defendant holding under a title regular on its face. But the cases in which it may exercise that power before a trial of the issues on the merits without a departure from the established principles and practice of equity jurisprudence are exceptions to the general rule, and clear proof of the following necessary facts is indispensable to bring such a case within the exceptions:

"First—The fact that there is imminent danger that unless a receiver is appointed the property or its proceeds will be deteriorated in value or wasted during the pendency of the suit. Second—The fact that the plaintiff will suffer irreparable loss from such deterioration or waste. But if the defendant is solvent and abundantly able to respond to any such loss, or if he will give a good bond so to respond, the loss can rarely be irreparable, and the general rule is that a receiver should not be appointed. Third—The fact that on the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately prevail on the merits.

"But courts of equity are extremely averse to any interference with the possession of a defendant claiming real estate under a legal title. They proceed in such a case with extreme caution and rarely interfere. If it seems doubtful whether or not the plaintiff will recover at the

final hearing, or whether or not there is imminent danger that the plaintiff will suffer irreparable loss, the application for a receiver will be denied and in the hearing and decision of such a case all the presumptions are in favor of the defendant in possession under a legal title. A court of equity is sedulous to prevent the successful invocation of its interlocutory injunction, or its appointment of a receiver to perform the function of a successful action of ejectment and at the same time to avoid the trial of titles indispensable to such an action."[11]

§ 12. Receivership Where Recovery Is Doubtful.

In order to authorize the appointment of a receiver it is an indispensable rule that the party petitioning for such an appointment must show to the court that there is a reasonable probability that he will ultimately prevail in the litigation,[1] and a danger of the property in

11 The court cited the following authorities: Kelley v. Boettcher (C. C.), 89 Fed. 125, 129, 19 Morr. Min. Rep. 515; Lancaster v. Asheville St. Ry. Co. (C. C.), 90 Fed. 129, 133; Sage v. Railroad Co., 125 U. S. 376, 377, 8 Sup. Ct. 887, 31 L. Ed. 694; United States v. American Tobacco Co., 221 U. S. 106, 186, 187, 31 Sup. Ct. 632, 55 L. Ed. 663; Bosworth v. Terminal R. R. Ass'n, 174 U. S. 182, 186, 187, 19 Sup. Ct. 625, 43 L. Ed. 941; Ryder v. Bateman (C. C.), 93 Fed. 16, 28, 29, 31; Trust & Deposit Co. v. Spartanburg Waterworks Co. (C. C.), 91 Fed. 324, 325, 326; Worth Mfg. Co. v. Bingham, 116 Fed. 785, 790, 792, 54 C. C. A. 119, 124, 126; Carson v. Allegany Window Glass Co. (C. C.), 189 Fed. 791, 795, 796, 797, 798, 800; Higginson v. Chicago, B. & Q. R. R. Co., 102 Fed. 197, 199, 42 C. C. A. 254; Moore v. Bank of British Columbia (C. C.), 106 Fed. 574, 579, affirmed 125 Fed. 849, 60 C. C. A. 431; High on Receivers (4th ed.) §§ 553, 557, 558.

1 Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596; Steele v. Aspy, 128 Ind. 367, 27 N. E. 739; Mead v. Burk, 156 Ind. 577, 60 N.E. 338; Paine v. Mueller, 150 Iowa 340, 130 N. W. 133; Blondheim v. Moore, 11 Md. 365; Mays v. Rose, Freem. Ch. (Miss.) 718; McCarter v. Clavin, 72 N. J. Eq. 642, 66 Atl. 599; Flagler v. Blunt, 32 N. J. Eq. 518; Smith v. Wells, 20 How. Pr. (N. Y.) 158; Goodyear v. Betts, 7 How. Pr. (N. Y.) 187; Leavitt v. Yates, 4 Edw. Ch. (N. Y.) 162; Rheinstein v. Bixbey, 92 N. C. 309; Levenson v. Elson, 88 N. C. 184; Beecher v. Bininger, 7 Blatchf. 170, Fed. Cas. No. 1222; Folk v. United States, 233 Fed. 177; Bainbrigge v. Baddeley, 3 Macn. & G. 413; Owen v. Homan, 3 Macn. & G. 378, 412 (affirmed in 4 H. L. Cas. 997).

controversy being lost or endangered pending the litigation. This is substantially the rule which also obtains in

If the ultimate success of the plaintiff in the litigation is a matter of grave doubt, no receiver should be appointed. Hurt v. Hurt, 157 Ala. 126, 47 So. 260.

To entitle a plaintiff to the appointment of a receiver, an absolute right to recover in the action need not be shown; it is sufficient if the right to a judgment is probable. Paine v. Mueller, 150 Iowa 340, 130 N. W. 133.

Where, in a petition for the appointment of a receiver, the relief prayed for is that complainant's claim be decreed a prior lien on all the insolvent's assets, and such relief can not be granted, a receiver should not be granted. Bank of Florence v. United States Sav. & L. Co., 104 Ala. 297, 16 So. 110.

The general rule of equity is also set forth in the statutory provisions relative to the matter. Thus under Rev. Stats., art. 1465, which provides that a receiver may be appointed in certain cases on the application of any party whose right to or interest in the property is probable, it is held that, in order to authorize the appointment of a receiver in an action for the recovery of an interest in real estate before final hearing, the one seeking such relief must show that he will probably succeed in establishing his right. Hardy Oil Co. v. Burnham (Tex. Civ. App.), 124 S. W. 221.

Where a farming contract contained no provisions for rescission, forfeiture, or re-entry for a breach of it, the court will not appoint a receiver to farm the land in a suit by the landowner charging the tenant with bad husbandry and with breaches of different covenants and the tenant denied the allegations and the plaintiff had delayed for months after an attempted rescission and had allowed the tenant to put in and partially harvest crops, and the inconveniences arising from the receivership would also be very great. Conover v. Tansey, 73 N. J. Eq. 562, 67 Atl. 1013.

Where the owner of timber land made a contract with the owners of a sawmill to remove their mill and set it up on such land, and saw the timber thereon, at certain prices, but the timber owner to have the right, on notice and payment of a bonus, to terminate the contract, and the mill was affixed to the soil in the ordinary way for such mills, the mill owners, in the absence of provisions to the contrary in the contract, were entitled on termination of the contract to remove the mill, since it was not a part of the land and hence the grantee of the land owner had no such interest or probable interest in the mill as to entitle him to a receiver for the mill under Rev. Stats. 1895, art. 1465, on breach of the contract by the mill owners. J. A. Wotring & Son v. Indemnity Imp. Co., 47 Tex. Civ. App. 300, 100 S. W. 358.

In an action by a father, after commencement of proceedings, by his children, without his knowledge, under the statute, to have a guardian appointed for him, where the children had no interest

cases where injunctive relief is sought.[2] In other words, if the evidence is conflicting or the legal questions involved are doubtful in respect to the ultimate determination, the application should be refused as in a foreclosure proceeding where the right to foreclose is doubtful or in a proceeding involving the legal construction of deeds. It is, of course, likewise essential that it is probable that the property over which a receiver is sought will be lost or will sustain injury during the pendency of the suit if left in the possession of the defendant, or, if it be a business, that it will be mismanaged by defendant if left under his control.[3] The court must be satisfied that a receiver is necessary to preserve the property and thereby adequately protect the rights of

in the property, the appointment of a receiver of the property of the father and the granting of an injunction against interference with the property in the receiver's hands is improper. Gartrell v. McCravey, 144 Ga. 249, 86 S. E. 932.

Parties who have acquiesced in the enjoyment of the property against their rights can not have a receiver appointed. Gray v. Chaplin, 2 Russ. 147; Skinner's Co. v. Irish Society, 1 My. & Cr. 162.

2 Weis v. Goetter, 72 Ala. 259 (see statute); Ashurst v. Lehman, 86 Ala. 370, 5 So. 731; Lovett v. Slocumb, 109 N. C. 110, 13 S. E. 893; Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781; Norris v. Lake, 89 Va. 513, 16 S. E. 663; Davenport v. Davenport, 7 Hare 217; Oütcalt v. Disborough, 3 N. J. Eq. 214; Hill v. Thompson, 3 Meriv. 622; Pillsworth v. Hopton, 6 Ves. Jr. 51; Smith v. Collyer, 8 Ves. Jr. 89; Norway v. Rowe, 19 Ves. Jr. 144.

"The authority of the court to preserve the property the subject of litigation pending the action until final judgment and then apply it, as justice may require, is too manifest to admit of question, and such authority should be exercised when it appears that there is reasonable ground to believe that the plaintiff may recover, and the interference of the court is necessary to protect the property in question pending the controversy." Craycroff v. Morehead, 67 N. C. 422; Morris v. Willard, 84 N. C. 293; Levenson v. Elson, 88 N. C. 182. If the defendant demands affirmative relief he must show an apparently good title, either not controverted or not unequivocally denied. Lovett v. Slocumb, 109 N. C. 110, 13 S. E. 893; McNair v. Pope, 96 N. C. 502, 2 S. E. 54; Bryan v. Moring, 94 N. C. 694; Oldham v. First Nat. Bank, 84 N. C. 304; Wilkinson v. Dobbie, 12 Blatchf. 298, Fed. Cas. No. 17670.

3 Ogden City v. Bear Lake & River Waterworks & Irrig. Co., 16 Utah 440, 41 L. R. A. 305, 52 Pac. 697; Vose v. Reed, 1 Woods 647, Fed. Cas. No. 17011.

the litigants.[4] There must be a legal or equitable right in property reasonably clear and free from doubt and attended with danger of loss. The preservation of the

4 Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596; Chase's Case, 1 Bland (Md.) 206, 213, 17 Am. Dec. 277; Walker v. House, 4 Md. Ch. 39; Bloodgood v. Clark, 4 Paige (N. Y.) 574; Orphan Asylum Soc. v. McCartee, Hopk. Ch. (N. Y.) 429.

The chancellor in Clark v. Ridgely, 1 Md. Ch. 70, said: "Indeed, it is believed the authority and duty of the court to appoint, or not appoint, a receiver depends upon the question whether the property is or is not in danger in the hands of the party who may at the time be in possession. . . . There is no case in which the court appoints a receiver merely because the measure can do no harm." The Chief Justice in Blondheim v. Moore, 11 Md. 365, laid down as a rule that should govern the court in the appointment of a receiver the following: "That fraud or imminent danger if the intermediate possession should not be taken by the court must be clearly proved."

"There should, however, be a concurrence upon two grounds—a reasonable probability of success on the part of complainant, and that the subject-matter in controversy is in danger." Ashurst v. Lehman, 86 Ala. 370, 5 So. 731; Norris v. Lake, 89 Va. 513, 16 S. E. 663; Skinner v. Maxwell, 66 N. C. 45; Flagler v. Blunt, 32 N. J. Eq. 518. Waste on the part of the party in possession is sufficient to justify the appointment. Vose v. Reed, 1 Woods 647, Fed. Cas. No. 17011.

A receiver of book accounts assigned by a debtor to one of his creditors will not be appointed pending a suit by another creditor to set aside the assignment as fraudulent, where the assignee has put in an answer denying the allegations of fraud and asserting his right to the security, and it appears that he has abundant means to respond in any amount for which he may be held liable. Waeber v. Rosenstein, 6 App. Div. 447, 39 N. Y. Supp. 593.

A receiver should never be appointed over a mortgagee of chattels in possession, where there is a balance due him. Bayaud v. Fellows, 28 Barb. (N. Y.) 451.

In the absence of fraud, and where a corporation has parted with all its property and used the same in payment of debts, a receiver will not be appointed. Hale-Berry Co. v. Diamond State Iron Co., 94 Ga. 61, 22 S. E. 217.

And where rents are applied to the payment of the mortgage debt and necessary expenses in the management and care of the property, a receiver will not be appointed. Myton v. Davenport, 51 Iowa 583, 2 N. W. 402.

Receiver not appointed where administrator has power to protect property. Veret v. Duprez, L. R. 6 Eq. 329.

An order appointing a receiver pendente lite, in a proceeding under 3 How. (Mich.) Ann. Stat. § 8749o, providing for the appointment of a receiver at the instance of persons having preferred claims

subject of the controversy for the benefit of the party who will ultimately be decreed to have the right thereto is the object of committing it to the custody of the receiver.[5] It must, however, be borne in mind that unless

under a voluntary assignment, is improvident, if not an absolute nullity. Hall v. Wayne Circuit Judge, 111 Mich. 395, 69 N. W. 643.

Because the husband of an executrix was in the West Indies, and not amenable to the process of court in case his wife as executrix should commit waste or refuse to pay, a receiver was appointed. Decided by the Lord Chancellor of England in 1741. Taylor v. Allen, 2 Atk. 213.

In Lloyd v. Passingham, 16 Ves. Jr. 59-70, Lord Eldon said: "The court must not only be satisfied of the existence of fraud, but it must be morally sure that upon the hearing of the cause the party would upon the circumstances be turned out of possession, and not only that, but it must see some danger to the immediate rents and profits."

5 Fort Payne Furnace Co. v. Fort Payne Coal & I. Co., 96 Ala. 472, 38 **Am. St. Rep.** 109, 11 So. 439; Hughes v. Hatchett, 55 Ala. 631; Randle v. Carter, 62 Ala. 95; Skinner v. Maxwell, 66 N. C. 45.

In actions at law property will not be taken from a party in possession, claiming in good faith the right to it, without first exacting from him at whose suit it is done ample security for the protection of his adversary against injury. In actions of detinue and attachment for the seizure of property an adequate bond with good sureties is required to indemnify the defendant against loss. Injunctions and equitable attachments are allowed only on the same conditions. In actions for the appointment of receivers ordinarily no indemnifying bonds are required, and the consequences that may follow from wresting from the defendant of the property in litigation, are such that the granting of a receiver should, in all cases, be attended with great care and circumspection. Briarfield Iron Works Co. v. Foster, 54 Ala. 622.

The appointment of a receiver is unnecessary where the property is a decree of court, of which the receiver could not take possession, it being virtually in the hands of the court. Matthews (Scruggs) v. Memphis & C. R. Co., 108 U. S. 368, 27 **L. Ed.** 756, 2 Sup. Ct. 780.

A receiver pendente lite should not be appointed unless there is a probable right to a permanent receiver. Party seeking the appointment of a receiver pendente lite must show a probable interest in the property involved and danger of loss or misappropriation of same unless receiver is appointed. Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596.

Where there is no danger to the property in controversy and no other reason for a receiver, none will be appointed. Beaumont v. Beaumont, 166 Pa. St. 615, 31 Atl. 336.

The danger of loss must be of an immediate character and not past or remote. Kean v. Colt, 5 N. J. Eq. (1 Halst. Ch.) 365.

the power to appoint a receiver is exercised with due caution property may be illegally taken from its rightful owner. If property is properly placed in the hands of a receiver the remedy becomes a shield and protection, whereas if improperly placed in the hands of a receiver, the remedy may be a great hardship and method of harassment. The necessity for caution in its exercise is also shown by the fact that the ultimate rights of the litigants are necessarily prejudged to a certain extent by the probabilities of the petitioner's right to recover.

In other words, when, from all the facts before the court, it is a question of grave doubt whether the plaintiff will ultimately be entitled to recover, the court may in the exercise of its discretion refuse to appoint a receiver.[6] And in certain classes of cases such as *quasi*-public corporations, which furnish service to the public in the shape of water, light, transportation, and the like, the court will not only scrutinize the rights of the moving party and the injuries which may result to the defendant, but also the effects of the appointment of a receiver upon the public whom the corporation serves and upon the numerous employees engaged in the public service.[7]

In all cases, however, the question of the probability of plaintiff ultimately recovering is necessarily one which can not be defined, and the question of such probability in such circumstances is one of degree, which in each particular case must practically be determined by the discretion of the court exercised in view of all of the equitable rules applicable to the subject.

6 Bank of Florence v. United States Sav. etc. Co., 104 Ala. 297, 16 So. 110; Builders' etc. Supply Co. v. Lucas, 119 Ala. 202, 24 So. 416; Hayes v. Jasper Land Co., 147 Ala. 340, 41 So. 909; Vila v. Grand Island etc. Co., 68 Neb. 222, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 63 L. R. A. 791, 94 N. W. 136, 97 N. W. 613; Wilkinson v. Dobbie, 12 Blatchf. 298, Fed. Cas. No. 17670; Kelley v. Boettcher, 89 Fed. 125; Lancaster v. Asheville St. Ry. Co., 90 Fed. 129; Owen v. Homan, 3 Macn. & G. 378.

7 Wabash R. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823.

§ 13. Whether Existence of Property Must Be Shown.

It is not necessary to show that there is property to come into the hands of the receiver as a prerequisite to the appointment.[1] But where it does not appear that any advantage will be gained by the appointment of a receiver none will be appointed.[2] And where it is shown that there are no assets which could be distributed by the receiver the court will not perform an idle act by appointing one.[3] And likewise where existing mortgages upon the property will consume the entire property no receiver will be appointed.[4]

Nor will a receiver be appointed where it appears that the plaintiff has parted with his interest in the property over which a receiver is sought, even where it otherwise would have done so.[5]

So also courts are averse to appointing a receiver where the property in controversy is of trifling value.[6] And a court will not appoint a receiver over property outside of its jurisdiction.[7]

1 Dutton v. Thomas, 97 Mich. 93, 56 N. W. 229; Rankin v. Rothschild, 78 Mich. 10, 43 N. W. 1077.

That the debtor does not appear to have property is no ground for refusal to appoint; but where it appears that the only property is a trust fund under a devise which the debtor is willing to apply upon demand, the appointment will be refused. DeCamp v. Dempsey, 10 N. Y. Civ. Proc. Rep. 210.

The answer in a creditor's bill, that defendant has not property to the amount of $100, is not a sufficient reason for refusing to appoint a receiver. Fuller v. Taylor, 6 N. J. Eq. 301, Fitzburgh v. Everingham, 6 Paige Ch. (N. Y.) 29.

That there is no other property than an equity of redemption is not a defense. Bailey v. Lane, 15 Abb. Pr. (N. Y.) 373, note.

2 Grandfalls Mut. Irr. Co. v. White (Tex. Civ.), 131 S. W. 233; Mercantile Investment etc. Co. v. River Platte Trust etc. Co., L. R. [1892] 2 Ch. 303.

A receiver will not be appointed after a judgment debtor has become a bankrupt. Ryan v. Lefroy, 3 Ir. Ch. Rep. 351.

3 Burton v. Enterprise Loan etc. Ass'n, 114 Ind. 226, 5 Am. St. Rep. 608, 16 N. E. 486.

4 Collins v. Myers, 68 Ga. 530.

5 Smith v. Wells, 20 How. Pr. (N. Y.) 158.

6 Whitworth v. Whyddon, 2 Macn. & G. 52.

7 Baltimore etc. Loan Ass'n v. Alderson, 90 Fed. 142, 32 C. C. A. 542.

§ 14. Necessity for Pendency of a Suit.

In effect the appointment of a receiver is not unlike a statutory attachment so far as the seizure and preservation of the property are concerned and the ultimate right of the successful party relates back to the date of the appointment. The appointment of a receiver amounts to a sequestration of the property of the defendant in advance of a hearing and adjudication of his rights. Hence it is apparent that the appointment, save in a few exceptional cases, is an incident to the litigation itself and not the main purpose of the litigation. Consequently it is a well established rule that in order to authorize the appointment of a receiver it is essential that there shall be at the time of the appointment a suit pending in which relief other than the mere appointment of the receiver is sought.[1] The exceptions to the general rule

1 Harwell v. Potts, 80 Ala. 70; Crowder v. Moone, 52 Ala. 220; Baker v. Backus' Admr., 32 Ill. 79; State v. Union Nat. Bank, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; Guy v. Doak, 47 Kan. 236, 366, 27 Pac. 968; Merchants etc. Nat. Bank v. Kent, Circuit Judge, 43 Mich. 292, 5 N. W. 627; Jones v. Schall, 45 Mich. 379, 8 N. W. 68; Hardy v. McClellan, 53 Miss. 507; Barber v. Manier, 71 Miss. 725, 15 So. 890; Jones v. Schaff Bros. Co., 187 Mo. App. 597, 174 S. W. 177; State v. Ross, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947; Lyon v. United States Fidelity etc. Co., 48 Mont. 591, Ann. Cas. 1915D, 1036, 140 Pac. 86; Vila v. Grand Island etc. Co., 68 Neb. 222, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 63 L. R. A. 791, 94 N. W. 136, 97 N. W. 613; Mann v. German-Am. etc. Co., 70 Neb. 454, 97 N. W. 600; In re Hancock, 27 Hun (N. Y.) 575; Mabon v. Ongley etc. Co., 156 N. Y. 196, 50 N. E. 805; Martin v. Harnage, 26 Okla. 790, 38 L. R. A. (N. S.) 228, 110 Pac. 781; Republic Trust Co. v. Taylor (Tex. Civ.), 184 S. W. 772; Popp v. Daisy Gold Min. Co., 27 Utah 83, 74 Pac. 426; Rainey v. Freeport etc. Co., 58 W. Va. 424, 52 S. E. 528; Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660; Robinson v. W. Va. Loan Co., 90 Fed. 770; In re Brant, 96 Fed. 257; Ex parte Mountfort, 15 Ves. Jr. 445; Ex parte Whitfield, 2 Atk. 315; Anon., 1 Atk. 489, 578; Ex parte Peillon, 2 Thomson (Nova Scotia) 405; Young v. Wright, 8 P. R. (New Brunswick) 198; Salter v. Salter, L. R. [1896] Prob. Div. 291.

In this connection see also note to Ann. Cas. 1912B, 236.

The filing of the petition in an action between partners is a prerequisite to the appointment of a receiver by the district court, under Tex. Rev. Stat. 1895, art.

occur in matters relative to the preservation of the estates of insane persons, infants, and estates of decedents where there does not appear to be any one who has a legal right to deal with the property.[2]

The resort to receivership in such cases is more often done in England than in this country.[3] At one time in Ireland it was the practice of the chancery court in certain specified cases to appoint receivers where no bill was pending, but this exceptional practice grew out of the statute known as 4 & 5 Wm. IV, chap. 78, § 7; 5 & 6 Wm. IV, chap. 55, § 31.

The pending action must be one for such relief as can be litigated between the parties even if the application for the appointment be denied.[4] Hence if the sole object

1465. Webb v. Allen, 15 Tex. Civ. App. 605, 40 S. W. 342.

A suit is necessary to the appointment of a receiver, and the party whose property is to be taken from him and placed in the hands of a receiver must be a party to the pending suit. Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 34 So. 216; Baker v. Backus' Admr., 32 Ill. 79; Ex parte Williams, 17 S. C. 396; McLean v. Lafayette Bank, 3 McLean 503, Fed. Cas. No. 8887 (16 Fed. Cas. 262).

A suit which has for its sole object the appointment of a receiver will not authorize such an appointment. Continental Trust Co. v. Brown (Tex. Civ. App.), 179 S. W. 939.

A motion for the appointment, where the order to show cause against the appointment is served before the commencement of the suit, is irregular. Kattenstroth v. Astor Bank, 2 Duer. (N. Y.) 632.

A receiver will not be appointed on a petition, but only on a bill. Rice v. Tonnele, 4 Sandf. Ch. (N. Y.) 568.

2 Price v. Bankers Trust Co. (Mo.), 178 S. W. 745; Style v. Lantrip (Tex. Civ.), 171 S. W. 786; Jones v. Bank of Leadville, 10 Colo. 464, 17 Pac. 272; Hardy v. McClellan, 53 Miss. 507; Davis v. Flagstaff S. U. Co., 2 Utah 74, 91, 2 Morr. Min. Rep. 660.

Except in certain statutory circumstances, the only instances in the English practice in which a receiver will be appointed without a suit being pending is that of the appointment of a receiver in the case of a lunatic. Ex parte Whitfield, 2 Atk. 315.

3 For the cases on this subject, see the treatment of the subject under estates of that character.

4 Houston etc. Ry. Co. v. Hughes (Tex. Civ.), 182 S. W. 23; Hartnett v. St. Louis Min. etc. Co., 51 Mont. 395, 153 Pac. 437; Mann v. German-American etc. Co., 70 Neb. 454, 97 N. W. 600.

of the suit is the appointment of a receiver, the court will not take jurisdiction in the absence of statutory provisions allowing such suits.[5] The court must have jurisdiction to entertain the cause of action to which the appointment of the receiver would be ancillary and have power to grant the relief demanded in the action,[6] for if the court has no jurisdiction over the subject-matter it has no authority to appoint a receiver, since it is fundamental that there is no such proceeding in equity as a plain receivership action, in which the appointment of a receiver is the only desideratum.[7] The action must, of course, be one which comes within the equitable juris-

5 Hermann v. Thomas (Tex. Civ. App.), 143 S. W. 195; Price v. Bankers Trust Co. of St. Louis (Mo.), 178 S. W. 745; Hartnett v. St. Louis Min. & Mill. Co. of Montana, 51 Mont. 395, 153 Pac. 437.

One who alleges himself a creditor of the corporation can not apply for the appointment of a receiver without making a principal demand. Van Vleet v. Evangeline Oil Co., 127 La. 919, 54 So. 286.

The appointment is not the ultimate end and object of the suit, but is merely a provisional remedy or auxiliary proceeding. Sheridan Brick Works v. Marion Trust Co., 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666; State ex rel. Merriam v. Ross, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947.

A bill which has for its sole object the appointment of a receiver will not be entertained. Continental Trust Co. v. Brown (Tex. Civ. App.), 179 S. W. 939.

6 Red River Potato Growers' Ass'n v. Bernardy, 126 Minn. 440, 148 N. W. 449.

Thus a bill for the appointment of a receiver merely asking for time in which to pay an indebtedness does not state sufficient ground for the appointment. Continental Trust Co. v. Brown (Tex. Civ. App.), 179 S. W. 939.

7 Condon v. Mutual Reserve etc. Ass'n, 89 Md. 99, 73 Am. St. Rep. 169, 44 L. R. A. 149, 42 Atl. 944; Hartnett v. St. Louis Min. etc. Co., 51 Mont. 395, 153 Pac. 437; Zuber v. Micmac Gold Min. Co., 180 Fed. 625. A very clear and concise discussion of this subject was rendered by Mr. Presiding Justice Faris in Price v. Bankers Trust Co. (Mo.), 178 S. W. 745.

Equity has no jurisdiction, under Code 1899, ch. 133, § 28 (Code 1906, 4031), authorizing the appointment of a receiver, in an action where there is danger of loss or misappropriation of the subject-matter of the action, to appoint a special receiver, unless there be equity jurisdiction independent of the application for such receiver. Ward v. Hotel Randolph Co., 65 W. Va. 721, 63 S. E. 613.

diction of the court,[8] and the relief prayed for must be of such a character as to be germane to the cause of action set up.[9]

In order to constitute a suit as pending within the above rule it is necessary that the complaint or bill shall state a cause of action against the defendant.[10] The complaint may, however, be one in the nature of a cross-bill filed by the defendant.[11] Under statutes which provide that a suit is not commenced until a summons has been issued in the case or other conditions complied with, a receiver can not be appointed before such a summons has been issued, even though the complaint has been filed,[12] but the action will be deemed as pending for this purpose

8 A receiver will not be appointed in a proceeding in quo warranto. Stone v. Wetmore, 42 Ga. 601.

9 Davis v. Alton, J. & P. Ry. Co., 180 Ill. App. 1; Hartnett v. St. Louis Min. etc. Co., 51 Mont. 395, 153 Pac. 437.

10 Hartnett v. St. Louis Min. etc. Co., 51 Mont. 395, 153 Pac. 437; Price v. Bankers Trust Co. (Mo.), 178 S. W. 745; Mann v. German-American etc. Co., 70 Neb. 454, 97 N. W. 601; Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095; Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167; Forest Oil Co. v. Wilson (Tex. Civ. App.), 178 S. W. 626; Houston etc. Ry. Co. v. Hughes (Tex. Civ. App.), 182 S. W. 23; Republic Trust Co. v. Taylor (Tex. Civ. App.), 184 S. W. 772.

A liberal construction will be given to a complaint in determining its sufficiency so far as it relates to the appointment of a temporary receiver pending the action, but it must state a cause for such appointment; and if the application is made without notice, the cause for an appointment without notice must appear either in the verified complaint or by affidavit, under Ind. Rev. Stat. 1894, § 1244, providing that a receiver shall not be appointed without notice of the application to the adverse party, except upon sufficient cause shown by affidavit. Sullivan Electric Light & P. Co. v. Blue, 142 Ind. 407, 41 N. E. 805.

11 Russell v. Mohr-Weil Lumber Co., 102 Ga. 593, 27 S. E. 699.

12 Guy v. Doak, 47 Kan. 236, 366, 27 Pac. 968; Dixon v. Dixon, 119 Md. 413, 86 Atl. 1042; Hardy v. McClellan, 53 Miss. 507; Barber Bros. v. Manier, 71 Miss. 725, 15 So. 890; Dwelle v. Hinde, 8 Ohio C. D. 10, 18 Ohio Ct. 618.

Where the summons was not delivered to the serving officer until the next day after the filing of the complaint and appointment of the receiver, the appointment was made before the action was commenced, and hence while the court had no jurisdiction. Marshall v. Matson, 171 Ind. 238, 86 N. E. 339.

where the notice or service is merely defective.[13] And where, under the statutory provisions in force, a suit is deemed to be commenced upon the serving of notice of the pendency of the action, it has been held that the appointment of a receiver was not premature, although made before the actual filing of the petition, but subsequent to the service of the notice.[14] And in another instance it was held where the receiver was appointed by a judge in chambers, while in another district, upon the presentation of the bill and answer which had not been filed, but the appointment was not to take effect until the pleadings and order of appointment had been filed, the appointment was valid.[15] In accordance with the rules above set forth, an appointment of a receiver in advance of the pendency of a proper suit is held to be void,[16] and the subsequent filing of the bill will not validate such an appointment.[17] Where at the time of making the original appointment, no suit was pending before the court, but after the proper filing of the suit the court confirms the original appointment, such confirmation will be regarded as an original appointment and be valid from the date of confirmation.[18]

If the controversy, which is the subject-matter of the litigation, is settled during the pendency of the suit, the court loses jurisdiction to appoint a receiver,[19] or if one

13 Hellebrusn v. Blake, 119 Ind. 349, 21 N. E. 976.

14 Paine v. Mueller, 150 Iowa 340, 130 N. W. 133.

15 Horn v. Pere Marquette R. Co., 151 Fed. 626.

16 Howell v. Harris-Cortner Co., 168 Ala. 383, Ann. Cas. 1912B 234, 52 So. 935; Bank of Meadville v. Hardy, 94 Miss. 587, 48 So. 731.

17 Harwell v. Potts, 80 Ala. 70; Gold Hunter Min. & S. Co. v. Holleman, 3 Ida. 99 (2 Ida. 839), 27 Pac. 413; Jones v. Schall, 45 Mich. 379, 8 N. W. 68; Hardy v. McClellan, 53 Miss. 507.

18 Anderson v. Riddle, 10 Wyo. 277, 68 Pac. 829.

19 Christoffel v. Lee, 153 Ill. App. 395.

The jurisdiction of a court to appoint a receiver should always follow the jurisdiction of the action upon which the receivership is sought to be ingrafted. Price v. Bankers Trust Co., (Mo.) 178 S. W. 745.

has been appointed the only jurisdiction remaining in the court is to settle the receiver's accounts.[20] Likewise where judgment is rendered in favor of the defendant such judgment operates as a termination of the receivership where the receiver was appointed for the purpose of preserving the property during the pendency of the action.[21] The same result happens where a judgment in favor of the plaintiff is reversed on appeal.[22]

§ 15. Right of Court to Refuse Appointment on Condition of Defendant Furnishing a Bond.

Where a court is of the opinion that the plaintiff is entitled to have a receiver appointed to take charge of the property or fund in litigation but nevertheless feels that the plaintiff could be made secure in respect to the outcome of the litigation in the event of his recovery by the furnishing of a bond by the defendant to secure any such recovery, it is within the discretion of the court to make an order refusing to appoint a receiver upon condition that the defendant furnish such a bond.[1] The

20 Decker Bros. v. Berner's Bay Mining Co., 3 Alaska 280.

21 Wiencke v. Bibby, 15 Cal. App. 50, 113 Pac. 876; Brewster v. F. G. Brewster Co., 130 N. Y. Supp. 654, 145 App. Div. 812.

22 Co-operative Sanitary Baking Co. v. Shields, (Fla.) 70 So. 937.

1 Baker v. Bartol, 7 Cal. 551; Davis v. Leonard, 66 Fla. 351, 63 So. 584; Clyatt v. Taylor, 136 Ga. 774, 71 S. E. 1076; Conquest v. National Bank, 97 Ga. 500, 25 S. E. 343; Parsille v. Brown, 188 Mich. 485, 154 N. W. 569; Mead v. Orrery, 3 Atk. 235; Haigh v. Grattan, 1 Beav. 201.

It is not an abuse of discretion to appoint a receiver conditioned on defendant's failure to give bond to pay plaintiff his eventual condemnation money in case said property or any part thereof is found subject to plaintiff's judgment, where the defendant had offered to file such bond. Clyatt v. Taylor, 136 Ga. 774, 71 S. E. 1076.

In Low v. Holmes, 2 C. E. Green (17 N. J. Eq.) 148, the court refused to appoint a receiver over property in possession of one tenant in common, in a suit for partition, where he offered to give adequate security for the rents and profits pending the litigation.

A reasonable time may be allowed within which the defendant may file a bond to secure the plaintiff in the event of his recovery. Barclay v. Quicksilver Min. Co., 9 Abb. Pr. N. S. (N. Y.) 283.

making of such an order is merely another way of saying that a receiver should be appointed in the case, but making it optional with the defendant to submit to the appointment or furnish a bond if he prefer to do that rather than have a receiver appointed, but such a choice should only be offered by a court in a case wherein the appointment of a receiver would be proper. At first sight in such a case it would appear that the court was exacting a bond from the defendant in advance of trial to secure the payment of any judgment which might be recovered against him, but such is not the case since the order for the furnishing of the bond is not mandatory but merely presented in the alternative and allows the defendant to refuse to furnish the bond if he desires. The reasons for the practice in such case were well stated in an early case in California,[2] wherein the court said:

"It is true that the court had no power to compel the defendant to execute the bond in question, but it undoubtedly had the power to appoint a receiver, and if the defendant chose to execute a bond rather than pay the money over to the officer of the court, it was a voluntary act upon his part, and the bond was good as a common law bond. In this respect he is not to be considered as a receiver or officer of the court, but as a party who, for a personal accommodation, has assumed a legal

Where the character of the property involved is such that it is not likely to be injured if a receiver is not appointed, and the defendant is solvent, it has been held that the court should allow the defendant the alternative of giving a bond for the protection of plaintiff or having a receiver appointed. Stillwell v. Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Cordele Ice Co. v. Sims, 120 Ga. 428, 48 S. E. 12.

Hence in cases of partnership dissolution and accounting where losses to the partnership business and assets can be avoided by the furnishing of a bond to make a final accounting, the courts will give the defendant the privilege of furnishing such a bond. Cary Bros. v. Dolhoff etc. Co., 126 Fed. 584; Mann v. Gaddie, 158 Fed. 42, 88 C. C. A. 1.

2 Baker v. Bartol, 7 Cal. 551.

responsibility, and, after receiving its benefits on his part, should be estopped from denying its legality."

The court in such cases knows the circumstances surrounding the case and adopts the remedial relief so as to reach the ends of substantial justice without unduly injuring the rights or interest of any party to the litigation. The provisional remedy, being merely auxiliary to the ultimate relief, should not usurp or anticipate the office and effects of a trial on the merits.[3] Where a fund which is in litigation is placed in the custody of the court, a receiver will not, of course, be appointed to take charge of it.[4]

In some states statutory provisions exist which provide that a receiver should not be appointed in a case if the defendant offers to furnish a bond to protect the plaintiff in the event of his recovery and, of course, under such statutes, no receiver will be appointed if the statutory bond is forthcoming.[5]

§ 16. Effect Where an Injunction Would Serve Same Purpose.

An injunction, of course, does not have the effect of taking the possession away from the enjoined party, although it may restrict him in the exercise of his possession while the appointment of a receiver takes the entire management and control of the property from the defendant. The object of both an injunction and receivership proceeding is the preservation of the property pending the litigation, and both remedies are frequently exercised in the same litigation, but the court will not nec-

3 In Popper v. Scheider, 7 Abb. Pr. N. S. (N. Y.) 56, which was an action to dissolve a partnership, the existence of which was denied by defendant, the court had appointed a receiver, but upon motion of the defendant and his showing that the business would be injured by the receivership, the court vacated its order of appointment on condition of a bond being given to pay plaintiff any sum found due on a final settlement of the alleged partnership.

4 Curling v. Townshend, 19 Ves. Jr. 628.

5 Roberts v. Pipkin, 63 S. C. 252, 41 S. E. 300.

essarily appoint a receiver merely because the plaintiff has shown sufficient grounds for the granting of an injunction.[1]

Where, however, the granting of an injunction will protect the rights of the plaintiff in the event of his recovery, the court will not resort to the more drastic remedy of a receivership whereby the defendant will be deprived of the possession of the property in controversy.[2]

§ 17. Insolvency as a Ground for Receivership.

Mere insolvency of the defendant without any other ground being stated as a cause of action will not be sufficient for the appointment of a receiver by a court of equity in the absence of a statute allowing the appointment upon a showing of insolvency or imminent danger of such a condition.[1]

Insolvency is, however, most frequently one of several reasons for the appointment of a receiver, but insolvency as a ground for the appointment of a receiver is predicated upon the general doctrine of probable loss. Hence there must be coupled with an allegation of insol-

1 Rawnsley v. Trenton Mut. etc. Ins. Co., 1 Stockt. (9 N. J. Eq.) 347; Oakley v. Paterson Bank, 1 Green Ch. (2 N. J. Eq.) 173. It does not follow that because an injunction may be granted to stay irreparable damage by the defendant until decision respecting title can be reached, a receiver will be appointed to deprive one in possession under color of title of his advantage and more especially allow the receiver to work his land, and charge it with a lien for expenditures. Freer v. Davis, 52 W. Va. 35, 94 Am. St. Rep. 910, 43 S. E. 172.

2 Empire Hotel Co. v. Main, 98 Ga. 176, 25 S. E. 413; Tarvin v. Walker's Creek etc. Co., 109 Ky. 579, 60 S. W. 185.

1 Prudential etc. Co. v. Three Forks etc. Ry. Co., 49 Mont. 567, 144 Pac. 158; Virginia-Carolina Chemical Co. v. Hunter, 84 S. C. 214, 66 S. E. 177; Galvin v. McConnell, 53 Tex. Civ. 486, 117 S. W. 211; Floore v. Morgan, (Tex. Civ.) 175 S. W. 737; Continental Trust Co. v. Brown, (Tex. Civ.) 179 S. W. 939; Houston etc. Ry. Co. v. Hughes, (Tex. Civ.) 182 S. W. 23.

vency additional allegations showing the plaintiff's right of recovery or probability of recovery, and that such recovery will be wholly or substantially lost or impaired by reason of the insolvency.[2] Insolvency is most frequently one of the grounds of application for a receiver in cases of insolvent banks,[3] corporations,[4] mortgages,[5] fraudulent conveyances,[6] matters involving trusts,[7] part-

2 Cofer v. Echerson, 6 Iowa 502; Chase's Case, 1 Bland Ch. (Md.) 206, 17 Am. Dec. 277; Cox v. Peters, 13 N. J. Eq. 39; Gregory v. Gregory, 1 Jones & S. (N. Y.) 1; Rollins v. Henry, 77 N. C. 467; McNair v. Pope, 96 N. C. 502, 2 S. E. 54; Lawrence Iron Works Co. v. Rockbridge Co., 47 Fed. 755; Trust & Deposit Co. v. Spartanburg etc. Co., 91 Fed. 324; Ryder v. Bateman, 93 Fed. 16; Owen v. Homan, 4 H. L. Cas. 997, 3 Macn. & G. 378; Commissioners etc. v. Lockhart, Ir. Rep. 3 Eq. 515.

While mere insolvency is not sufficient ground for appointment of a receiver, if a debtor adopts a course of conduct which shows a fraudulent intent to delay or hinder his creditors, an equity court will appoint a receiver. Virginia-Carolina Chemical Co. v. Hunter, 84 S. C. 214, 66 S. E. 177.

An auxiliary petition was filed for the appointment of a receiver to protect the property and impound the rents, on the ground of the defendant's insolvency and the insufficiency of the property to discharge the balance due on the purchase price. There was no abuse of discretion in making such appointment. Adams v. Foster, 143 Ga. 701, 85 S. E. 834.

3 Hill v. Western & A. R. Co., 86 Ga. 284, 12 S. E. 835; Attorney General v. Bank of Columbia, 1 Paige (N. Y.) 511.

4 Nichols v. Perry Patent Arms Co., 11 N. J. Eq. 126; Middlesex County Board of Chosen Freeholders v. State Bank at New Brunswick, 30 N. J. Eq. 311; North Carolina S. C. C. R. Co. v. Drew, 3 Woods 691, Fed. Cas. No. 17434; Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849, 4 Hughes 415; Whitewater Valley Canal Co. v. Vallette, 62 U. S. (21 How.) 414, 16 L. Ed. 154; Evans v. Coventry, 5 DeG. M. & G. 911.

5 Hart v. Respess, 89 Ga. 87, 14 S. E. 910; McMahon v. North Kent Ironworks Co., [1891] 2 Ch. 148; Reynolds v. Quick, 128 Ind. 316, 27 N. E. 621; Merritt v. Gibson, 129 Ind. 155, 15 L. R. A. 227, 27 N. E. 136; Hill v. Robertson, 24 Miss. 368; Quincy v. Cheeseman, 4 Sandf. Ch. 405.

6 Tufts v. Little, 56 Ga. 139; Gunby v. Thompson, 56 Ga. 316; Chappell v. Boyd, 56 Ga. 578; Pendleton Bros. v. Johnson, 85 Ga. 840, 11 S. E. 144; Flagler v. Blunt, 32 N. J. Eq. 518; Ahlhauser v. Doud, 74 Wis. 400, 43 N. W. 169.

7 Bowling v. Scales, 2 Tenn. Ch. 63; Driskill v. Boyd, (Tex. Civ.) 181 S. W. 715.

nerships,[8] judgment debtors,[9] executors and administrators,[10] joint tenants,[11] and matters relating to dower.[12] In respect to the question when a person or corporation is insolvent reference must be had to the general decisions on the question irrespective as to whether they refer to questions of receivers or not, since different courts view the question from different angles, some basing insolvency upon inability to pay debts as they become due in the usual course of business, while others base it on a deficiency of assets over liabilities. It is obvious that the same rule should not be applied to a railroad company or large manufacturing concern as should be applied to a bank. In a general sense, however, and as generally used in bankruptcy and insolvent laws, insolvency means an inability to pay debts as they mature.[13]

A receiver may, however, be appointed in a proper case notwithstanding that the defendant is perfectly solvent.[14]

8 Bard v. Bingham, 54 Ala. 463; Barnard v. Davis, 54 Ala. 565; Boyce v. Burchard, 21 Ga. 74; Williamson v. Wilson, 1 Bland Ch. (Md.) 418; Heathcot v. Ravenscroft, 6 N. J. Eq. 113; Randall v. Morrell, 17 N. J. Eq. 343; People's Bank v. Fancher, 21 N. Y. Supp. 545.

9 McCord v. Weil, 33 Neb. 868, 51 N. W. 300; Shannon v. Hanks, 88 Va. 338, 13 S. E. 437; Dunlap v. Hedges, 35 W. Va. 287, 13 S. E. 657; Ogden v. Chalfant, 32 W. Va. 559, 9 S. E. 879.

10 Williams v. Jenkins, 11 Ga. 595; Johns v. Johns, 23 Ga. 31; Jenkins v. Jenkins, 1 Paige 243.

11 Bryan v. Moring, 94 N. C. 694, 699; Street v. Anderton, 4 Bro. C. C. 414; Sandford v. Ballard, 30 Beav. 109.

12 Chase's Case, 1 Bland Ch. 206.

13 The fact that a defendant can not pay its current obligations as they mature, and is unable in the ordinary course of its business to pay its liabilities, is a proper and sufficient allegation of insolvency in a suit in equity. American Can Co. v. Erie Preserving Co., 171 Fed. 540.

See discussion of the subject in Sill v. Kentucky Coal etc. Co., (Del. Ch.) 97 Atl. 617.

14 Mead v. Burk, 156 Ind. 577, 60 N. E. 338; Fink v. Montgomery, 162 Ind. 424, 68 N. E. 1010; Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 104 N. E. 579.

§ 18. What Constitutes a Bar to Relief by Receivership.

Following the analogy of the rules applicable to injunctional relief, long acquiescence in the perpetration of the wrongs or injuries complained of as ground for the appointment of a receiver will be regarded by the courts as a bar to the appointment of a receiver.[1] So, also, the appointment of a receiver has been refused where the plaintiff applying for the receiver was a monopoly engaged in the conduct of transactions in restraint of trade.[2]

§ 19. Right of Court to Exact Security for Receivership Expenses.

The receiver and those who render services in respect to the receivership are entitled to be compensated for their services as well as those who furnish funds or material during the pendency of the receivership. Ordinarily payment and reimbursement for services and expenses must be sought from out of the property constituting the receivership fund, but sometimes it may be doubtful whether the receivership fund will be sufficient to meet such expenses. This may be the result of the fluctuating value of the business over which a receiver is sought or because of the bulk of the receivership property being in the nature of a chose in action, the recovery of which and adding to the fund may be doubtful. Sometimes the receivership may suffer unforeseen losses in its assets

1 Skinners Company v. Irish Society, 1 Myl. & Cr. 162.

After forty years undisturbed possession the court will not appoint a receiver. Gray v. Chaplin, 2 Russ. Ch. 126.

2 American Biscuit etc. Co. v. Klotz, 44 Fed. 721.

In this connection see also the case of Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, where the question was raised on a writ of prohibition whether stockholders in a corporation which had forfeited its charter because of being conducted as a monopoly and over which the trial court had appointed a receiver, were in a position to object to such an appointment, but the appellate court held that under the statutes in force no receiver could be appointed.

and thus be unable to pay its expenses from out of the fund, but where at the time of the making of the appointment it is known that it is doubtful whether the assets of the receivership will be sufficient to meet the reasonable anticipated expenses of the receivership the question arises as to the practice to be followed by the court in the circumstances. "No court," as was well said by the Supreme Court of Oregon,[1] "is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and unless it can do so it should keep out or immediately go out of the business."

Hence cases may arise in which by reason of the special circumstances it is equitable to require the parties commencing the receivership proceedings to meet the expenses in the event that the receivership funds prove to be inadequate for that purpose.[2] The proper practice for a court to follow in a case where it appears probable at the time of making the appointment of a receiver that the property which is about to be placed under a receiver will be inadequate to meet the expenses of the receivership is to require the moving parties to furnish a guaranty or security for the payment of the expenses to be incurred in the event that the property belonging to the receivership proves to be inadequate for that purpose.[3] A distinction will be seen between cases where such security is required by the court as a condition of making the appointment and cases where the appoint-

1 Farmers Loan etc. Co. v. Oregon etc. Co., 31 Or. 237, 65 Am. St. Rep. 822, 38 L. R. A. 424, 48 Pac. 706.

2 Atlantic Trust Co. v. Chapman, 208 U. S. 360, 13 Ann. Cas. 1155, 52 L. Ed. 528, 28 Sup. Ct. 406.

3 Farmers Loan etc. Co. v. Oregon etc. Co., 31 Or. 237, 65 Am. St. Rep. 822, 38 L. R. A. 424, 48 Pac. 706; Chapman v. Atlantic Trust Co., 119 Fed. 257, 56 C. C. A. 61.

In this connection see also Farmers Nat. Bank v. Backus, 74 Minn. 264, 77 N. W. 142; Atlantic Trust Co. v. Chapman, 208 U. S. 360, 13 Ann. Cas. 1155, 52 L. Ed. 528, 28 Sup. Ct. 406.

ment is made without such conditions, as will be more fully discussed when we consider the questions relating to the payment of receivership expenses. The court certainly has a right to withhold the remedy of a receivership or impose conditions upon its duration if it appears probable that the fund will not be sufficient to meet the legitimate expenses and thereby bring the court into disrepute on account of exacting or accepting services for which it can not compensate. After a receiver has been appointed, however, it is his duty to keep the court advised as to the condition of the estate and the parties to the litigation can not be held liable. A receiver as soon as he is appointed and qualifies is brought under the sole direction of the court to which he owes his appointment. The contracts which he makes or the transactions into which he enters, from time to time, under the order of the court are in a substantial sense the contracts and transactions of the court. The liabilities which he incurs are liabilities chargeable upon the property in the possession and control of the court and not liabilities of the parties to the pending cause since they have no authority over him and can not control his acts.[4]

§ 20. Appointment of Receiver With Consent of Parties.

It is, of course, axiomatic that the parties to a litigation can not by consent confer jurisdiction to a court of a case over which it otherwise would not have jurisdiction. Hence an appointment of a receiver in a case in which the pleadings do not state a cause for such an appointment will not be validated by the fact that the litigants have consented to it.[1] Where the pleadings show

4 Atlantic Trust Co. v. Chapman, 208 U. S. 360, 13 Ann. Cas. 1155, 52 L. Ed. 528, 28 Sup. Ct. 406.

1 Elliott v. Superior Court, 168 Cal. 727, 145 Pac. 101.

Vila v. Grand Island etc. Storage Co., 68 Neb. 222, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 63 L.R.A. 791, 94 N. W. 136, 97 N. W. 613.

An agreement between the parties to a suit can not confer jurisdiction to appoint a receiver, where such power does not otherwise exist. Scott v. Hotchkiss,

a proper case for the appointment of a receiver, it is no objection to such an appointment that the defendant consented thereto instead of putting the plaintiff to the necessity of determining the matter by means of a contest, provided, of course, that such consent was not the result of fraud or collusion on the part of the litigants.[2]

115 Cal. 89, 47 Pac. 45; Baker v. Varney, 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100; Browning v. Sire, 56 App. Div. 399, 67 N. Y. Supp. 798; Whelpley v. Erie Ry. Co., 6 Blatchf. 271, Fed. Cas. No. 17504; Hutchinson v. American Palace Car Co., 104 Fed. 182.

In Atlantic Trust Co. v. Chapman, 208 U. S. 360, 13 Ann. Cas. 1155, 52 L. Ed. 528, 28 Sup. Ct. 406, a receiver for a canal and irrigation company was appointed in a suit to foreclose a mortgage securing bonds, with the consent of the mortgagor.

In Pennsylvania Steel Co. v. New York City R. Co., 157 Fed. 440, the court said: "There is no collusion apparent in any legal sense. It is of course manifest that complainants and defendants were entirely in accord, and arranged together that the suit should be brought to the federal court, and that the averments of the bill should be admitted by the answer. But there was no colorable assignment of some claim to a citizen of another state, nor any misrepresentation or distortion of facts to mislead the court. On the contrary, examination of the books shows that the financial situation is precisely such as was averred in the complaint."

The fact that a receiver is appointed by a consent decree does not render his authority subject to collateral attack in another jurisdiction. Jenkins v. Purcell, 29 App. D. C. 209, 9 L. R. A. (N. S.) 1074.

While consent of parties can not confer jurisdiction on the courts of the United States, yet the parties may admit the existence of facts which show jurisdiction and the courts may act judicially upon such an admission. Railway Co. v. Ramsey, 22 Wall. 322, 22 L. Ed. 823.

Where the court has no statutory jurisdiction to appoint a receiver, authority to do so can not be conferred by consent or a stipulation of parties. First Nat. Bank v. Superior Court, 12 Cal. App. 335, 107 Pac. 322.

2 Guaranty Trust Co. v. International Steam Pump Co., 231 Fed. 594, 145 C. C. A. 480.

An intervenor coming into the case after the appointment of a receiver can not challenge the jurisdiction of the court to make such appointment in a creditor's suit against a corporation asking the appointment of a receiver, where the defendant appeared and admitted the averments of the bill, which sufficiently alleged insolvency, and no collusion is charged. Cincinnati Equipment Co. v. Degnan, 184 Fed. 834, 107 C. C. A. 158.

In fact, it is a well established practice in the case of large corporations which are hopelessly insolvent or confronted with an unusual financial crisis, to have a receiver appointed upon a bill and answer in which the defendant admits the jurisdictional facts warranting the appointment of a receiver and joins in the prayer asking for such appointment.[3] Of course, the court in such circumstances must be astute in its consideration of the case so as to be certain that it is not one in which fraud and collusion exist.[4] It generally happens, however, that in such cases the facts constituting the ground for the appointment of a receiver are easily ascertained and often of such notoriety that the court could almost have judicial knowledge of their existence. One of the leading cases on this subject is that of the Metropolitan Railway Receivership,[5] decided by the United States Supreme Court, in which it was contended that a collusive controversy was raised with the consent of the parties in order to confer jurisdiction upon the federal court to appoint a receiver. The case involved both the question whether there was a dispute or controversy between the parties by reason of the answer of the defendant admitting the allegations of the complaint and whether the facts showed collusion on the part of the litigants, but Mr. Justice Peckham in rejecting these contentions laid down the rules in such cases with great clearness. He said: "Although the amount involved in the suit in the Circuit Court was sufficient, it is insisted now that there was no dispute or controversy in that case within the

3 Ex parte Equitable Trust Co., 231 Fed. 571, 145 C. C. A. 457.

A federal judge, in the exercise of his general equity powers as a chancellor, and those prescribed by Rev. St. 638, U. S. Comp. St. 1901, p. 519, and equity rule 3, has authority at chambers to make an order appointing a receiver in a pending cause, or on a bill and an answer by the defendant joining in the prayer for such appointment. Horn v. Pere Marquette R. Co., 151 Fed. 626.

4 In re Reisenberg, 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219.

5 See case of Gutterson v. Lebanon Iron etc. Co., 151 Fed. 72.

meaning of the statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers. Notwithstanding this objection, we think there was such a controversy between the parties as is contemplated by the statute. In the bill filed there was the allegation that a demand of payment of a debt due each of complainants had been made and refused. This was not denied, and had not been. There was therefore an unsatisfied demand made by complainants and refused by defendants at the time of the filing of the bill. We think that where there is a justifiable claim of some right made by a citizen of one state against a citizen of another state, involving an amount named in the statute, which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability or, mayhap, from indisposition, he fails to satisfy it, it can not be that because the claim is not controverted the federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the Circuit Court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt. This would involve the contention that the federal court might be without jurisdiction in many cases where, upon bill filed, it was taken *pro confesso,* or whenever a judgment was entered by default. These are propositions which, it seems to us, need only to be stated to be condemned."

And continuing, the learned justice in answering the contention that the parties had collusively presented the

case in the federal court instead of commencing it in the state court, said: "We can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill, and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts named in the bill as owing to the complainants did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the federal court. That the parties preferred to take the subject-matter of the litigation into the federal courts, instead of proceeding in one of the courts of the state, is not wrongful. So long as no improper act was done by which the jurisdiction of the federal court attached, the motive for bringing the suit there is unimportant."[6]

§ 21. Effect of Statutory Provisions on the Subject.

It would be, of course, impracticable in a book intended for general use in the different states to attempt to discuss in detail the various statutory provisions relating to the subject of receivers. Such statutory provisions insofar as they are disclosed by the decisions will be considered as they arise. There is a great degree of similarity between the statutory provisions of the different

[6] The court cited the following cases: Dickerman v. Northern Trust Co., 176 U. S. 181-190, 44 L. Ed. 423-430, 20 Sup. Ct. Rep. 311; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. Ed. 448, 457, 24 Sup. Ct. Rep. 269; Blair v. Chicago, 201 U. S. 400-448, 50 L. Ed. 801-821, 26 Sup. Ct. Rep. 427; Smithers v. Smith, 204 U. S. 632, 644, 51 L. Ed. 656, 661, 27 Sup. Ct. Rep. 297.

states, and in many cases such provisions, or at least the greater part of them, are merely declaratory of the general rules respecting the subject prevailing in the courts of equity prior to the statutory declarations.[1] The great-

1 In Price v. Bankers Trust Co., (Mo.) 178 S. W. 745, the court said: "In this view we are mindful of the statute (section 2018, Rev. Stats. 1909) which relegates the appointment of a receiver to the discretion of the judge or court nisi, by providing that such court or judge 'shall have power to appoint a receiver, whenever such appointment shall be deemed necessary.' This statute is but declaratory of the rule and practice which had long prevailed in equity, before the enactment of the statute. The discretion thus lodged in the courts or judges is a sound judicial discretion 'to be exercised for the promotion of justice where no other adequate remedy exists' (High on Receivers, 7), and not an arbitrary or capricious liberty bounded by no rules and limited only by the varying temperaments of the ephemeral incumbent of the judicial office. No one will contend that a power more comprehensive than the analogous attachment at law ought to be committed to the courts without any rule by which to measure discretion except the 'length of the chancellor's foot.'"

In Jones v. Schaff Bros. Co., 187 Mo. App. 597, 174 S. W. 177, the court said: "The appointment of a receiver is not the ultimate end and object of a suit. The court can not appoint a receiver upon the ex parte application of the corporation itself. There must be a proceeding pending. State ex rel. v. Ross, 122 Mo. 435, loc. cit. 456, 461, 25 S. W. 947, 23 L. R. A. 534; State ex rel. v. Reynolds, 209 Mo. 161, loc. cit. 185, 107 S. W. 487, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 468, 14 Ann. Cas. 198. This is clearly recognized by every statute authorizing the appointment of a receiver of which we have any knowledge. They are sections 1081, 1171, 2018, 2196, 2197, 2323, 2533, 3012, 3153, 3365, 3429, 3444, 3492, and 7923, Rev. St. Mo. 1909. There may possibly seem to be two exceptions to the above statement, that of section 3492 and section 3429, the former of which provides that a receiver may be appointed on the application of a shareholder of a bond investment company, and the latter that a receiver may be appointed for a co-operative company upon the application of the supervisor of building and loan associations. But sections 3494 and 3430 provide, in these two cases, for a proceeding to be instituted by the Attorney General and for process to be issued as in other actions. Sections 2996-2999, Rev. St. Mo. 1909, provide a means whereby a corporation may have itself dissolved and its affairs wound up by the directors under the supervisory control of the court, but these have no reference to the appointment of a receiver, and even they require notice to all creditors and others interested before the court has power to finally act. So that there

est variations in statutory provisions on the subject of receivers will be found to be among those touching the appointment of receivers for corporations,[2] a subject

is no known statutory authority given a court to appoint a receiver upon the mere ex parte application of an insolvent corporation to take charge of and manage its affairs. And a court of equity has no inherent power to appoint such receiver except as an incident to and in a pending suit. Whitney v. Hanover National Bank, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531; Jones v. Bank of Leadville, 10 Colo. 464, 17 Pac. 272; Mann v. German-Am. Inv. Co., 70 Neb. 454, 97 N. W. 600; Texas etc. R. Co. v. Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; 34 Cyc. 29. There may be exceptions to this rule, but, if there are, they do not come within the purview of the facts involved herein."

Code provisions do not as a general rule alter the equitable jurisdiction of the court to appoint. Skinner v. Maxwell, 66 N. C. 45.

Equity has power to appoint a receiver on the grounds prescribed by Rev. Codes, sec. 4329, subds. 2, 5, 6, to take charge of the property and to care for and protect same. Commercial Trust Co. v. Idaho Brick Co., 25 Idaho 755, 139 Pac. 1004.

Iowa Code, sec. 3822, by its express provisions, authorizes the appointment of a receiver by a judge in vacation, on petition of either party, where he shows that he has a probable right to or interest in the property in controversy, and that the property is in danger of being lost, materially injured, or impaired. McKee v. Murphy, 138 Iowa 322, 113 N. W. 499.

Iowa Code, sec. 3822, authorizing the appointment of a receiver, does not authorize the appointment of a receiver where no equitable ground for appointment as a principal foundation for the relief asked for appears. Stockholders of Jefferson County Agricultural Ass'n v. Jefferson County Agricultural Ass'n, 155 Iowa 634, Ann. Cas. 1914B, 63, 136 N. W. 672.

[2] In the case of Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627, the court said: "In the absence of any statute regulating the matter, a court of equity would have undoubted right, in a proper proceeding instituted by a creditor or a stockholder, to appoint a receiver to administer the property. But in many of the states, statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same functions, though sometimes called by other names. In all cases it is made their duty to collect the assets, pay the debts, and distribute the surplus pro rata to the stockholders. As this is precisely what a court of equity would have done in the absence of a statute, it is to be inferred that the motive of such legislation has been to accomplish some other object—some object, that is to say, for which express legislation was necessary. This inference is fully justified and amply borne out by reference to the different statutes.

which will be considered when discussing the subject of corporations.

As has been shown before, the jurisdiction of the Court of Chancery of England to appoint receivers was exercised for the purpose of enforcing justice in cases in which it was shown that the remedies to be found in the courts of ordinary jurisdiction were inadequate for the purpose. The exercise of the right was one founded on the inherent function of a court of equity.[3] This inherent power of a court of equity is like that of any power which is essential to the exercise of a certain func-

They seem to have been enacted with the object, in some instances, of abrogating the old law of forfeiture, and reversion; in others, of committing the administration to other courts than courts of equity; in others to provide uniform rules of procedure, as to giving notice to creditors, etc., to take the place of rules of court and specific orders to be made by the chancellor in each particular case; in others, to keep the matter out of courts altogether, as by allowing the dissolved corporation to continue its existence for a term for purposes of liquidation, but for no other purpose. The whole mass of this legislation seems to be pervaded by the one idea of simplifying, expediting, and cheapening the means of accomplishing the one object of transferring to the stockholders of a defunct corporation their full share of its surplus assets. There is, from beginning to end, no suggestion of added penalties or punishment after death. In New York, as we have seen, there was no other provision, and the appointment of a receiver was made obligatory in all cases of dissolution, whether voluntary or involuntary. That was the rule, to which there was no exception. Under our codes, on the contrary, the rule is not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of dissolution. The appointment of a receiver is the exception, not the rule, and is not to be made unless some party interested, either a creditor or a stockholder, can show that for the protection of his rights the appointment of a receiver and the administration of the assets under the control and superintendence of a court of equity is necessary; and even then no receiver will be appointed upon his ex parte application without requiring ample security by his undertaking with sufficient sureties for all damages that may be caused by the appointment if it shall turn out that it was made without sufficient cause."

3 Hopkins v. Worcester etc. Canal, L. R. 6 Eq. 447; Cupit v. Jackson, 13 Price 734.

tion. It is implied from the very nature of a court of equity. Hence it is laid down as a rule that the power to appoint receivers is inherent to courts of equity.[4] The power of a court of equity to appoint a receiver in cases which come within those principles which make its duty inherent is exercised without the necessity for statutory authority,[5] and is in fact independent of statutes.[6] In the well known English work of Mr. Kerr on Receivers, in stating the rule in England, he says: "The courts of common law had not, under the former procedure, jurisdiction to appoint a receiver. But by the Judicature Act of 1873, 36 & 37 Vict., chap. 66, sec. 16, all the jurisdiction of the Court of Chancery was transferred to the High Court of Justice; and by sec. 25, subsec. 8 of that act it is declared that a receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient that such order should be made; and that any such order may be made either unconditionally, or upon such terms and conditions as the court shall think fit. The effect of the subsection is to enlarge very much the powers which the Court of Chancery formerly possessed.[7] Under this

4 Bitting v. Ten Eyck, 85 Ind. 360; Folsom v. Evans, 5 Minn. 418; Miller v. Perkins, 154 Mo. 629, 55 S. W. 874; Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; Skinner v. Maxwell, 66 N. C. 47; Barbour v. National Ex. Bank, 45 Ohio St. 133, 12 N. E. 5; Chicago etc. Oil Co. v. United States Petroleum Co., 57 Pa. St. 83; Smith v. Butcher, 28 Gratt. (Va.) 144.

5 Hillsborough Grocery Co. v. Ingalls, 60 Fla. 105, 53 So. 930; Bank of Mississippi v. Duncan, 52 Miss. 740; Murphy v. Fidelity Mut. etc. Co., 69 Neb. 489, 95 N. W. 1022; Battle v. Davis, 66 N. C. 252.

The power of appointing a receiver pendente lite was one incidental to the jurisdiction of the chancery court. It did not depend upon statute and was not affected by the character of the parties before it, whether an individual or corporation or by the nature of the property. Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814.

6 State v. Farmers etc. Ins. Co., 90 Neb. 664, 134 N. W. 284, Ann. Cas. 1913B, 643; Slover v. Coal Creek Coal Co., 113 Tenn. 421, 435, 106 Am. St. Rep. 851, 68 L. R. A. 852, 82 S. W. 1131.

7 Citing: "Anglo-Italian Bank v. Davies, 9 Ch. Div. 275, at p. 286, per Jersel, M. R.; ib. at p. 293, per Cotton, L. J."

enactment there is no limit to the power of the court to appoint a receiver on an interlocutory application, except that such power is only to be exercised where 'just or convenient.'[8] The words 'just and convenient' must, however, be construed with reference to the existing law of the country. They only empower the court to appoint a receiver in aid of existing rights.[9] The act does not empower the court to appoint a receiver in cases where prior to the act it had no jurisdiction to do so.[10] It relaxed certain inconvenient rules, but it did not alter the principles on which the jurisdiction of the Court of Chancery rested.[11] The court will not appoint a receiver where the appointment might prejudice existing rights.''[12]

The primary purpose in all circumstances in which a receiver is appointed is to protect and safeguard the property which is the subject-matter of the litigation where there is no other adequate method of doing so in order that the work of the court in determining the litigation will not be an idle ceremony.[13] Hence a receivership proceeding implies the exercise of equitable powers which a common law court does not possess.[14] Consequently whenever a common law court appoints a receiver it is because of some statutory authority to do so,[15] and in most of

8 Citing: "Gawthorpe v. Gawthorpe, W. N. [1878] 91, per Jersel, M. R.; Coney v. Bennett, 29 Ch. Div. 993; see Real and Personal Advance Co. v. Macarthy, 27 W. R. 706; Oliver v. Lowther, 28 W. R. 381."

9 Citing: "Philipps v. Jones, 28 Sol. J. 360."

10 Citing: "Holmes v. Millage [1893], 1 Q. B. 551; Harris v. Beauchamp [1894], 1 Q. B. 801."

11 Citing: "Lindley, L. J., in Holmes v. Millage [1893], 1 Q. B. 557."

12 Citing: "Re Wells, 45 Ch. Div. 569."

13 See Battle v. Davis, 66 N. C. 252.

14 Oehme v. Rucklehaus, 50 N. J. L. 84, 11 Atl. 145.

15 Myres v. Frankenthal, 55 Ill. App. 390; Murphy v. Fidelity Mut. etc. Co., 69 Neb. 489, 95 N. W. 1022; Miller v. Perkins, 154 Mo. 629; 55 S. W. 874.

In the absence of statutory authority, a common law court will not appoint a receiver. Walmsley v. Mundy, 13 Q. B. Div. 812.

such cases it will be found that the statutory provisions have simply enlarged the circumstances under which a receiver will be appointed. It will generally be found that statutory provisions upon the subject, in addition to giving statutory expression to the rules which have immemorially existed in chancery practice, have added some provisions for the appointment of a receiver after the rendition of judgment in order to carry the judgment into effect,[16] or provided for the appointment of a receiver in circumstances which do not constitute a pending suit, such as a special proceeding to forfeit a charter or franchise or dissolve a corporation.[17] Sometimes such statutory provisions are merely regulatory of the manner in which the appointment should be made for the purposes of protecting the rights of the defendant,[18] as, for

16 Rev. Codes, section 6698, providing for the appointment of a receiver after judgment to carry the judgment into effect, does not authorize the appointment of a receiver when a money judgment has been recovered in a simple action at law, since the creditor can himself take the necessary steps to enforce the judgment. Forsell v. Pittsburg & Montana Copper Co., 42 Mont. 412, 113 Pac. 479.

The power of a court to appoint a receiver exists only in cases provided by statute; hence a statute providing for such appointment "after judgment to carry the judgment into effect" applies only to cases where the judgment affects specific property, and has no application to a simple money judgment, which can be enforced by a writ of execution. White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

17 People v. Washington Ice Co., 18 Abb. Pr. (N. Y.) 383; East Line etc. Ry. Co. v. State, 75 Tex. 434, 12 S. W. 690; Texas Trunk R. Co. v. State, 83 Tex. 1, 18 S. W. 199.

An interesting case of statutory discussion in a case of this character is that of the case of Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, in which comparisons were made between the code provisions of California and those of New York in reference to receivers for corporations, from whence the California statute was derived, though varied in phraseology.

18 Where by statute the court must sanction the filing of a bill in equity praying extraordinary relief, it has implied authority, in order to preserve the status upon allowing such bill, to appoint a temporary receiver of the property involved in the litigation. Young v. Hamilton, 135 Ga. 339, 69 S. E. 593, Ann. Cas. 1912A, 144, 31 L. R. A. (N. S.) 1057.

instance, in requiring certain bonds to be furnished by the plaintiff as a condition for the making of an *ex parte* appointment or upon the part of the receiver himself;[19] while in other instances they enlarge the jurisdiction of the court to appoint receivers in a general way.[20] Sometimes the statutory provisions on the subject are framed with a view to allowing the appointment of a receiver whenever justice requires such a remedy, regardless of the form of the action.[21] In some states the statutes on the subject after making specific provisions for the appointment of receivers in certain cases and in certain circumstances contain a provision that a receiver may be appointed "in all other cases where receivers have heretofore been appointed by the usages of the courts of equity,"[22] or phrases of like import; and under such stat-

19 Lee v. Stevens, 22 Ida. 670, 127 Pac. 680; Staar v. Moy Tong Koon, 145 Ill. App. 341.

20 John L. Roper Lumber Co. v. Wallace, 93 N. C. 22.

21 See section 1222 of the code. Hellebush v. Blake, 119 Ind. 349, 21 N. E. 976.

22 In Ward v. Inter-Ocean Oil etc. Co., (Okl.) 153 Pac. 115, the court, in construing the effect of such a clause, said: "In this state, while we have a statute (section 4979, Rev. Laws 1910), in specific terms, authorizing the appointment of a receiver in certain cases, yet the same statute authorizes their appointment 'in all other cases where receivers have heretofore been appointed by the usages of the courts of equity.' And so, after all, in deciding questions arising under this head, the court must look for guidance to the established usages and customs heretofore prevailing in the courts of equity. In such courts it is well established that in order to invoke this extraordinary remedy—the appointment of a receiver—the court must have before it facts, proven or admitted by the pleadings, sufficient to satisfy it that the property can be managed and preserved more advantageously to the interested parties by the court, through its agent, the receiver, than by the litigants or either of them. In this case, however, it seems to us that, taking the facts as they stand established by the averments of the petition, together with the admissions of the answer, that the court acted properly in putting a receiver in charge. Neither this court nor the court below, when passing upon the necessity of a receiver, was trying the title, as between these two claimants, to the land involved. That was a question in the original suit; the one necessary and pivotal point to be determined in it. When the court came to con-

utory provisions it is held that the appointment must be made under the authority of some one of the specific cases

sider the question of a receivership, it then became its duty to (1) inquire whether, from the information before it, plaintiff appeared to have a valid interest in the property involved; and (2) if so, whether the property was being used in such a way as to probably result in irreparable loss to plaintiff, in case he should finally prevail, or whether or not a receiver, if appointed, could preserve the property during the pendency of the litigation, so as to deliver it to the successful party at the end thereof, better and more surely than to leave it in the hands of the defendant."

So also in Shaw v. Shaw, 51 Tex. Civ. 55, 112 S. W. 124, under Rev. St. 1895, art. 1465, 1-3, which provides for the appointment of receivers in certain specified cases, but in another section provided for the appointment in all other cases where receivers have heretofore been appointed by the usages of the court of equity, the court held that the latter language was not a limitation on the right given by the preceding sections, but an extension of it, and when the facts in a particular case justify the appointment under the other sections, the right is a legal one, and not dependent upon the general rules of practice in courts of equity.

Under Code Civ. Proc., section 564, subd. 6, providing for appointment of receivers in all cases where receivers have been appointed by usages of courts of equity, receiver can not be appointed in a partnership case involving merely legal rights on a mere showing that defendants were largely indebted and their property would be better conserved by appointment of receiver. First Nat. Bank v. Lassen County Superior Court, 12 Cal. App. 335, 107 Pac. 322.

Where the complaint for the appointment of a receiver was within one of the preceding subdivisions of Code Civ. Proc., sec. 564, the appointment could not be justified under subd. 6, which authorized the appointment in cases where receivers had previously been appointed in equity. Dabney Oil Co. v. Providence Oil Co. of Arizona, 22 Cal. App. 233, 133 Pac. 1155.

And where such a statute provides that a receiver may be appointed "whenever such appointment shall be deemed necessary," it is held that the statute is merely declaratory of the rule and practice which had long prevailed in equity. Price v. Bankers Trust Co., (Mo.) 178 S. W. 745.

The New York Code of 1848 had a provision authorizing the appointment of receivers "in such other cases as are now provided by law or may be in accordance with the existing practice except as otherwise provided in this act." The court held that the inherent power of chancery courts to appoint receivers in mortgage foreclosures continued as theretofore. It was also held that the intention of the code was not to abolish the old practice in such respects and was not exclusive, but permissive

or circumstances mentioned in the statute or placed under the general chancery rules, in which case the appointment will then be dependent upon the principles of equitable jurisprudence established by courts of chancery in the making of such appointments. It will be observed that the courts in proceeding under the authority of the statutory provisions in force construe such provisions with reference to the decisions of the courts on the general subject and inject the spirit of the chancery rules in their construction of the statutes.[23]

and declaratory. Hollenbeck v. Donnell, 94 N. Y. 342.

In Colwell v. Garfield Nat. Bank, 119 N. Y. 409, 23 N. E. 739, the court said: "We need not determine in this case whether the jurisdiction of the Supreme Court to appoint receivers can be exercised only in the cases and under the circumstances prescribed by section 713 or by other statutes. But in cases where the provisions of section 713 are applicable and the statutory provisions furnish an adequate remedy, the power of the court is, we think, limited by that section, and it must proceed in the manner pointed out thereby or else its orders will be void."

In Idaho the statute also provides: "In all other cases where receivers have heretofore been appointed by the usages of courts of equity." Commercial Trust Co. v. Idaho Brick Co., 25 Ida. 755, 139 Pac. 1004.

Similar provisions in Washington. Oleson v. Bank of Tacoma, 15 Wash. 148, 45 Pac. 734.

23 See Hartnett v. St. Louis Min. etc. Co., 51 Mont. 395, 153 Pac. 437.

The discretion as to the appointment of a receiver pursuant to Civ. Code, sec. 298, providing that it "may" be done on motion of a party to an action who shows a right to the property involved, and that it is in danger of being lost or removed, is not unlimited, and so where the remedies provided by sections 180-184, by claim and delivery and by special attachment, are open to plaintiff, and it is not shown that defendant is insolvent, or some other reason exists, rendering the other remedies inadequate, the appointment of a receiver in such case is unauthorized. McClure v. McGee, 32 Ky. Law. Rep. 1318, 108 S. W. 341.

It is a well settled rule that where a new remedy is given by statute other than to enforce a new right, it is cumulative unless there is something in the law conferring it clearly indicating the contrary. Morgan v. South Milwaukee Lake View Co., 100 Wis. 465, 76 N. W. 354.

In North Carolina it is held that the code provisions do "not materially alter the equitable jurisdiction" of the courts. Skinner v. Maxwell, 66 N. C. 45.

Rev. Stats. 1909, § 2018, is merely declaratory of the equitable rule that a judge has sound judicial discretion to appoint a receiver

Perhaps the greatest statutory innovations in respect to receiverships have occurred in connection with the appointment of receivers for corporations, and laws relating to such appointments have sometimes been confusing, on account of being in conflict with other statutory provisions providing for the dissolution of corporations. Consequently where the effect of the receivership is the winding up of the corporation, particular attention must be observed to see that the proceeding is not one covered by the ordinary dissolution statutes, and if a receiver is sought some facts must exist which appeal to the chancery side of the court or specifically bring it within the statutory provisions. It is our opinion that although a statute may add circumstances in which a receiver may be appointed, it can not take away the power to make such appointments in cases where the facts warrant a receiver under the general rules of equitable jurisprudence, at least in any state where it is recognized that courts have the powers generally accorded to courts of equity. To take away the power of appointment in such cases would be to deprive a court of equity of one of the powers essential to its existence as such a court. We do not doubt, however, that it is within the power of such statutory provisions to regulate the exercise of the power, but with a regard to the distinction between mere regulation and a destruction of the power. The matter is somewhat similar to the inherent power of a court to protect the exercise of its inherent functions by a resort to contempt proceedings.

There are certain kinds of receivership proceedings which are not the exercise of chancery powers but merely appointments by courts of law as successive steps in an

only for the promotion of justice, where no other adequate remedy exists, and does not vest arbitrary power in the court. Price v. Bankers' Trust Co., (Mo.) 178 S. W. 745.

action at law irrespective of equitable considerations such as in supplementary proceedings and the like.[24]

[24] Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120; Habenicht v. Lissak, 78 Cal. 351, 12 Am. St. Rep. 63, 5 L. R. A. 713, 20 Pac. 874; Kimbrough v. J. K. Orr Shoe Co., 98 Ga. 537, 25 S. E. 576; Flint v. Zimmerman, 70 Minn. 346, 73 N. W. 175; Tvedt v. Mackel, 67 Minn. 24, 69 N. W. 475; Colton v. Bigelow, 41 N. J. L. 266; Rodman v. Henry, 17 N. Y. 482; Strong v. Epstein, 14 Abb. N. C. (N. Y.) 322; Ward v. Petrie, 157 N. Y. 301, 68 Am. St. Rep. 790, 51 N. E. 1002; Corbin v. Berry, 83 N. C. 27; Sparks v. Davis, 25 S. C. 381; Second Ward Bank v. Upmann, 12 Wis. 499.

Where the assets of a debtor were about to be placed beyond a creditor's reach, his right to a receiver does not rest alone in equity, but also exists under the express provision of Vernon's Sayles's Ann. Civ. St. 1914, art. 2128. Bond-Reed Hardware Co. v. Walsh (Tex. Civ. App.), 181 S. W. 248.

A receiver may be appointed in a law action if such appointment is authorized by statutory provisions. Paine v. Mueller, 150 Iowa 340, 130 N. W. 133.

In respect to a case of an ordinary action at law for the recovery of a money judgment, the power to appoint a receiver, if it exists at all in any given case, exists by virtue of some statutory enactment. Miller v. Perkins, 154 Mo. 629, 55 S. W. 874.

Civ. Code 1895, § 2716, authorizing a receiver for an insolvent trader at the instance of a creditor without lien or judgment, is in derogation of the common law and must be strictly construed. Farmers' Union Warehouse Co. v. Coweta Fertilizer Co., 133 Ga. 132, 65 S. E. 291.

The fact that Code Pub. Gen. Laws 1904, art. 16, § 192, provides that the court may at any stage of the cause, or matter concerning real or personal property, on its own motion, or on application, pass such order as it may see fit with regard to the possession of the property pendente lite, or the receipt of the income of the same, and gave a right of appeal as provided in section 191, which authorized an appeal in such manner and on such terms as is allowed in the case of injunction, and that section 190 provides that the court can at any stage of a cause or matter on its own motion, or on application, order a mandate or injunction as therein provided, does not abolish the rules relating to the appointment of receivers, and it is only when there is enough shown in the proceedings to authorize such appointment that the court can act on its own motion, or where the proceedings and application are sufficient for that purpose. Baker v. Baker, 108 Md. 269, 129 Am. St. Rep. 439, 70 Atl. 418.

§ 22. Effect of Combining Legal and Equitable Powers in One Court.

Where the same court possesses both legal and equitable powers, the exercise of the power to appoint a receiver is regarded as an exercise of its equitable jurisdiction.[1] And under the uniform procedure acts allowing a plaintiff to seek both legal and equitable relief in one action, the appointment of a receiver can not be sought under circumstances where it would not have been made prior to such act.[2]

The fact that the appointment of a receiver in an action at law is authorized by a statute will not prevent a court which has both legal and equitable jurisdiction from exercising its equitable jurisdiction in a case which sets up facts furnishing ground for the appointment of a chancery receiver.[3]

§ 23. Appointment of Receiver by Executive Officers.

The appointment of a receiver has been held to be properly made by a governor under a statute allowing him to appoint a receiver for a certain specified insolvent bank. Such a statute was held not to constitute a violation of the constitutional limitations respecting the province of the different departments of the government inasmuch as such an appointment of a receiver did not constitute a decree or judgment affecting property interests nor decide any judicial rights.[1]

1 Folsom v. Evans, 5 Minn. 418; Sloan v. Moore, 37 Pa. St. 217.

Courts invested with the power of both courts of equity and law have an inherent power to appoint a receiver in all cases pending in such courts of equitable cognizance. Cox v. Volkert, 86 Mo. 505; Miller v. Perkins, 154 Mo. 629, 55 S. W. 874.

2 Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 S. E. 929.

3 Washington Iron Works v. Jensen, 3 Wash. 584, 28 Pac. 1019.

1 In Carey v. Giles, 9 Ga. 253, an appointment of a receiver by the governor of the state, under the provisions of an act of the legislature authorizing the governor to appoint a receiver of a certain named insolvent bank, was sus-

The appointment of a receiver of a national bank by the Comptroller is also an instance of the appointment of a receiver by an executive officer and without the interposition of a court. The appointment of the receiver by the Comptroller under such circumstances is a departmental and not a judicial act and the courts have no control over the making of such an appointment. The right of the Comptroller to make the appointment is the result of an act of Congress.[2]

§ 24. Right to Appoint Receiver Without Resorting to a Court.

Sometimes a person is appointed a receiver of property without resorting to a court as the result of an agreement made at the time of the appointment or as a result of some prior contract providing for his appointment under certain circumstances. Such a receiver or liquidator, as he is sometimes called, occupies no official position and must yield to a receiver appointed by a court and render an accounting to him.[1] Such a receiver,

tained. It was conceded that if the appointment of a receiver was a judicial act, the act of the legislature was unconstitutional. The court in so holding said: "It was not a case of controversy between party and party; nor is there any decree or judgment affecting title to property; it determines no right, legal or equitable. The receiver is merely to collect, hold and disburse the assets of the bank for the benefit of all concerned; and it is in the power of the courts to direct and control him in the proper execution of his duties."

A law allowing the governor to appoint a receiver to collect certain taxes is adverted to in Loague v. Brownsville Taxing Dist., 29 Fed. 742. but no argument is made in regard to the question.

2 Bushnell v. Leland, 164 U. S. 684, 41 L. Ed. 598, 17 Sup. Ct. 209; Price v. Abbott, 17 Fed. 506; Washington Nat. Bank v. Eckels, 57 Fed. 870.

1 Liquidators of an insolvent bank appointed by the stockholders occupy no official position, and receivers subsequently appointed are the proper persons to maintain actions against them for an accounting. Leidigh-Dalton Lumber Co. v. Houck, 138 La. 159, 70 So. 72.

The appointment of a receiver of a national bank by the comptroller is also an instance of a nonjudicial appointment of a receiver. See section 23, supra.

In re Henry Pound, Son & Hutchins, 42 Ch. D. 402, it was held that the court would not interfere with the right of debenture holders to

who may properly be called a contractual receiver, is merely an agent of the parties appointing him.[2] The practice of making such appointments is quite common in England and is often provided for in voluntary dissolution proceedings respecting a partnership,[3] and particularly in connection with mortgages [4] and other indentures in which the rights of the parties to property or a fund are not terminated.[5] In fact, the right of the parties to a mortgage to provide for such a receiver is expressly recognized by statute in England,[6] but where he is appointed under the terms of the statute, the terms of the statute are the limits of his authority in the same manner as if the statute was written into the mortgage or other instrument.[7]

appoint the receiver provided for under the terms of this security.

The receiver to be appointed under such circumstances is limited to the purposes of the contract under which he is appointed. Re Maskelyne British Type Writer [1895], 1 Ch. 133.

2 Jefferys v. Dickson, L. R., 1 Ch. 183; Law v. Glen, L. R., 2 Ch. 634; Owen & Co. v. Cronk [1895], 1 Q. B. 265; Gosling v. Gaskell [1897], A. C. 575; In re Vimbos [1900], 1 Ch. 470.

Where a trust deed, executed to secure the debentures of a company, authorizes the trustees to appoint a receiver in certain circumstances, such receiver is regarded as the agent of the company and is not held personally responsible for the expenses incurred by the receivership. Owen & Co. v. Cronk [1895], 1 Q. B. 265; Gosling v. Gaskell [1897], A. C. 575.

3 Prior v. Bagster W. N. [1887], 194, 57 L. T. 761.

4 Houldsworth v. Yorkshire etc. Ass'n [1903], 2 Ch. 284; Illingsworth v. Houldsworth [1904], A. C. 355; Craghan v. Maffett, 26 L. R. Ir. 671; Re Hale-Lilley v. Foad [1899], 2 Ch. 107.

For forms of mortgages providing for such receivers, see 2 Key & Elphinstone's Precedents, 8th ed., pp. 53, 167 and 251; also Palmer's Company Precedents, part 3, 9th ed., pp. 243, 285, 295, 402 and 403.

5 Cradock v. Scottish Provident Institutions, W. N. [1893] 146, W. N. [1894] 88, in connection with an agreement to pay an annuity.

6 23 and 24 Vict., ch. 145; 44 and 45 Vict., ch. 41.

7 Where the receiver is provided for in the mortgage merely in the terms of the conveyancing act of 1881, his duties and powers are limited by the terms of the act. White v. Metcalf [1903], 2 Ch. 567; In re Della Rocella's Estate, 29 L. R. Ir. 464; Woolston v. Ross [1900], 1 Ch. 788.

§ 25. Effect of Defendant Offering to Furnish Security to Protect Plaintiff.

As we have shown before,[1] it is within the power of the court to refuse to appoint a receiver on condition that the defendant furnish a bond to secure the plaintiff in the event of his recovery and also in cases where the receivership fund is of doubtful value to require a bond to secure the payment of the expenses of the receivership, but cases arise in which the defendant without being so required offers to furnish a bond to secure the plaintiff. In some states the right to furnish such a bond is given by statute and it naturally follows that where the defendant in such states brings himself clearly within the statutory provisions, no receiver should be appointed.[2] Regardless of statutory provisions allowing such a bond, it is quite clear that if it appears to the court that the rights of the plaintiff will be amply protected by the furnishing of such security, or in other words that there is no great probability of the plaintiff suffering any irreparable injury by the failure of the court to appoint a receiver, the court will refuse to appoint one.[3] The matter is one resting in the discretion of the court and must be decided in view of the circumstances of each case. The question frequently arises in controversies between partners or in cases in which a partnership is claimed by one party and denied by the other.[4]

1 See sections 15 and 16, supra.

2 Roberts v. Pipkin, 63 S. C. 252, 41 S. E. 300.

3 Where it is sought to appoint a receiver of crops which are about to be harvested, such appointment should be refused where the defendant offers to give a bond to fully secure the plaintiff from any loss. Stephens v. Kaga, 142 Ind. 523, 41 N. E. 930.

It is within the power of the court to allow a bond to be given in lieu of appointing a receiver. Valentine v. Muir, 121 N. Y. Supp. 704.

A receiver should not be appointed for property in the hands of a trustee for creditors, who offers to file a bond in double the value of the property, to indemnify all persons interested. Branch v. Ward, 114 N. C. 148, 19 S. E. 104.

4 Likewise where the existence of a partnership is denied and the

Of course it must be remembered in cases of this sort that a receiver may be appointed regardless of the fact that the defendant is perfectly solvent where elements of irreparable injury are probable,[5] or other circumstances exist which make the appointment of a receiver proper under the general principles of the law applicable to the subject of receivers.

defendant offers to produce security to pay any sum found to be due to the plaintiff, it is proper to discharge the receiver upon the filing of such security, since the rights of the parties will be properly safeguarded. Popper v. Scheider, 7 Abb. Pr. (N. S.) (N. Y.) 56, 38 How. Pr. (N. Y.) 34.

Where partnership assets were sold by one partner to one who was solvent, and the nonconsenting partner sued to set the sale aside and asked the appointment of a receiver, and the purchaser offered to give a sufficient bond to obey the orders of the court in the matter and satisfy any judgment rendered against him, and it was not clear that the sale was fraudulently made, it is improper to appoint a receiver. Saverios v. Levy, 40 Hun 639, 1 N. Y. St. Rep. 758.

In a suit between partners, where one partner offers to give adequate security against loss, there is insufficient ground for the appointment of a receiver. Buchanan v. Comstock, 57 Barb. (N. Y.) 568.

[5] Mead v. Burk, 156 Ind. 577, 60 N. E. 338; Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 104 N. E. 579.

CHAPTER III.

GENERAL EFFECT OF THE APPOINTMENT OF A RECEIVER AND DUTIES THEREUNDER.

§ 26. Status of the Receiver Respecting Receivership Property.

The appointment of a receiver pending the litigation does not in any way determine the rights of the parties to the litigation.[1] He is but the arm of the court to take care of and administer the property placed under his charge as receiver as the court may from time to time direct.[2] Property in his hands is in *custodia legis*

1 Chicago Title & Trust Co. v. Chapman, 132 Ill. App. 55; Howell v. Hough, 46 Kan. 152, 26 Pac. 436; Harman v. McMullin, 85 Va. 187, 7 S. E. 349.

The mere appointment determines no right existing at the time. Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277.

The appointment terminates no right as between the parties, nor does it affect the title. The court proceeds to determine the rights of the parties upon the same principles as if no change of possession had occurred. Davis v. Bonney, 89 Va. 755, 17 S. E. 229.

2 International Trust Co. v. Decker Bros., 152 Fed. 78, 82, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152.

A receiver appointed upon the application of a secured creditor has no right to the custody of funds not arising from the property which has been pledged as security, and which may be applied upon the claims of general unsecured creditors, if any. The possession in such case is coextensive with the rights or lien of the plaintiff, and as to the owner of the property or creditors can not go beyond that. Wormser v. Merchants' Nat. Bank, 49 Ark. 117, 4 S. W. 198.

The right of custody extends only to the property which is the subject-matter of the litigation. In a proceeding under a general creditors' bill of course the receiver is entitled to the entire property, as in the case of bankruptcy and insolvency, or proceedings to wind up banks, etc. Noyes v. Rich, 52 Me. 115. But in case of a mortgage foreclosure the right to possession extends only to the property mortgaged. Idem.

He is but an arm of the court to take care of and administer the property, assets, and estate in suit, to do with it as the law may direct

and the court in the event that it determines that it had no jurisdiction to appoint the receiver[3] still has juris-

for the benefit of the parties concerned. While in theory he can do nothing without the court's order or sanction, he has, however, in matters of management and manner of disposition of the estate, a large discretion. Coy v. Title Guarantee & Trust Co., 198 Fed. 275.

Whatever he does under order of the court regarding the property in his hands is the act of the court. His possession is not altered by an order vacating the appointment of the receiver and substituting another person in that position. State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 468, 14 Ann. Cas. 198, 107 S. W. 487, 492.

The order of appointment not only creates the office of receiver, but fills the office so created. In fact neither the office nor the appointee can exist in this particular class of offices without the other. Thurber v. Miller, 11 S. D. 124, 75 N. W. 900.

A judgment appointing a receiver never terminates a cause. It remains the duty of the court to make whatever orders may be necessary from time to time to settle the rights of all the parties claiming an interest in the estate, and any such order, if final in its nature, as to the particular parties and matters affected by it, may be the subject of a separate appeal. Barber v. International Co., 74 Conn. 652, 92 Am. St. Rep. 246, 51 Atl. 857.

In a legal sense, property placed by a court in the hands of a receiver is not in the receiver's possession, but in the court's through such receiver as its officer. McKinnon-Young Co. v. Stockton, 55 Fla. 708, 46 So. 87.

He holds the funds in his hands subject to the orders of the court, having supervision over the receivership, and all persons dealing with him are chargeable with knowledge thereof. Stone v. St. Louis Union Trust Co., 183 Mo. App. 261, 166 S. W. 1091.

He is an officer of the court that appoints him, and derives his authority from its orders, and is accountable to it alone for the faithful performance of his office. City Bank of Wheeling v. Bryan, (W. Va.) 86 S. E. 8.

[3] Beardsley Co. v. V. E. Ashdown & Co., 73 W. Va. 132, 80 S. E. 128.

Property in the actual or constructive possession of a receiver is in custodia legis, and can not be interfered with without leave of court. Pelletier v. Greenville Lumber Co., 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855.

Property placed in the hands of a receiver is in custodia legis, and in the exclusive control of the court appointing him. City Bank of Wheeling v. Bryan, (W. Va.) 86 S. E. 8.

Money or property in the receiver's hands is in custodia legis. Delany v. Mansfield, 1 Hogan 234.

A mere order that a receiver shall be appointed to take charge of the goods of defendant does not place such goods in custodia legis. Dutcher v. Culver, 24 Minn. 584.

diction to restore the property to the owner or person having the legal title to it. He is a person indifferent as between the parties to the litigation and holding the property for the benefit of all of them, but his possession is really that of the court.[4] The title to the property does not change by reason of his appointment[5] and he

The control of all controversies affecting the property after the appointment of a receiver lies in the court. Howell v. Hough, 46 Kan. 152, 26 Pac. 436.

Possession is not essential to place the exclusive right to control the property in the power of the court appointing the receiver. Regenstein v. Pearlstein, 30 S. C. 192, 8 S. E. 850.

A "receiver" is an officer of the court that appoints him, and derives his authority from its orders, and is accountable to it alone for the faithful performance of his office. City Bank of Wheeling v. Bryan, (W. Va.) 86 S. E. 8.

[4] Green v. Coast Line R. Co., 97 Ga. 15, 54 **Am. St. Rep.** 379, 33 **L. R. A.** 806, 24 S. E. 814.

State v. Norfolk & S. R. Co., 152 N. C. 785, 21 **Ann. Cas.** 692, 26 **L. R. A.** (N. S.) 710, 67 S. E. 42.

Ordinarily the appointment of a receiver does not vest in him any title to the property involved, but only the right of possession. Oates v. Smith, 176 Ala. 39, 57 So. 438.

[5] Crine v. Davis, 68 Ga. 138; Southern Bank of Kentucky v. Ohio Ins. Co., 22 Ind. 181; Ellis v. Boston etc. R. Co., 107 Mass. 1; Bell v. American Protective League, 163 Mass. 558, 47 **Am. St. Rep.** 481, 28 **L. R. A.** 452, 40 N. E. 857; First Nat. Bank of Detroit v. E. T. Barnum Wire etc. Works, 60 Mich. 487, 27 N. W. 657; Maynard v. Bond, 67 Mo. 315; Heiman v. Fisher, 11 Mo. App. 275; Owen v. Kellogg (Owen v. Homeopathic Mut. L. Ins. Co.), 56 Hun (N. Y.) 455, 10 N. Y. Supp. 75; Pringle v. Woolworth, 90 N. Y. 502; Attorney General v. Atlantic etc. Ins. Co., 100 N. Y. 279, 3 N. E. 193; Ex parte Dunn, 8 S. C. 207; Beverley v. Brooke, 4 Grat. (Va.) 187; Murtey v. Allen, 71 Vt. 377, 76 **Am. St. Rep.** 779, 45 Atl. 752; State v. Superior Court of Snohomish County, 7 Wash. 77, 34 Pac. 430; State v. Superior Court of Chehalis County, 8 Wash. 210, 25 **L. R. A.** 354, 35 Pac. 1087; Wiswall v. Sampson, 14 How. (55 U. S.) 52, 14 **L. Ed.** 322; Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 **L. Ed.** 341, 10 Sup. Ct. 1013; Pennsylvania Steel Co. v. New York City R. Co., 198 Fed. 721, 117 C. C. A. 503, reversing decrees (C. C.); In re New York City R. Co., 188 Fed. 339, and (C. C.) Pennsylvania Steel Co. v. New York City R. Co., 188 Fed. 343; modifying decrees (C. C.) Pennsylvania Steel Co. v. New York City R. Co., 189 Fed. 661, 190 Fed. 609, and (D. C.) 189 Fed. 661, 194 Fed. 543.

As a rule the receiver takes no title to the property. Matthews v. Cooper, 49 N. Y. St. Rep. 792, 796, 21 N. Y. Supp. 71.

The appointment does not in any manner change the title to or right of possession of the prop-

consequently obtains no greater rights to a fund in the hands of a third person than has the party for whom he is receiver,[6] but he has the same rights which

erty, but merely places in the receiver its custody for the benefit of the party ultimately found to be entitled to it. Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. Ed. 341, 10 Sup. Ct. 1013; Owen v. Kellogg, 56 Hun 455, 10 N. Y. Supp. 75.

The receiver is the hand of the law and the law conserves and enforces rights — never destroys them. His appointment determines no right and in no way affects the title of any party to the property in litigation. Von Roun v. San Francisco Superior Court, 58 Cal. 358. He holds the property subject to all liens of every kind.

While property is in the hands of a receiver, or under the control of the court, no execution can be levied upon it; but the fi. fa. creates a lien thereon. Davis v. Bonney, 89 Va. 755, 17 S. E. 229.

A receiver is an officer of the court, but his appointment determines no right, nor does it affect the title of the property in any way; it will not prevent the running of the statute of limitations. His holding is the holding of the court for him from whom the possession was taken. He is appointed on behalf of all parties and if any loss arises from deficiency in his accounts the estate must bear it. Ellicott v. United States Ins. Co., 7 Gill (Md.) 307.

If the appointment of a receiver interferes with the rights of a stranger to the suit, he may apply to the court for the protection of his rights, though he can not have the benefit of the receivership. Howell v Ripley, 10 Paige (N. Y.) 43.

A receiver of the effects of an insolvent auctioneer was appointed. The auctioneer had sold goods for a party and with his knowledge and consent deposited the money arising therefrom to his general account at the bank. After the appointment and notice thereof to the bank, the auctioneer drew a check in favor of this principal for the amount due him and gave him an assignment of an amount on demand equal to the amount of the check. Held, that the principal thereby gained no right to the moneys on deposit, nor of action against the bank. All title to the moneys passed to the receiver on the day of his appointment and by virtue thereof. Levy v. Cavanagh, 2 Bosw. (N. Y.) 100.

The appointment of a receiver in a suit to foreclose a mortgage against a lessee will not deprive the lessor of the right to obtain possession of the premises under the forcible entry and detainer statute. Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860.

A receiver holds the property coming into his hands by the same right as the person for whose property he is the receiver. Lawson v. Warren, 34 Okl. 94, Ann Cas. 1914C, 139, 42 L. R. A. (N. S.) 183, 124 Pac. 46.

[6] McBride v. American Ry. etc. Co., 60 Tex. Civ. App. 226, 127 S. W. 229.

The general rule is well estab-

such party has in it. In other words, a receiver holds the property coming into his hands by the same right

lished that a receiver takes the title of the corporation or individual whose receiver he is and that any defense which would have been good against the individual or corporation may be asserted against the receiver. Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680; Hyde v. Lynde, 4 N. Y. 387; Higgins v. Gillesheiner, 26 N. J. Eq. 308.

But to this rule there is a well recognized exception which permits a receiver of an insolvent individual or corporation in the interest of creditors to disaffirm dealings of the debtor in fraud of their rights, but as we have seen elsewhere, this rule is dependent upon statutory powers and not upon the inherent equity powers of the court. Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. 530; Gillet v. Moody, 3 N. Y 479; Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519; Curtis v. Leavitt, 15 N. Y. 9, 108.

Under the Michigan voluntary assignment law the receiver gets no better title than the assignee had. In general the rights and powers of the person or corporation over whose property the receivership extends, measures the rights and powers of the receiver in his relation to third parties, and all causes of action, or defenses, existing in favor of the former are available to the latter. Wisconsin Marine & F. Ins. Co. Bank v. Manistee Salt & L. Co., 77 Mich. 76, 43 N. W. 907; Farrington v. Sexton, 43 Mich. 454, 5 N.W. 654; Lentz v. Flint & P. M. R. Co., 53 Mich. 444, 19 N. W. 138; Byles v. Kellogg, 67 Mich. 318, 34 N. W. 671.

Under Pub. Laws 1905, ch. 85, 3, receiver held to succeed only to the rights of the defendant in the receivership suit, and not to the rights of creditors. Folsom v. Smith, 113 Me. 83, 92 Atl. 1003.

A receiver occupies the position of the debtor so far as the proceeds of the fund or property are concerned. Crine v. Davis, 68 Ga. 138.

Seizure of a debtor's property as property of another by third person is ineffectual as against owner's receiver. Generotzky v. Barnay Hotel Co., 85 N. J. Eq. 63, 95 Atl. 865.

A court may appoint a receiver to take possession of property, whether the property is in the immediate possession of the defendant or his agent, and may order the agent or employees of defendant, though not parties to the record, to deliver the specified property to the receiver. Severns v. English, 19 Okl. 567, 101 Pac. 750.

A subcontractor of a firm of contractors for a courthouse for a county in Wisconsin, who brings suit as authorized by statutes, against the county and the firm more than a month before the filing of a bill for the dissolution of the firm and an accounting, acquires priority over other creditors in the fund, and he may prosecute the action to judgment and enforce

and title as the person for whose property he is receiver, subject to all liens, priorities, and equities existing at the time of his appointment.[7] From his position as the

his priority. Rickman v. Rickman, 180 Mich. 224, Ann. Cas. 1915C, 1237, 146 N. W. 609.

The receiver of an insolvent bank acquired no greater rights to funds deposited with a third party for the bank's benefit than the bank had. McBride v. American Ry. & Lighting Co., 60 Tex. Civ. App. 226, 127 S. W. 229.

7 Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823; Mulcahey v. Strauss, 151 Ill. 70, 37 N. E. 702; Chicago Title & Trust Co. v. Smith, 158 Ill. 417, 41 N. E. 1076; Bates v. Wiggin, 37 Kan. 44, 1 Am. St. Rep. 234, 14 Pac. 442; Rickman v. Rickman, 180 Mich. 224, Ann. Cas. 1915C, 1237, 146 S. W. 609; Cox v. Volkert, 86 Mo. 505; Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 7 Atl. 647; Gere v. Dibble, 17 How. Pr. (N. Y.) 31; VanAlstyne v. Cook, 25 N. Y. 489; Becker v. Torrance, 31 N. Y. 631; Davenport v. Kelly, 42 N. Y. 193; Commercial Pub. Co. v. Beckwith, 167 N. Y. 329, 60 N. E. 642; Ardmore Nat. Bank v. Briggs Machinery etc. Co., 20 Okla. 427, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, 94 Pac. 533; Lawson v. Warren, 34 Okla. 94, Ann. Cas. 1914C, 139, 42 L. R. A. (N. S.) 183, 124 Pac. 46; Hays v. Lycoming Fire Ins. Co., 99 Pa. 621; Central Trust Co. v. Wabash, St. L. & P. R. Co., 46 Fed. 26; Adams v. Spokane Drug Co., 57 Fed. 889, 23 L. R. A. 334; Lowenberg v. Jeffries, 74 Fed. 385; Black v. Manhattan Trust Co., 213 Fed. 692; Kneeland v. American Loan & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; Scott v. Armstrong, 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. 148.

"A receiver by his appointment as such acquires no greater or superior right or interest in the property coming into his hands than the debtor had, and in this relation may be said to stand in the shoes of the debtor; and, furthermore, as a general rule the receiver takes the property in the same plight and condition, and subject to the same equities and liens, as he finds it in the hands of the person or corporation out of whose hands it is taken. 34 Cyc. 191, 193." Black v. Manhattan Trust Co., 213 Fed. 692.

A receiver takes the debtor's property subject to the legal and equitable rights of third persons. Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, reversing decree (D. C.); In re Clairfield Lumber Co., 194 Fed. 181.

A receiver can not place the creditors having an equity in a worse condition and the creditors having no equity in a better condition than they occupied before his appointment. American etc. Bank v. McGettigan, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793.

A receiver to sequestrate the property of a corporation and apply it to the payment of corporate debts can not question the validity of a mortgage executed by the corporation to secure the debt of its president, where none of the creditors represented by him were

representative of the court he is said to represent both the debtor and the creditors, although he is not their

such at the execution of the mortgage. Osborn v. Montelac Park, 89 Hun 167, 35 N. Y. Supp. 610.

A receiver's possession is subject to all valid and existing liens upon the property at the time of his appointment, and does not devest a lien previously acquired in good faith. Chicago Title & T. Co. v. Smith, 158 Ill. 417, 41 N. E. 1076.

A transfer of a trustee of accounts belonging to a corporation, duly made and noted on the books of the corporation under authority of the board of directors and accepted by the trustee in writing, with notice from him to the parties whose accounts are assigned, and also to the persons for whom he is acting as trustee, is sufficient to vest in the trustee the right to the money derived from the accounts, although on the same day, but subsequent to such transfer, a bill was filed for the appointment of a receiver and the winding up of the affairs of the corporation. Chicago Title & T. Co. v. Smith, 158 Ill. 417, 41 N. E. 1076.

The right of the assignee in bankruptcy of a firm to bring any and all suits which concern the estate or trust is not affected by the appointment of a receiver of the property of an individual holding assets of the firm in trust, and the passing of the legal title to such receiver. Shainwald v. Davids, 69 Fed. 687.

The lien of encumbrances is not affected by the appointment of the receiver. Bryant v. Bull, L. R., 10 Ch. Div. 153.

As a general rule a receiver can not maintain an action on an obligation which the original party to whom it ran could not have maintained. Hollander v. Heaslip, 222 Fed. 808, 137 C. C. A. 1.

The appointment of a receiver for a debtor's property in an action by a creditor will not affect vested rights or interests of third persons therein. Albien v. Smith, 24 S. D. 203, 123 N. W. 675.

Nor has a liquidator power to recover in an action by him where the company itself could not have recovered. Waterhouse v. Jamieson, L. R. 2 H. L. (Sc.) 29.

As a general rule the appointment of a receiver does not affect vested rights or interests of third persons in the receivership property, or disarrange the order of priority of existing liens, particularly where the lienors have not been made parties nor intervened. Hulings v. Jones, 63 W. Va. 696, 60 S. E. 874.

Defenses available against the holder of a note are available against a receiver appointed under a decree of court to collect the note. Hutchins v. Langley, 27 App. D. C. 234.

Under the code provisions, property of a harvester company, left in the storehouses of a hardware company, as its agent, behind sign of latter, is the property of the hardware company as to creditors, of which the receiver of the hardware company is entitled to possession, notwithstanding replevin by harvester company before appointment of receiver. Payne Hardware Co. v. International Harvester Co., 110 Miss. 783, 70 So. 892.

agent.[8] His possession, however, is not adverse to either the plaintiff or the defendant of the litigation in

The effect of the appointment of a receiver is not to oust any person of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled thereto. In re John L. Nelson & Bros. Co., 149 Fed. 590.

Where attorneys have been employed to foreclose a mortgage, and pending the foreclosure proceedings a receiver is appointed over the property of the mortgagee, although the receiver takes the mortgage or its proceeds, he does so subject to the lien of the attorneys for the payment of their fees for services in the foreclosure proceedings. They can not assert against the mortgage fund, however, any claim for other services performed in other matters for the mortgagee. Bowling Green Sav. Bank v. Todd, 64 Barb. (N. Y.) 146.

The appointment does not release the property from the effect of prior existing liens, but it affects, however, the manner and time of their enforcement. Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823; Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; Arnold v. Weimer, 40 Neb. 216, 58 N. W. 709; Cherry v. Western Washington Ind. etc. Co., 11 Wash. 586, 40 Pac. 136; Kneeland v. American Loan etc. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950.

While property is in the possession of a receiver, the right to enforce liens against it is generally suspended, for the reason that it is in the custody of the court. Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; State v. Superior Court, 7 Wash. 77, 34 Pac. 430; State v. Superior Court, 14 Wash. 324, 44 Pac. 542.

A power of attorney to collect rents and apply them to a debt, which was given as security for a loan, is not revoked by the appointment of a receiver for the grantor's property. Abbot v. Stratton, 3 Jo. & Lat. 603.

[8] A receiver appointed to take possession of property involved in the litigation during the pendency of the suit, who does not stand as the representative of any of the parties, nor file any pleadings in the case, is not a necessary or proper party in a proceeding in error brought to review the judgment rendered in such suit. Grand De Tour Plow Co. v. Rude Bros. Mfg. Co., 60 Kan. 145, 55 Pac. 848.

A receiver does not act as agent of the company of which he is appointed receiver, or on its behalf alone, but is appointed to preserve property pending litigation, or to wind up the affairs of an insolvent, reduce its property into cash, and distribute it among its creditors. Rochester Tumbler Works v. Mitchell Woodbury Co., 215 Mass. 194, 102 N. E. 438.

The effect on the creditor of the taking over by a receiver of the general assets of the debtor is to substitute for the right of action, in personam, theretofore existing, a right to a proportional share of the impounded assets, together with a right to receive such a part thereof as his total proved demand bears to the total of all demands, unaffected by the fact that he

which he has been appointed.[9] The position of the receiver in respect to the court appointing him is somewhat analogous to that of the Sheriff in respect to a court of law.[10] The general principles of law which govern the relation of the court, acting through its receiver, in relation to the receivership property was well stated by the Court of Appeals of New York in a well considered case,[11] in which the court said: "No principle has been more frequently asserted or is so well established as that where a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all the matters at

holds security for a part or all of his debt. In re E. Bement's Sons (Detroit Trust Co. v. State Bank of Michigan), 150 Mich. 530, 114 N. W. 327, 14 Detroit Leg. N. 672; In re E. Bement's Sons (Detroit Trust Co. v. Old Nat. Bank), 150 Mich. 530, 114 N. W. 327, 14 Detroit Leg. N. 672; In re E. Bement's Sons (Detroit Trust Co. v. Michigan Sav. Bank), 150 Mich. 536, 114 N. W. 329, 14 Detroit Leg. N. 784.

A receiver appointed by the court in the progress of litigation acts as receiver for all the parties interested; but he is not the agent for the parties in the sense that each of the parties interested in the litigation is personally severally responsible for his wrongful or negligent acts. City Savings Bank v. Carlon, 87 Neb. 266, 127 N. W. 161.

The receiver of a corporation represents both the creditors and stockholders and may assert their rights when affected by the fraudulent or illegal acts of the corporation. Gillet v. Moody, 3 N. Y. 479.

A receiver represents both the creditors and their debtor, he being the trustee of both and bound to serve both, but his right to represent the creditors in opposing a contract entered into by the debtor is generally limited to questions of fraud, though he may be heard individually when he asserts a personal right, although precluded from being heard as a receiver. In re Pleasant Hill Lumber Co., 126 La. 743, 52 So. 1010.

9 Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 34 So. 216; Mays v. Rose, Freem. Ch. (Miss.) 703.

10 In re Merchants Ins. Co., 3 Biss. 162, 165, Fed. Cas. No. 9441.

Although the appointment of a receiver operates very much as an equitable execution, it reaches only the actual interest of the debtor in the property covered by the receivership. Longfellow v. Barnard, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255.

11 McGean v. Metropolitan Elevated Ry. Co., 133 N. Y. 9, 30 N. E. 647.

issue. To such an extent has the doctrine been carried that it has been declared that if the controversy contains an equitable feature, or requires any purely equitable relief belonging to the exclusive jurisdiction of equity, or pertaining to the concurrent jurisdiction of equity and law, and a court of equity thus acquires a partial cognizance of an action, it may go to a complete adjudication and establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority."

Some confusion has arisen in respect to the character of the rights of the receiver over property belonging to the receivership because of a loose way of using the term "title" in speaking of the relation of the receiver toward the receivership property. The term "title" is often used in this connection in the sense of the rights of control of the receiver rather than in that of ownership.

The receiver's title has reference more particularly to the right to the possession and control of the property, real or personal, for the time being, rather than to the ownership thereof. There are cases in matters of insolvency and winding up proceedings where the absolute legal title becomes vested in the receiver, and not unfrequently in the earlier practice the owner was required to execute and deliver to the receiver a formal conveyance of the property owned by him at the date of granting the receivership. In other cases the receiver is the mere custodian for the time being of the property of the debtor, charged with the duty of caring for the same, collecting the rents in case of real estate, and the income and profits in case of personal property, and transferring the title as an officer of and as ordered by the court. In this latter case the receiver, strictly speaking, has no title to the property, and where the title of such a receiver is referred

to it has reference solely to his right of possession under the order of court, and as an officer of the court, the scope of his authority in all cases being measured by the order of his appointment, having reference to the character of the property, and the rights therein of the plaintiffs at whose instance he is appointed, and the owner over whose property he is placed in custody. In many cases the actual manual possession of the property is not intended to be placed in the receiver, but he is only charged with the collection of the rents and profits, and in such case his possession is only constructive, and rights so far as third parties are concerned are largely dependent on the doctrine of *lis pendens*.[12]

12 In Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. Ed. 341, 342, 10 Sup. Ct. 1013, Mr. Justice Gray says: "A receiver derives his authority from the act of the court appointing him and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property." Skip v. Harwood, 3 Atk. 564; Anon., 2 Atk. 15; Wiswall v. Sampson, 55 U. S. (14 How.) 52, 14 L. Ed. 322; Ellis v. Boston, H. & E. R. Co., 107 Mass. 1; Maynard v. Bond, 67 Mo. 315; Heiman v. Fisher, 11 Mo. App. 275. In Yeager v. Wallace, 44 Pa. 294, it was held that a receiver of partnership effects could not maintain trover for the converted assets of the firm before the appointment, on the ground that the receiver does not become the legal owner of the property which he is required to take in charge. The appointment does not transfer to the receiver the legal rights of the partnership in any of their choses in possession or in action. Wilson v. Allen, 6 Barb. (N. Y.) 545. In Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 257, it was held that the effect of the order was to vest the property in the receiver as effectually in equity as if an assignment had been made in due form. The property is transferred by operation of law by means of the order of the court; and equity looking at the substance will hold the transfer accomplished which has been decreed. In re Eagle Iron Works, 8 Paige (N. Y.) 386; Eldred v. Hall, 9 Paige (N. Y.) 640. In a foreclosure proceeding in Harland v. Bankers & M. Teleg. Co., 32

Fed. 305, it was held that a receiver pendente lite is a mere custodian of the mortgaged property, and not being appointed under a statute acquired no title to the property which belonged to the mortgagee.

In Union Trust Co. v. Weber, 96 Ill. 346, it is said: "We are aware of no rule of law or any adjudged case independent of a statute that holds the appointment of a receiver transfers the title of real or personal property to the person thus appointed. Nor do we conceive by what means such an appointment can have that effect. That officer by his appointment is authorized to take and hold possession of property under the control and direction of the court." In Atty. Gen. v. Atlantic Mut. L. Ins. Co., 100 N. Y. 279, 3 N. E. 193, it was held that under the New York statute (Act 1869, § 7) the title to real estate of the debtor became vested in the receiver by his appointment, as well as personal property. And if this were not true the receiver is the holder of the equitable title accompanied by possession, and a conveyance could be ordered by the court if necessary. See, also, Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814; Wing v. Disse, 15 Hun (N. Y.) 190; Osgood v. Maguire, 61 N. Y. 524; Owen v. Smith, 31 Barb. (N. Y.) 641; Atlas Bank v. Nahant Bank, 23 Pick. (Mass.) 480. The power of the court to invest the receiver with the legal as well as the equitable title would seem to be unquestioned. Atty. Gen. v. Atlantic Mut. L. Ins. Co., 100 N. Y. 279, 3 N. E. 193; Chautauque County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Hoyt v. Thompson, 5 N. Y. 320; Scott v. Elmore, 10 Hun (N. Y.) 68; Union Trust Co. v. Weber, 96 Ill. 348; Adams v. Howard, 22 Fed. 656, 23 Blatchf. 27; Wilmer v. Atlanta & R. Air Line R. Co., 2 Woods 409, Fed. Cas. No. 17775; Noyes v. Rich, 52 Me. 115; Ellis v. Boston, H. & E. R. Co., 107 Mass. 1. In Coates v. Cunningham, 80 Ill. 467, the court say: "The appointment of a receiver does not determine any rights nor affect the title of either party in any manner whatever. He is the officer of the court, and his holding is the holding of the court for him, from whom the possession was taken. He is appointed on behalf of all parties, and his appointment is not to oust any party of his rights to the possession, but merely to retain it for the benefit of the party ultimately entitled; and where he is ascertained the receiver will be considered as his receiver." Ellicott v. Warford, 4 Md. 80; Re Colvin, 3 Md. Ch. 280; Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519.

Real estate is vested in the receiver only by a conveyance to him. St. Louis & S. Coal & M. Co. v. Sandoval Coal & M. Co., 111 Ill. 32; Chautauque County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; In re Colvin, 3 Md. Ch. 278; Williamson v. Wilson, 1 Bland. (Md.) 418. In Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510, it was held that a receiver of a dissolved copartnership appointed by a court of equity is invested with the whole equitable title to the partnership property, without

§ 27. Relation of the Receiver to Pending Litigation.

The appointment of a receiver does not operate as an abatement of actions pending against the defendant [1] in

an assignment; and in Fincke v. Funke, 25 Hun (N. Y.) 616, it was held that a receiver in a partnership case pendente lite has no powers except such as have been conferred upon him by the order, and is a common law receiver whose duty it is to merely protect the fund pending litigation. The order appointing him makes no change in the title. Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60. In proceedings supplementary to execution, however, and in cases of embarrassed or insolvent corporations, and statutory proceedings, his powers are greater.

1 Alabama Terminal R. Co. v. Benns, 189 Ala. 590, 66 So. 589.

Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 291; American Nat. Bank v. Robinson, 141 Ga. 78, 80 S. E. 555, and see Citizens Bank of Georgia v. Hubbard, 70 Ga. 411; Toledo W. & W. Ry. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Manker v. Phoenix Loan Assoc., (Iowa) 96 N. W. 982; Weigen v. Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862; O'Mara v. Newton etc. R. Co., 156 Iowa 701, 137 N. W. 942; Hunt v. Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Kittredge v. Osgood (Page v. Supreme Lodge etc.), 161 Mass. 384, 37 N. E. 369; American Engine Co. v. Crowley, 105 Minn. 233, 117 N. W. 428; Heath v. Missouri etc. Ry. Co., 83 Mo. 617; St. Louis etc. Ry. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49; Cooper v. Philadelphia Worsted Co., (N. J.) 57 Atl. 733; compare Morton v. Stone Harbor Imp. Co., (N. J.) 44 Atl. 875; Tracy v. Selma First Nat. Bank, 37 N. Y. 523; Fleischauer v. Dittenhoefer, 49 N. Y. Super. Ct. 311; Wilson v. Wilson, 1 Barb. Ch. (N. Y.) 592; Parry v. American Opera Co., 12 Civ. Proc. Rep. 194, 9 N. Y. St. Rep. 536; People v. Commercial Alliance Life Ins. Co., 5 App. Div. 273, 39 N. Y. Supp. 117; People v. Troy Steel etc. Co., 82 Hun 303, 31 N. Y. Supp. 337. See also Waverly Co. v. Worthington Co., 4 Misc. Rep. 447, 24 N. Y. Supp. 331; Monnett v. Columbus etc. Ry. Co., 26 Ohio Cir. Ct. Rep. 469; Wagner v. Keystone Mut. Ben. Assoc., 8 Pa. Dist. Ct. 231; Van Dusen v. Blake, 20 Wkly. Notes Cas. (Pa.) 45; Gadsden v. Whaley, 14 S. C. 210; Kansas City etc. Ry. Co. v. State, (Tex. Civ.) 155 S. W. 561; Mercantile Trust Co. v. Pittsburgh etc. R. Co., 29 Fed. 732; Pine Lake Iron Co. v. La Fayette Car Works, 53 Fed. 853; Wilder v. New Orleans, 87 Fed. 843, 58 U. S. App. 109, 31 C. C. A. 249; Bowker v. Haight etc. Co., 147 Fed. 923.

"The appointment of a receiver is not a bar to suits brought against the corporation before the bill in this case was filed, nor do such suits abate in consequence of such appointment. The receiver can appear in and defend such suits if the interests he represents render it proper or neces-

the receivership proceeding. If the parties to the pending suit prefer to proceed with the suit and obtain the relief sought in that proceeding, they will not, however, obtain by their judgment or decree any priority over other claimants to the receivership property.[2] Where the pending proceeding is one for the benefit of the receivership estate, such as an action to set aside certain transfers as having been in fraud of creditors, it is proper for the court to stay the further prosecution of the pending action upon the commencement of a similar action by the receiver.[3] Ordinarily, however, the practice is to allow the pending action to proceed to judgment regardless of the receivership proceedings.[4] The receiver does not by reason of his appointment become substituted as a party to suits pending against the defendant in the receivership proceedings. In order to make him a party to such pending suits he should be

sary. Whether the claims of the defendants are such that actions at law can be maintained on them is a question we can not consider in this proceeding. If they are, we see no reason why the defendants should not proceed to judgment, if they desire to do so. Whether judgments rendered after the bill was filed can be proved before the receiver, or whether the proof should be the original demands as they existed at the time the bill was filed, made up in the same manner as other claims of the same kind, and what the effect of obtaining such judgments would be upon the right to make proof of the original demands, are questions not now before us." Kittredge v. Osgood (Page v. Supreme Lodge etc.), 161 Mass. 384, 37 N. E. 369.

The act of a creditor in filing his claim with a receiver is not such an election of remedies as to bar the prosecution of a suit for the same debt which was pending when the receiver was appointed. Pine Lake Iron Co. v. LaFayette Car Works, 53 Fed. 853. See Taylor v. Gray, 59 N. J. Eq. 621, 44 Atl. 668, to the same effect.

2 Blair v. St. Louis etc. R. Co., 25 Fed. 2. The court in this case very pertinently observed: "The parties preferred to proceed in the state court without the leave of this court, and they must lie in the bed which they have made. This court will not help them."

3 Attorney-General v. Guardian Mut. Life Ins. Co., 77 N. Y. 272.

4 Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 291; Kelley v. Union Pac. Ry. Co., 58 Kan. 161, 48 Pac. 843; Tracy v. Selma First Nat. Bank, 37 N. Y. 523; Speckart v. German Nat. Bank, 85 Fed. 12.

substituted by an order of the court in which the suit is pending,[5] but the making of such order lies in the discretion of the court,[6] although it is the ordinary practice to allow such a substitution upon application by the receiver.[7] It is not incumbent upon the plaintiff in the pending suit to seek to substitute the receiver as a party to the suit. If the receiver desires to be made a party he should seek to be substituted as a party upon his own motion.[8] The receiver ought not, however, to be substituted as a party unless the pending suit specifically affects property in his possession.[9] Of course,

5 Tracy v. Selma First Nat. Bank, 37 N. Y. 523; Gadsden v. Whaley, 14 S. C. 210.

6 Patrick v. Eells etc., 30 Kan. 680 2 Pac. 116; St. Louis etc. Ry. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49.

7 Andrews v. Steele City Bank, 57 Neb. 173, 77 N. W. 342; Willink v. Morris Canal etc. Co., 4 N. J. Eq. 377; State v. District Court, 37 Utah 418, 108 Pac. 1121; Perry v. Godbe, 82 Fed. 141.

8 Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Mercantile Trust Co. v. Pittsburgh etc. R. Co., 29 Fed. 732.

9 Decker v. Gardner, 124 N. Y. 334; 11 L. R. A. 480, 26 N. E. 814. On a disclosure by a garnishee that it was in the possession of money which it did not know who owned, plaintiffs filed supplementary complaint, alleging, among other things, that the fund belonged to defendant in the action. Defendant, however, answered disclaiming ownership and alleging that the money belonged to a third person, who subsequently intervened and asserted ownership. Thereafter plaintiffs commenced supplementary proceedings, in which a receiver was appointed of all the property and effects of defendant with the usual power to recover, take possession of, and to convert the same into money to satisfy plaintiffs' judgments. On the issues presented in the garnishment proceedings coming on for trial, defendant and intervener moved to dismiss the same for the reason that by the appointment of a receiver the right to maintain the same passed from plaintiffs to the receiver, and that the latter had the sole right to litigate the question of ownership of the money. The court held that the motion was properly denied, and that the remedy was not by motion for dismissal, but for substitution, under Rev. Laws 1905, § 4064, providing that an action shall not abate by transfer of plaintiffs' interest therein, and that where a transfer has taken place, pending the action and before trial, plaintiffs' successor may be substituted. American Engine Co. v. Crowley, 105 Minn. 233, 117 N. W. 428.

if it appears as if the pending suit is a collusive arrangement between the parties for the purpose of procuring an improper liability as against the receivership funds, it is eminently proper that the receiver be substituted as a party to the proceeding so as to properly protect the receivership estate.[10]

§ 28. Relation of Receiver to Garnishments, Attachments, and Other Liens.

The effect of the appointment of a receiver is to vest in him the title to the personal property, choses in action, and equitable interests of the debtor, over which the receivership extends without a formal assignment.[1] This principle, of course, has particular application to creditor's proceedings, and not to mortgage foreclosures or other proceedings relating to specific property. In some cases the defendant is permitted to remain in possession pending the receivership and the receivership is extended to the rents and profits only. But one in possession under a *prima facie* title can not be deprived of such possession by a receiver at the suit of creditors of the debtor unless a showing is made of danger of the property being lost, or materially injured, or that the sale to the defendant is fraudulent, and that he will be turned out of possession at the hearing.[2]

The appointment of a receiver, as has been already suggested, removes the parties in possession of property, who are parties to the suit, from the custody and control thereof and pending the litigation terminates all rights growing out of such possession.[3]

10 Honegger v. Wettstein, 94 N. Y. 252.

1 Albany City Bank v. Schermerhorn, Clarke's Ch. (N. Y.) 297; Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 257; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 223; Wilson v. Allen, 6 Barb. (N. Y.) 542; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

2 Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781.

3 Payne v. Baxter, 2 Tenn. Ch.

The right to custody of property relates to the custody of such personal property as is within the jurisdiction of the court making the appointment.[4]

Where at the time of the appointment of a receiver a creditor of the party for whom the receiver was appointed had obtained a lien on a fund belonging to the party by means of garnishment proceedings, such appointment will not operate as a dissolution of the garnishment and the garnishment may be enforced.[5]

The question whether a receiver is subject to garnishment is one generally dependent upon the condition of the statutes prevailing in the forum. Under the phrasing of certain acts of Congress relative to the right to sue receivers appointed by federal courts without leave of court, it is held that such receiver may be garnished in respect to moneys due by him to a defendant in a

517; Shaw v. Wright, 3 Ves. Jr. 22; McDonnell v. White, 11 H. L. Cas. 570.

4 Humphreys v. Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76, 6 L. R. A. 792, 22 Pac. 892; Kronberg v. Elder, 18 Kan. 150; Hunt v. Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Tully v. Herrin, 44 Miss. 626; Farmers' etc. Ins. Co. v. Needles, 52 Mo. 17; Moseby v. Burrow, 52 Tex. 396; Filkins v. Nunnemacher, 81 Wis. 91, 51 N. W. 79; McClure v. Campbell, 71 Wis. 350, 5 Am. St. Rep. 220, 37 N. W. 343.

5 Rickman v. Rickman, 180 Mich. 224, Ann. Cas. 1915C, 1237, 146 N. W. 609.

The appointment of a receiver in a foreign jurisdiction does not operate to deprive a nonresident plaintiff, suing a railroad company for which the receiver was appointed, of her right to recover against a garnishee in the state of the forum. Seaboard Air Line Ry. v. Burns, 17 Ga. App. 1, 86 S. E. 270.

In the case last cited the official syllabus stated that the appointment of a receiver in a foreign jurisdiction did not of itself operate to deprive the plaintiff, merely because she was a nonresident, of her right to recover judgment against the garnishee for the amount of her judgment against the defendant, which was less in amount than the admitted indebtedness. See 34 Cyc. 489 et seq.; Catlin v. Wilcox Silver Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338; Linville v. Hadden, 88 Md. 594, 43 L. R. A. 222, 41 Atl. 1097; Gray v. Covert, 25 Ind. App. 561, 58 N. E. 731, 81 Am. St. Rep. 117; Lichtenstein v. Gillett, 37 La. Ann. 522, and the cases cited in each.

garnishee proceeding.[6] Of course the general rule is that property in the custody of the court is not subject

[6] But possession by receiver of defendant corporation in another state of claims against garnishee railroad companies is a continuing right, which can not be divested and sufficient to preclude plaintiff from attaching in the state any claim against the railroad companies. De Mattos v. Camp & Hinton Co., 129 La. 251, 55 So. 832.

On a rule by liquidators for a corporation appointed in a state court to show cause why a garnishment issued under a judgment in the United States Circuit Court against the corporation should not be quashed, the Circuit Court made an order that the garnishment be quashed unless the judgment creditor filed a suit in the state court within a certain time attacking the validity of the liquidators' appointment, it is a sufficient compliance with such order that the judgment creditor caused a rule to issue, in the suit wherein the liquidators were appointed on plaintiff, the corporation, and its liquidators, to show cause why the appointment should not be set aside. Rouge v. Larfargue Bros. Co., 47 La. Ann. 1646, 18 So. 652.

"An indebtedness incurred by the receiver of a railway company, appointed by the federal court, while operating the road under the authority of the court, may be garnished in a state court." Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987, 26 L. R. A. 218, 49 Am. St. Rep. 495. See also Glover v. Thayer, 101 Ga. 824, 827, 29 S. E. 36, to the effect that section 5485 of the Civil Code of 1910, providing immunity from process of garnishment for a receiver appointed by a court of equity, does not apply to a receiver appointed by a federal court of equity having jurisdiction within this state for an indebtedness arising in the operation of the road, since the statutes of the United States are paramount, and the extent and scope of the liability of a receiver appointed by the United States courts can not be circumscribed by state legislation.

Under act of Congress March 3, 1887, ch. 373, 3, 24 Stat. 554, as amended by act Aug. 13, 1888, ch. 866, 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), which provides that a receiver appointed by a federal court may be sued in respect to any transaction of his in carrying on the business connected with the property of which he is receiver without previous leave of the appointing authority; where a receiver was appointed to operate a railroad, he is only subject to suit without leave under such section concerning matters having their origin in his operation of the railroad, and the act does not authorize the garnishment of funds in his hands alleged to belong to a debtor in the receiver's employ, especially where at the time the garnishment was instituted the amount due the debtor had not been adjudicated and ordered paid so that the receiver could be regarded as holding it merely as the debtor's agent or custodian. The receiver under such circumstances may ignore the service and subse-

to garnishment except by leave of the court but this general rule does not apply where nothing remains for the receiver to do but to pay money on a final decree,[7] since in such circumstances the garnishment proceedings can not interfere with the jurisdiction of the court

quent proceedings based on the garnishment proceedings. Central Trust Co. v. Wheeling & L. E. R. Co., 189 Fed. 82.

But it has been held that a receiver appointed by a federal court in Georgia of a railroad which was partly in that state and partly in another state, is not liable to garnishment in a federal court of the latter state without leave of court, notwithstanding the act of Congress. Central Trust Co. v. Chattanooga etc. R. Co., 68 Fed. 685. See also Harrison v. Waterberry, (Tex.) 27 S. W. 109, to the same effect.

7 Property of an insolvent partnership can not be reached by garnishment to satisfy a judgment recovered subsequently to the appointment of a receiver. Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; McGowan v. Myers, 66 Iowa 99, 23 N. W. 282; Taylor v. Gilleau, 23 Tex. 508.

In Smith v. McNamara, 15 Hun (N. Y.) 447, the court said: "It is clearly against the policy of the law to justify such an irregular and vexatious interference with the orderly and customary method of adjusting and winding up the affairs of a corporation after a receiver has been appointed. When a court of competent authority has assumed control in such a case and possesses a jurisdiction adequate to grant proper relief to all parties interested, such court should be applied to instead of instituting numerous proceedings before other officers and tribunals, to reach a result which could be attained with less expense and trouble by a direct application to the court which appointed the receiver."

Money of an insolvent estate being administered in another state through receivers there appointed is exempt from attachment in Pennsylvania, where placed in the hands of the garnishee in that state under order of the court having jurisdiction over them. Somerset Coal Co. v. Diamond State Steel Co., 224 Pa. 217, 132 Am. St. Rep. 775, 73 Atl. 442.

A statute prohibiting garnishment of a "public officer" is not sufficient to include a receiver. Cohnen v. Sweenie (Black.), 105 Mich. 643, 63 N. W. 641.

The rule that a receiver is not subject to garnishment is not affected by the statutory provisions authorizing suits to be instituted against a receiver without first obtaining leave of the appointing court. Kreisle v. Campbell, 89 Tex. 104, 33 S. W. 852.

One may without leave of court garnishee a receiver of the principal debtor to secure the fund which the receiver is directed to pay by a final decree to him. Robertson v. Detroit Pattern Works, 152 Mich. 612, 15 Ann. Cas. 131, 116 N. W. 196.

or its authority to deal with the controversy or fund before it.[8]

Though a receiver appointed by a court of equity is by statute exempt from garnishment in his own state, the federal courts of another state will not refuse to entertain garnishment against him on a petition properly presented by citizens within the jurisdiction when no objection to the jurisdiction on other grounds exists.[9]

Where a debt due from a receiver is garnished in a state court, no executory process will, as a rule, be issued on the judgment rendered in the proceeding but the judgment creditor will be required to enforce its satisfaction in the court of the receivership.[10]

The appointment of a receiver does not divest a plaintiff of the benefits of an attachment lien which he has previously secured against the defendant in the receivership proceeding.[11]

8 Dunsmoor v. Furstenfeldt, 88 Cal. 522, 22 Am. St. Rep. 331, 12 L. R. A. 508, 26 Pac. 518; Smith v. People, 93 Ill. App. 135.

9 Central Trust Co. v. Chattanooga, R. & C. R. Co. (C. C.), 68 Fed. 685.

10 Irwin v. McKechnie, 58 Minn. 145, 49 Am. St. Rep. 495, 26 L. R. A. 218, 59 N. W. 987.

But an attachment of a national bank and its receiver as garnishees can be maintained in a state court, although it can not create any lien upon specific assets of the bank in the receiver's hands, or disturb his custody of those assets, or prevent him from paying to the treasurer of the United States, subject to the order of the comptroller of the currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. Judgment, Conway v. Chestnut St. Nat. Bank (1899), 189 Pa. 610, 42 Atl. 303, affirmed, Earle v. Conway, 178 U. S. 456, 44 L. Ed. 1149, 20 Sup. Ct. 918.

11 Buswell v. Supreme Sitting of Order of Iron Hall, 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065; Kittredge v. Osgood (Page v. Supreme Lodge etc.), 161 Mass. 384, 37 N. E. 369; Hays v. Lycoming Fire Ins. Co., 99 Pa. St. 621; Second Nat. Bank v. New York Silk Mfg. Co., 11 Fed. 532.

A levy of an attachment issued out of, and a return of the writ to the court issuing it, place the attached land within the control of that court, so that a subsequent appointment by the United States Circuit Court of a receiver for the land is unwarranted. Southern Bank & Trust Co. v. Folsom, 75 Fed. 929, 21 C. C. A. 568.

Under statutory provisions which provide for the dissolution of attachments as the result of the appointment of a receiver or allowing attachments procured within a certain stated time before the appointment to be dissolved upon the making of such an appointment, it naturally follows that such cases will be governed by the statutory provisions existing at the time.[12] Quite frequently statutes provide that in the event of the appointment of a receiver in proceedings for the dissolution of a corporation all attachments in pending cases shall be dissolved and the litigants compelled to participate with the balance of the unsecured creditors. Under such statutory provisions, the attachments may be vacated after the appointment of a receiver,[13] but statutory

But in this respect see Ennis v. Eden Mills Paper Co., 65 N. J. L. 577, 48 Atl. 610; French v. McCready, (Tex. Civ.) 57 S. W. 894; State v. District Court, 37 Utah 418, 108 Pac. 1121.

The appointment of a receiver does not dissolve valid attachments levied before the commencement of the proceedings in which the appointment was made. Kittredge v. Osgood (Page v. Supreme Lodge etc.), 161 Mass. 384, 37 N. E. 369; Garham v. Mutual Aid Society, 161 Mass. 357, 37 N. E. 447.

Where property has been attached wrongfully in a state court, a party who desires to pursue his remedy in a federal court should do so by action in trespass, not by replevin, nor by proceedings for an injunction or receiver. Hale v. Bugg, 82 Fed. 33.

12 The levy of execution on the property of a judgment debtor is not an "attachment" of such property, within Kirby's Dig. 4055, authorizing the receiver to have all attachments of the insolvent debtor's property dissolved. J. M. McGuire & Co. v. Barnhill, 89 Ark. 209, 115 S. W. 1144.

The fact that a receivership is ancillary does not prevent the operation of Rev. Laws, ch. 167, 126, which provides that an attachment shall be dissolved by the appointment of a receiver, where the bill for the appointment of such receiver is filed within four months after the attachment is made. Second Nat. Bank v. J. C. Lappe Tanning Co., 198 Mass. 159, 84 N. E. 301.

An attachment by trustee process of property belonging to a company is dissolved, under Rev. Laws, ch. 167, 126, by the appointment of a receiver, where the petition for the receiver is filed within four months after the attachment. Thornley v. J. C. Walsh Co., 207 Mass. 62, 92 N. E. 1007.

13 The appointment of a receiver of a corporation for the purpose of liquidation operates as a seques-

provisions of that character do not authorize the vacation of attachments upon the appointment of a receiver for some other purpose, such as under a mortgage foreclosure proceeding against the corporation.[14]

And based on the principle that the receivership property is in the custody of the court after the appointment of a receiver, the rule is that after such appointment the right of a creditor to sequester property belonging to the receivership by attachment proceedings and thus gain a priority, is suspended,[15] although there are appar-

tration of all of its property. Temple v. Glasgow, 80 Fed. 441, 25 C. C. A. 540.

It has been held that the dissolution of a corporation and appointment of a receiver dissolve pending attachments. Wilcox v. Continental etc. Ins. Co., 56 Conn. 468, 16 Atl. 244.

A receiver of an insolvent corporation is authorized to intervene in an attachment suit against the corporation and file a motion to set aside an order of sale of the attached property. State v. District Court in and for Third Dist., 37 Utah 418, 108 Pac. 1121.

Such appointment does not disable the corporation from moving to vacate the attachment against the property. Waverly Co. v. Worthington Co., 4 Misc. Rep. 447, 24 N. Y. Supp. 331.

But under Carter's Ann. Code Civ. Proc. Alaska, 141, the appointment of a receiver for a corporation subsequent to the attachment of its property, in a suit to which the plaintiffs in the attachment were not parties, did not divest the attachment lien. Cowden v. Wild Goose Mining & Trading Co., 199 Fed. 561, 118 C. C. A. 35.

[14] The provision of the Connecticut statute (Pub. Acts 1895, p. 491) that attachments shall be dissolved by the appointment of a receiver for a corporation within 60 days is intended to apply only to general receivers of all the property of the corporation situated in the state for the purpose of protecting the creditors of the corporation generally, and the appointment in a suit to foreclose a mortgage given by a corporation of a receiver for the mortgaged property to protect the rights of the mortgagee therein does not have the effect of dissolving a prior attachment under such provisions. Central Trust Co. v. Worcester Cycle Mfg. Co., 114 Fed. 659.

[15] Butler v. Wendell, 57 Mich. 62, 58 Am. Rep. 329, 23 N. W. 460.

Receivers appointed by a court of chancery are not subject to attachment in an action at law, since, in the absence of statutory authority, a court of chancery will not permit interference with its operations by proceedings at law. Central Trust Co. v. Wheeling & L. E. R. Co., 189 Fed. 82; Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491; Richards v. People, 81 Ill.

ent exceptions to the rule arising from the circumstance

551; Hazelrigg v. Bronaugh, 78 Ky. 62; Hagedon v. Bank of Wisconsin, 1 Pinn. (Wis.) 61, 39 Am. Dec. 275; Clark v. Bacorn, 116 Fed. 617, 54 C. C. A. 73.

If a receiver has lawfully acquired possession of property within the jurisdiction of the court which appointed him, and in the course of his duties takes it in another state, it still remains in his possession as a receiver and will not be subject to an attachment by creditors residing in the latter state. Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668; Jenkins v. Purcell, 29 App. D. C. 209, 9 L. R. A. (N. S.) 1074; Chicago etc. Ry. Co. v. Keokuk Northern Line Packet Co., 108 Ill. 317, 48 Am. Rep. 557; Somerset Coal Co. v. Diamond etc. Co., 224 Pa. St. 217, 132 Am. St. Rep. 775, 73 Atl. 442; Cagill v. Wooldridge, 8 Baxt. (67 Tenn.) 580, 35 Am. Rep. 716. But see to the contrary effect: Humphreys v. Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76, 6 L. R. A. 792, 22 Pac. 892; Grogan v. Egbert, 44 W. Va. 75, 67 Am. St. Rep. 763, 28 S. E. 714.

The appointment of a receiver may be made on the filing of the bill asking therefor, or at any time thereafter during the pendency of the suit, and can not be assailed by a third party under an attachment filed after the receiver was in charge under process issued on the bill. Benjamin v. Staples, 93 Miss. 507, 47 So. 425.

The legislature may, under the constitution, require the dissolution of attachments on the appointment of a receiver of the property attached only when the property can be held under the laws of the state for the benefit of creditors who prove their claims here. Consequently, under Rev. Laws, ch. 167, section 126, which provides that an attachment of property on mesne process shall be dissolved by the appointment by "any court of competent jurisdiction in this commonwealth" of a receiver to take possession of the property, etc., and section 127, which provides that, when an attachment has been so dissolved, the proceedings for the appointment of a receiver shall not thereafter be dismissed, and the receiver discharged, until all the assets which have come into his hands as receiver have been fully distributed, or the claim upon which the attachment was made has been fully paid and discharged, it is held that the words "any court of competent jurisdiction in this commonwealth," means any court which is subject to the legislation of the commonwealth, and the act does not apply to receivers appointed by federal courts. Prior to the enactment of these statutory provisions attachments in force at the time of the appointment of a receiver were not dissolved by the mere fact of his appointment. Reynolds v. Enterprise Transportation Co., 85 N. E. 110, 198 Mass. 590; Borden v. Enterprise Transportation Co., 85 N. E. 110, 198 Mass. 590.

A court, in appointing a receiver for cattle to protect the interest of one who is to receive a portion of their sale price for caring for them, acquires jurisdiction of such interest to the extent that it is

of the receiver being appointed by a court of another

not subject to attachment by a creditor in another state in which the receiver sells the cattle. Jenkins v. Purcell, 29 App. D. C. 209, 9 L. R. A. (N. S.) 1074.

Even though a receiver appointed in one state has not reduced all of the funds belonging to the receivership into his possession, a citizen within the jurisdiction of the court appointing him can not attach funds in another state without leave of the appointing court, since the receiver is in the constructive possession of all of the funds. Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606.

The property of a nonresident defendant can not, while in the hands of a receiver appointed in another state, be seized under attachment, when brought within the state for a lawful purpose. Woodhull v. Farmers' Trust Co., 11 N. D. 157, 95 Am. St. Rep. 712, 90 N. W. 795.

A nonresident creditor, who attaches and sells property of an estate after the estate has been placed in the hands of a receiver, and with equitable notice of the receiver's title, can be allowed to share as a creditor in the estate only after renouncing the benefit of the attachment and accounting for the property wrongfully converted. In such a case, the measure of liability is the fair value of the property at the date of the attachment, with interest. Ward v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706, 41 Atl. 1057.

If a receiver has been appointed in the state in which an attachment creditor is a citizen and the latter has been served with a copy of an injunction against interfering with said receivership, and he thereafter causes the lines and property of a telegraph company situate in another state to be attached, such act violates the injunction and can give no lien to such creditor which is capable of being enforced under an equitable administration of the company's assets in the state wherein the receiver was appointed. Farmers' Loan & T. Co. v. Bankers etc. Tel. Co., 148 N. Y. 315, 42 N. E. 707, 51 Am. St. Rep. 690, 31 L. R. A. 403, affirming 83 Hun 560, 31 N. Y. Supp. 1096.

And where a receiver has been appointed by the court of a foreign country over a railway company and he brings property belonging to the receivership in this country, such property will not be subject to attachment, and if attached by creditors in this country he may recover it by replevin. Robertson v. Staed, 135 Mo. 135, 58 Am. St. Rep. 569, 33 L. R. A. 203, 36 S. W. 610.

But in Maryland it was held that an attachment could be made against the property of a judgment debtor over whose estate a receiver had been appointed until the receivers took possession. Farmers' Bank v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226.

In Colorado it was held that a receiver operating a railroad would be subject to attachment if the attachment proceedings did not interfere with his rights under the order of appointment. Phelan v. Ganebin, 5 Colo. 14.

jurisdiction.[16] This exception is based on the theory that the jurisdiction of a receiver is merely co-extensive with that of the court which has appointed him.

The general rule in all cases of this character is that the court appointing a receiver has no power to displace or subordinate liens existing upon the receivership property at the time of taking it into possession through its receiver where it has jurisdiction of the receivership proceedings.[17] Such lien creditors, however, can not as a rule enforce their liens and thereby disturb the posses-

16 Local creditors may attach funds due a nonresident insolvent, inasmuch as an ancillary receiver, if appointed, would only take the funds out of the state for administration. Guimarin & Co. v. Southern Life & Trust Co., 100 S. C. 12, 84 S. E. 298.

Domestic creditors of an insolvent foreign corporation held entitled to attach funds due it from citizens of this state, though a receiver had been appointed by the federal court in the foreign state. Guimarin & Co. v. Southern Life & Trust Co., 100 S. C. 12, 84 S. E. 298.

If, however, a receiver sends a ship belonging to the receivership estate into a foreign state and necessary supplies are furnished to it, proceedings in rem in an admiralty court of that country may be maintained against the ship for the payment of such supplies, as in the case of other ships. Clark v. Chandler, 66 Fed. 565, 13 C. C. A. 635, affirming same case in The Willamette Valley, 62 Fed. 293, and s. c. 63 Fed. 130.

Likewise a seaman may acquire a lien on a ship in charge of a receiver for his services rendered on it while in his charge, and enforce such lien in a court of admiralty. In re William M. Hoag, 69 Fed. 742.

17 Arnold v. Weimer, 40 Neb. 216, 58 N. W. 709.

Although the general rule is as shown in the text, still the rights of prior lienholders may be affected under some circumstances by a diversion of the earnings of property for the benefit of the lienholders. Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699.

Such appointment does not affect pre-existing liens upon the property or vested rights or interests of third persons. The receiver takes his title to the property subject to all the equities to which it was subject in the hands of the debtor. Rickman v. Rickman, 180 Mich. 224, Ann. Cas. 1915C, 1237, 146 N. W. 609.

The receiver of an insolvent has no rights superior to an insolvent's assignee; the latter takes an assignment of a thing in action without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment. Williams v. Johnson, 50

sion of the receiver without the leave of the court.[18] No right of priority is fixed by the appointment, and although it prevents the acquisition of new liens it creates none.[19] A court of law has no authority to appoint a receiver of property under attachment in order to preserve it and continue the defendant's business pending the determination of the attachment litigation.[20]

§ 29. Effect of Judgments on the Receivership.

The appointment of a receiver is sometimes said to have an effect similar to that of an equitable execution although it reaches only the actual interest of the defendant in the property impounded in the receivership,[1] but the use of a receivership for the purposes of making an equitable attachment is not favored by the courts.[2]

Mont. 7, Ann. Cas. 1916D, 595, 144 Pac. 768.

Under Code Civ. Proc. 298, authorizing the appointment of a receiver where one shows that he has a lien upon property, and that there is danger of it being materially injured, a purchaser of hemp who had paid a large part of the purchase price, and the seller having failed to properly care for the crop, resulting in its damage, and refusing to deliver the crop until full payment of the contract price, a receiver is properly appointed to take charge of the hemp and preserve it until the parties' rights could be adjusted. Summers Fiber Co. v. Walker, 33 Ky. Law Rep. 153, 109 S. W. 883.

18 Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; Forest Lake Cemetery v. Baker, 113 Md. 529, 77 Atl. 853, 858.

19 Central Appalachian Co. v. Buchanan, 90 Fed. 454, 33 C. C. A. 598.

20 Berryman v. Billings Mut. Heating Co., 44 Mont. 517, 121 Pac. 280.

1 Longfellow v. Barnard, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255.

2 Ayres v. Graham Steamship Coal & Lumber Co., 150 Ill. App. 137.

In Johnson v. Garner, 233 Fed. 756, the court said: "The injunction and receivership secured to Mrs. Johnson no lien or preference over other interested parties. High on Receivers (4th ed.) § 5; Central Appalachian Co. v. Buchanan, 90 Fed. 454, 458, 33 C. C. A. 598, 23 Am. & Eng. Ency. L. 1043, 34 Cyc. 75. As a rule the existence of a receivership suspends the power of creditors to acquire any lien or advantage over other interested parties. Foster v. Field, 13 Okl. 230, 74 Pac. 190, 194; Barnett v. East Tennessee V. & G. Ry. Co. (Tenn. Ch. App.) 48 S. W. 817, 822; Attorney General v. Continen-

The natural effect of the existence of a judgment against the party over whose property a receiver is appointed is to make certain the amount or character of the judgment creditor's claim against the assets of the receivership. In other words, a judgment against the party whose property is under a receiver or against the receiver, after his appointment as such receiver, is conclusive as to the existence and amount of the

tal Life Ins. Co., 28 Hun (N. Y.) 360; Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; Besuden v. Besuden Co., 4 Ohio Dec. 144. In 34 Cyc. at page 199, it is said:

"'One who has no lien when a receiver is appointed, although the mere right to acquire one may then exist, can not proceed for that purpose by independent action after the appointment of the receiver, and gain a preference over other creditors, as in the case of the administration of insolvent's estates, in which creditors are entitled to pro rata and equitable distribution. The application of this rule depends upon the nature of the suit in which the receiver is appointed, and the rule has been held not to apply to a receiver pendente lite, where the sole object is to preserve the property for the purpose of the decree as between the parties to the suit only, without affecting the interests of third persons, as distinguished from a receivership for the general administration of assets as above mentioned.'

"The rule as indicated in the quotation has an exception into which the present case falls. In the beginning of this litigation there was no thought of settling Johnson's estate, or making an equitable distribution of his property. The order of appointment contained no direction to the receiver to give notice to creditors to file claims. The creditors were in nowise restricted in the prosecution of their demands, and it was not until January 18, 1915, more than seven months after the death of Johnson, that it became apparent to this court that it must in this proceeding distribute the estate. The entry of the judgments in favor of Ada Smith and the banking corporation, followed by the death of Johnson, had then raised those debts from the fifth to the fourth class mentioned in section 6052 of the Revised Laws of Nevada, and preferred them to general demands. This preference, having once attached, was not displaced by the subsequent determination of this court to administer the estate.

"These conclusions find abundant support in the following authorities: High on Receivers (4th ed.) § 349; Cramer v. Iler, 63 Kan. 579, 66 Pac. 617, 23 Am. & Eng. Ency. L. 1043; Waggy v. Jane Lew Lumber Co., 69 W. Va. 666, 72 S. E. 778, 779; Ellicott v. United States Ins. Co., 7 Gill (Md.) 307; Moore v. Southern States L. & T. Co., (C. C.) 83 Fed. 399."

judgment creditor's claim, but the time and manner of its payment are matters to be determined and controlled by the court which has appointed the receiver.[3] A judg-

[3] Judgments obtained against receivers are conclusive as to the existence and amount of the claim represented by it. If this were not so, it would be a useless proceeding to obtain any judgment against a receiver except in the court in which the receivership is pending. Painter v. Painter, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90; National Bank of Augusta v. Warren (Stillwell), 101 S. C. 453, 86 S. E. 21; Fordyce v. Withers, 1 Tex. Civ. 540, 20 S. W. 766; Garrison v. Texas etc. Ry. Co., 10 Tex. Civ. 136, 30 S. W. 725; Texas Pac. Ry. Co. v. Griffin, 76 Tex. 441, 13 S. W. 471; Central Trust Co. v. East Tennessee etc. Ry. Co., 59 Fed. 523; Dillingham v. Hawk, 60 Fed. 494, 23 L. R. A. 517, 9 C. C. A. 101; St. Louis S. W. Ry. Co. v. Holbrook, 73 Fed. 112, 19 C. C. A. 385; Texas etc. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. Ed. 81, 14 Sup. Ct. 250. A contrary view was, however, entertained in Missouri Pac. R. Co. v. Texas etc. Ry. Co., 41 Fed. 311, where the court reduced the amount of a judgment rendered against its receiver.

Judgments rendered in pending suits may be filed as claims in the receivership proceedings. Pringle v. Woolworth, 90 N. Y. 502; People v. Commercial Alliance Life Ins. Co., 5 App. Div. 273, 39 N. Y. Supp. 117; Mercantile Trust Co. v. Pittsburgh etc. R. Co., 29 Fed. 732; Pine Lake Iron Co. v. LaFayette Car Works, 53 Fed. 853. But see Danforth v. National Chemical Co., 68 Minn. 308, 71 N. W. 274.

A judgment against a corporation in the name of a receiver, for materials contracted for before his appointment, is valid. The order of payment should be determined by the United States Circuit Court which appointed the receiver. Harding v. Nettleton, 86 Mo. 658.

Since a receiver of a street railroad company is an arm of the court and his official acts those of the court, a judgment recovered against him in his official capacity as to any act or transaction of his in carrying on the business connected with the property is the establishment of a liability against the assets in his hands, and is conclusive as against lienors or purchasers of such assets in the absence of fraud, and this is true notwithstanding the statute providing that such a receiver shall be subject to the general jurisdiction of the court in which the receiver was appointed so far as necessary to the ends of justice. Manhattan Trust Co. v. Chicago Electric Traction Co., 188 Fed. 1006.

A judgment creditor is not affected by the appointment of a receiver for the debtor in proceedings to which he was not a party and in which he was not required to intervene. Central Coal & C. Co. v. Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383.

The lien of a judgment against a corporation, obtained after the appointment of a receiver, but before the filing of his official bond, is not destroyed by the filing of

ment may be complete and perfect and have full effect regardless of the fact whether the party has a right to issue an execution under it.

such bond, although his title dates back to the time of the appointment for the preservation and protection of the property, where the judgment would have been rendered before his appointment but for the interposition of a frivolous demurrer. Re Lewis & Fowler Mfg. Co., 89 Hun 208, 34 N. Y. Supp. 983.

One who purchases property at a time when all the property of the grantor is subject to a judgment lien is, as against a receiver subsequently appointed over the grantor's property, entitled to have the remainder of the property in his hands subjected to the lien in exoneration of that purchased by him. Semple v. Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509.

If on a day when the court adjudicates a corporation is insolvent and appoints a receiver in whom title to the company's property vests a judgment is recovered and entered at an earlier hour, the judgment is a preferred claim on the proceeds of the sale of the company's land. Gallagher v. True American Pub. Co., 75 N. J. Eq. 171, 138 **Am. St. Rep.** 514, 71 Atl. 741.

A judgment against a receiver operates only as an established claim against the assets of the receivership. Arnold v. Penn, 11 Tex. Civ. 325, 32 S. W. 353.

Under Act March 3, 1887, ch. 373, 3, 24 Stat. 554 (U. S. Comp. St. 1901, p. 582), which authorizes the suing of a federal receiver in respect of any act of his in carrying on the business without the previous leave of the court which appointed him, but such suit to be subject to the general equity jurisdiction of said court, a judgment rendered against such a receiver by a state court in an action brought against him to recover damages for the death of an employee is conclusive on the federal court as to the existence and amount of the plaintiff's claim; but the time and manner of its payment must be controlled by such court. (C. C. 1909) Meyer Rubber Co. v. Georgetown & W. R. Co., 174 Fed. 731.

Under Act Aug. 13, 1888, ch. 866, 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), which authorizes the suing of a federal receiver in respect of any act of his in carrying on the business without the previous leave of the court which appointed him, but such suit to be subject to the general equity jurisdiction of said court so far as the same shall be necessary to the ends of justice, a judgment rendered against such a receiver by a state court in an action brought against him for the death of an employee is conclusive on the federal court as to the right to recover, and the amount that should be recovered. (1910) Willcox v. Jones, 177 Fed. 870, 101 C. C. A. 84.

The recovery of a judgment against partners after the appointment of a receiver does not create a lien upon the partnership property in his hands, and such property can not be levied upon by

Frequently judgments are rendered against or in favor of receivers in courts other than the one having juris-

execution or reached by garnishment, because it is in custody of the court. Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172.

Where a suit to foreclose a lien which is pending at the time of appointing a receiver is prosecuted to judgment without leave of the court having jurisdiction of the receivership, the plaintiff will not by his judgment obtain any priority of payment out of the assets of the receivership. Blair v. St. Louis etc. R. Co., 25 Fed. 2.

A judgment against a receiver does not give the judgment creditor any preference over other creditors who have established their claims, but simply fixes the amount due and allows him to come in and share any fund administered by the receiver. National Bank of Augusta v. Warren (Stillwell) 101 S. C. 453, 86 S. E. 21.

Execution can not be issued in a judgment rendered against a receiver. The time and manner of satisfying it are under the control of the court in which the receivership is pending. Irwin v. McKechnie, 58 Minn. 145, 49 Am. St. Rep. 495, 26 L. R. A. 218, 59 N. W. 987; Dillingham v. Hawk, 60 Fed. 494, 23 L. R. A. 517, 9 C. C. A. 101.

A judgment against a receiver can not be enforced by execution. The proper practice is to apply to the court for an order to enforce it. Painter v. Painter, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90.

Although a pending suit may be prosecuted to judgment after the appointment of a receiver for the defendant, the judgment creditor can not levy under it on the receivership assets. Temple v. Branch Saw Co., 39 Tex. Civ. 606, 88 S. W. 442.

A judgment creditor having a judgment upon land in the possession of a receiver can not levy execution on it, but must apply to the court having jurisdiction of the receivership, which will protect his interests when selling the land. Wiswall v. Sampson, 14 How. (55 U. S.) 52, 14 L. Ed. 322.

A receiver may be concluded by a judgment in an action in which he was not a technical party, but caused the corporation of which he was receiver to enter its appearance in another state in the case and received certain benefits from the litigation. Smith v. United States Express Co., 135 Ill. 279, 25 N. E. 525.

But a judgment which was rendered in another state against a corporation over which a receiver has been appointed, the receiver not being a party to the suit, is not binding upon the receiver in the state of his appointment. McCulloch v. Norwood, 58 N. Y. 562.

A finding, however, as to the existence of a certain fact in an action by a receiver is not res judicata as to such fact in a subsequent action between other parties. Brown v. Clow, 158 Ind. 403, 62 N. E. 1006.

In a suit by a receiver appointed in supplementary proceedings and not in a general creditors' proceeding, to recover a note claimed by the receiver to belong

diction of the receivership, either under leave of court specifically given or under general permissive orders or statutory permission, and in such cases the question naturally arises as to how far such judgments are conclusive upon the parties. As has been shown, the general rule is that where the court rendering the judgment had jurisdiction of the parties and subject matter, the judgment imports the same conclusiveness as any judgment rendered in other cases under like jurisdictional facts. Basing his ruling upon the theory that the receivership is an equity proceeding, it was at one time believed by Judge Pardee [4] that a judgment rendered in a court other than that of the receivership was subject to revision and correction by the receivership court, but that

to the debtor, a judgment against the receiver does not bind the general creditors, although it binds the creditor at whose instance the supplementary proceedings were commenced. Southern Loan etc. Co. v. Benbow, 131 N. C. 413, 42 S. E. 896.

A judgment against the receiver rendered in a court other than that of the receivership is not evidence against persons not parties to it. Sullivan v. Texas etc. Coal Co., (Tex. Civ.) 60 S. W. 330. (The above case was reversed on a question relating to the priority of liens, in 94 Tex. 541, 63 S. W. 307.)

[4] Missouri Pac. R. Co. v. Texas etc. Ry. Co., 41 Fed. 311. In this case a judgment had been rendered in a state court against the receiver of a railroad for $10,000, but the federal court reduced the amount of the judgment to $5000. The court in the course of his opinion, after admitting that the state court had authority to entertain the suit, said: "However this may be, it is clear that where a judgment is so obtained, and is brought to the court of original jurisdiction to be ranked as a lien upon the trust funds, such judgment is subject to its general equity jurisdiction; and the duties of determining the rightfulness of the judgment, including whether the amount is just, is still imposed upon this court, as it would be if it had ordered an issue tried at law; for this court must still, in the language of the statute, exercise a 'general equity jurisdiction, so far as the same shall be necessary to the ends of justice.' . . . For this reason I am of the opinion that in the present intervention the court may inquire as to whether or not the intervenor has a lien, and, if so, the rank and amount thereof, and that in such inquiry the court is not concluded in any way by the verdict and judgment produced from the district court of Harrison County, Texas."

rule is not sustained by authority nor do we believe that it is sustained by sound reasoning. In our opinion the correct rule in cases of this sort was set forth by Judge Caldwell in a well considered case [5] in which he said: "The court is asked to qualify the order relating to judgments recovered in state courts by adding a proviso to the effect that, when it is shown that the judgment is for a grossly excessive amount, this court will reduce it to a just and reasonable sum. This court will not entertain the suggestion that its receiver will not obtain justice in the state courts. The act of Congress gives the right to sue the receiver in the state.[6] The state court has jurisdiction of the parties and the subject matter, and its judgment against a receiver of this court is as final and conclusive as it is against another suitor. The right to sue the receiver in a state court would be of little utility if its judgment could be annulled or modified at the discretion of this court. It is open to the receiver to correct the errors of inferior courts of the state by appeal to the Supreme Court. But this court is not invested with appellate or supervisory jurisdiction over the state courts, and can not annul, affect, or modify their judgments."[7]

The reasoning and conclusion of Judge Caldwell were approved by other cases in the federal courts, including the United States Supreme Court.[8]

5 Central Trust Co. v. St. Louis etc. Ry. Co., 41 Fed. 551.

6 Citing Central Trust Co. v. St. Louis etc. Ry. Co., 40 Fed. 426.

7 Citing Randall v. Howard, 67 U. S. (2 Black) 585, 17 L. Ed. 269; Nougue v. Clapp, 101 U. S. 551, 25 L. Ed. 1026.

8 Texas etc. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. Ed. 81, 14 Sup. Ct. 250.

In Central Trust Co. v. East Tennessee etc. Ry. Co., 59 Fed. 523, Judge Lurton, afterwards Justice of the United States Supreme Court, said: "A wide difference of opinion has been entertained as to the power of the court over judgments obtained against a receiver in courts other than that appointing the receiver. Central Trust Co. v. St. Louis etc. Ry. Co., 40 Fed. 426; Eddy v. Wallace, 49 Fed. 801, 1 C. C. A. 435; Missouri Pac. R. Co. v. Texas Pac. Ry. Co., 41 Fed. 311. In the two cases first

Where the receivership property is subject to the lien of a judgment, as in the case of a judgment against one having real estate, a receiver appointed subsequently takes the property subject to such lien.[9]

cited it was held that such judgments were conclusive. In the case reported in 41 Fed. it was held that it was within the power of the court, when such judgments were filed in the case in which the fund was being distributed, to look into them, and allow the whole, or half, or any part, as justice might require. The latter view seems to have been entertained by Mr. Justice Jackson, for, while judge of this circuit, he made an order in this cause, which has not been revoked, requiring all judgments in other courts in suits prosecuted without leave of the court, to be filed by intervening petition in the main cause, together with a full bill of exceptions showing the evidence upon which the judgment rested. That the judgment is conclusive, so far as to be regarded as a judicial ascertainment of the liability, and of the amount, is probably the better view. Speaking of the effect of the proviso, the learned Chief Justice, in the case of Texas etc. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. Ed. 81, 14 Sup. Ct. 250, said that 'the right to sue without resorting to the appointing court, which involves the right to obtain judgment, can not be assumed to have been rendered practically valueless by his former provision in the same section of the statute which granted it.'"

[9] Gere v. Dibble, 17 How. Pr. (N. Y.) 31. The same is true where at the time of the appointment the property is subject to a general tax lien. Duryee v. United States Credit etc. Co., 55 N. J. Eq. 311, 37 Atl. 155.

In Ellicott v. United States Ins. Co., 7 Gill (Md.) 307, the court decided that a creditor who had obtained a judgment in a court of law during the pendency of proceedings in equity, in which a receiver had been appointed, acquired thereby a lien on the defendant's real property in the hands of the receiver, quite as good as if no receiver had been appointed. The opinion of the court shows the reason for so deciding was that the only object in granting the receivership was to provide for safe keeping of the property, and that other creditors were not restrained from attempting to establish their demands.

In Moore v. Southern States Land & Timber Co. (C. C.) 83 Fed. 399, after other creditors had obtained judgments against the defendant during the existence of the receivership, the court determined to enlarge the scope of the proceedings, and to make an equitable distribution of all property of the defendant. This change, however, in nowise disturbed the preference already established by the judgments, though, if the larger purpose had characterized the proceedings from their inception, no such advantage could have been acquired. The facts in the case were as follows: There was a suit to foreclose a mortgage on

Where a judgment is rendered against a receiver in his official capacity, it creates no personal liability against him, and should be rendered against him as receiver and made payable in due course of administration of the receivership.[10] But where the judgment ren-

the property of an insolvent corporation; a receiver was appointed, and a decree pro confesso entered. Some time later there was an amended decree, in which the court indicated for the first time an intention to make an equitable distribution of the funds among all the creditors, and it then provided for notice to creditors to file their claims. During the time which intervened between the appointment and the amended decree, several creditors, not being restrained from bringing suits against the corporation, obtained judgments. The court held that the interveners who had thus obtained such judgments should have a lien on all the property and effects of the defendant not covered by the mortgage, and that their right to be paid out of the property of the debtor was paramount to that of other creditors.

10 McNulta v. Ensch, 134 Ill. 46, 55 24 N. E. 631 McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452; Robinson v. Kirkwood, 91 Ill. App. 54; Irwin v. McKechnie, 58 Minn. 145, 49 Am. St. Rep. 495, 26 L. R. A. 218, 59 N. W. 987; Combs v. Smith, 78 Mo. 32; Woodruff v. Jewett, 37 Hun (N. Y.) 205.

In Painter v. Painter, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90, the court said: "The judgment should be against the receiver in his official capacity, leaving the matter of its enforcement to be determined by the court having jurisdiction of the receivership. . . . The manner of paying the judgment is under the exclusive control of the court in which the receivership proceeding is pending, and to it there must be an application for its payment. Execution can not be issued against a receiver; the judgment only operates as an established claim against the assets in the possession of the receiver."

Suits against a receiver are in effect only against the receivership, and the judgment should be only against the funds in his hands. Smith v. Jones Lumber & Mercantile Co., 200 Fed. 647.

Judgment against a receiver should not be rendered in his individual capacity, nor should an execution be issued against him. A proper form of judgment should provide for payment in due course of administration. Lyons v. Sampsell, 168 Ill. App. 542.

The judgment or decree directing a general receiver to disburse a fund in his hands should not be personal, and it should show on its face that it is against him in his official character, and that the amount is to be paid out of the fund held by him in his official character, in the due course of the administration of the affairs of the receivership. United States Blow-

dered against the receiver is on account of property or funds which had been placed under his charge but lost through some fault, misconduct, or mismanagement on his part, the judgment may properly be entered against him in his personal capacity.[11]

A party who has a judgment against a debtor over whom a receiver has been appointed is not obliged to resort to the receivership proceedings to enforce its payment but may, if he so desires, await the termination of the receivership and then enforce it in the usual way.[12]

A suit which was pending at the time of the appointment of a receiver may be prosecuted to a judgment.[13] And where a receivership is terminated, a pending suit commenced by the receiver may be prosecuted to judgment in the name of the receiver.[14]

pipe Co. v. Spencer, 61 W. Va. 191, 56 S. E. 345.

No process will be issued on a judgment rendered against a receiver except by direction of the court having jurisdiction of the receivership, or unless a statute allows it to be done. Abbey v. International etc. Ry. Co.'s Receivers, 5 Tex. Civ. 261, 23 S. W. 934; Arnold v. Penn, 11 Tex. Civ. 325, 32 S. W. 353. The manner of enforcing such judgments is under control of the receivership court. Dillingham v. Russell (Anthony), 73 Tex. 47, 15 Am. St. Rep. 753, 3 L. R. A. 634, 11 S. W. 139.

The contention that a judgment creditor should abide a final settlement of the accounts of a receiver, and that in obtaining an order to enforce the judgment he should make other creditors parties, is without merit where it does not appear that payment of the judgment will exhaust the estate or prevent creditors from being paid. Painter v. Painter, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90.

The judgment will not, however, have any priority over other claims. Clinkscales v. Pendleton Mfg Co., 9 S. C. 318.

11 United States Blowpipe Co. v. Spencer, 61 W. Va. 191, 56 S. E. 345.

12 Heath v. Missouri etc. Ry. Co., 83 Mo. 617; Wilder v. New Orleans, 87 Fed. 843, 31 C. C. A. 249.

13 Hasselman v. Japanese Development Co., 2 Ind. App. 180, 27 N. E. 318, 28 N. E. 207.

14 Hall v. Henderson, 126 Ala. 449, 85 Am. St. Rep. 53, 61 L. R. A. 621, 28 So. 531.

§ 30. Rights Obtained by Levy of Writ of Execution.

The general rule is that property in the possession of a receiver being in the possession of the court can not be taken from him by means of writs of attachment or execution and the like.[1] The diversity of decisions on

1 Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606; Holbrook v. Ford, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091; Chalmers v. Littlefield, 103 Me. 271, 69 Atl. 100; Gardner v. Caldwell, 16 Mont. 221, 40 Pac. 590; Skinner v. Maxwell, 68 N. C. 400; Coe v. Columbus etc. R. Co., 10 Ohio St. 372, 403, 75 Am. Dec. 518; Thompson v. McCleary, 159 Pa. St. 189, 28 Atl. 254; Jones v. Moore, 106 Tenn. 188, 61 S. W. 81; Grosscup v. German Sav. etc. Soc., 162 Fed. 947; Wiswall v. Sampson, 14 How. (55 U. S.) 52, 14 L. Ed. 322.

Property in the hands of a receiver, being in custody of the court, can not be taken from him by writ of attachment or execution. Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491; Hooper v. Winton, 24 Ill. 353.

No title passes by a levy on money belonging to and in the hands of a receiver. Hundley Dry Goods Co. v. Albien, 32 S. D. 60, 142 N. W. 49.

As a general rule courts of equity will not permit a party who has defied their authority, by seizing under execution property in their possession, to excuse himself on the ground that the order appointing a receiver was irregular or improvidently made. Russell v. East Anglian R. Co., 3 Macn. & G. 104.

Property can not be subjected to garnishment when in the hands of a receiver. This is on the general principle that property in the custody of the law can not be reached by the garnishment of its legal custodian or otherwise. Blum v. Van Vechten, 92 Wis. 378, 66 N. W. 507.

Real estate in the possession of a receiver pending a suit relative to its title will not be subject to levy under an execution to satisfy a judgment rendered subsequent to the appointment of the receiver. Edwards v. Norton, 55 Tex. 405.

A sale of the equity of redemption of property which is in the possession of a receiver as the result of a foreclosure proceeding will not pass title. Grosscup v. German Sav. etc. Society, 162 Fed. 947.

In some cases the courts have in our opinion unduly protected the possession of the receiver. Thus it has been held that a sale under execution, made without permission of the receivership court, would not pass title to the property sold, even though the levy was made prior to the appointment of the receiver. Campau v. Detroit Driving Club, 130 Mich. 417, 90 N. W. 49; Walling v. Miller, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65. Under the circumstances above shown, the property might properly be considered already in the custody of the court. Doubtless, if the cir-

the subject is merely in respect to whether the property attempted to be taken from the receiver under such writ

cumstances of the sale had any elements of fraud or oppression connected with them, and there was a probable equity belonging to the receivership above the amount of the judgment, a court would restrain the sale.

The case of Wiswall v. Sampson, 14 How. (55 U. S.) 52, 14 L. Ed. 322, is often cited as authority to the proposition that an execution sale, without leave of court, of property in possession of a receiver, will pass no title. The case, however, does not sustain the proposition in a full degree. The demanded premises in that action had belonged to one Ticknor, who had conveyed them in fraud of creditors to Day prior to December, 1840. At that date plaintiff's lessors recovered a money judgment against Ticknor, execution upon which was returned nulla bona. In 1842 another creditor recovered judgment against Ticknor, and thereafter commenced a suit in equity to set aside the conveyance to Day. He succeeded in his action, and after the conveyance to Day was set aside a receiver of the property was appointed. While the receiver was in possession plaintiff's lessors, without leave asked or granted, sold it under an alias execution issued upon his judgment of 1840. The defendant in the ejectment suit claimed under the receiver, and it was held in his favor that the execution sale passed no title. The reason for so holding is obvious. By the conveyance to Day the land had been put beyond the reach of creditors, and had been made subject to their claims solely by means of the action in equity to set that conveyance aside. The fund, in other words, was the creation of the court appointing the receiver, and was necessarily subject to its disposition, to be applied to the satisfaction of the claims of such creditors only as could show a right to come in and share in the distribution. To hold, in such a case, that the execution sale passed a title superior to that of the receiver—title relating back to the date of the first judgment—would have been to hold that a creditor by a prior judgment may stand by while a junior creditor at his sole expense and risk uncovers assets of the debtor, and then step in and reap the entire benefit, which is neither equity nor law. The decision in that case, therefore, must be limited in its effect by reference to the facts of the case under consideration.

Where a receiver is appointed in a suit to dissolve an insolvent corporation, a sale of its real estate under an execution levied before the appointment of the receiver will not pass title. Ellis v. Vernon Ice etc. Co., 86 Tex. 109, 23 S. W. 858. We believe that the case last cited is distinguishable on account of the complete sequestration of the property of the corporation by the dissolution proceedings.

The appointment of a receiver will not deprive a sheriff of the right to sell personal property

is in fact in the custody of the court. The question sometimes arises in respect to property claimed by the receiver but which is alleged to belong to other parties who are judgment debtors under the judgment which is sought to be executed upon. In such cases, if the property does not belong to the receivership, it is naturally subject to execution process.[2] Perhaps the most difficult

seized under an execution where it was seized by him prior to the appointment. A distinction observed was that in the case of real estate the sheriff would not take possession of the property as in the case of personal property. Lake Bisteneau Lumber Co. v. Mimms, 49 La. Ann. 1283, 22 So. 730; In re Hall & Stilson Co., 73 Fed. 527.

But in Cole v. Oil-Well Supply Co., 57 Fed. 534, the federal court refused to require the sheriff to return to a receiver property which he had seized under an attachment issued by a state court prior to the appointment of the receiver.

The court appointing the receiver should upon application allow the judgment creditor to sell property upon which he had levied on an execution prior to the receivership. Cass v. Sutherland, 98 Wis. 551, 74 N. W. 337.

Property has been held to be in custody of law where a receiver had been appointed but had declined to act. Skinner v. Maxwell, 68 N. C. 400.

This exemption from execution has been held to continue, though the order appointing the receiver has been suspended by the giving of a sufficient supersedeas bond, and the consequent surrender of the property by the receiver. Stanton v. Heard, 100 Ala. 515, 14 So. 359.

[2] If the title to land held by a receiver is decreed by the court to be vested in another party, it becomes subject to execution for the debts of such party, even though the receiver is not formally discharged by the court. Very v. Watkins, 23 How. (64 U. S.) 469, 16 L. Ed. 522.

Property which belongs to another party who is not a party to the action in which a receiver has been appointed and for which a receiver has not been asked is not in the custody of the court so as to preclude its seizure under legal process, although the receiver has wrongfully taken possession of it. Farmers' etc. Nat Bank v. Scott, 19 Tex. Civ. 22, 45 S. W. 26.

The property of a third person may be levied upon and sold, although it is to some extent connected with the property in the hands of a receiver. The purchaser at an execution sale of such property obtains no greater rights than the original judgment creditor could have asserted. Wheaton v. Spooner, 52 Minn. 417, 54 N. W. 372.

So also where the receiver takes possession of property not embraced within the order of receivership, his possession will not be

question to be encountered in this connection is the one whether the nature of the receivership is such that it sequesters all of the property of the defendant or whether it merely sequesters specific property upon which the plaintiff claims some sort of a lien. If the effect of the receivership is such as to place all of the property of the defendant in the receivership, then the general rule is that no interference with its possession by the receiver will be permitted, but if the receivership is only extended to a part of his property or for some specific purpose, then the execution of such writs, where they do not interfere with the purpose of the receivership, will not be prohibited. The question frequently arises in connection with receivers on behalf of mortgagees, in respect to receiverships for partnerships and corporations, and in the determination of whether leave to sue the receiver ought to be allowed.[3]

protected against sale under execution, since the property is not in the custody of the court. St. Louis etc. Ry. Co. v. Whitaker, 68 Tex. 630, 5 S. W. 448.

One securing the appointment of a receiver to take possession of the property of defendant and an injunction against alienation does not for that reason obtain a lien or preference over other interested parties. Johnson v. Garner, 233 Fed. 756.

Though the property for which a receiver has been appointed is partly situated in another state, it has been held that the title thereto and the constructive possession thereof rest in him by virtue of his appointment, so that a citizen of the state wherein he is appointed can not proceed against such property in the other state without the sanction of the courts of his domicile, and, if he insists upon doing so, that he may be punished for his contempt. Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606.

3 The appointment of a receiver of a corporation for purposes of liquidation of all of its affairs amounts to a sequestration of all of its property. Temple v. Glasgow, 80 Fed. 441, 25 C. C. A. 540.

But ordinarily a receivership does not operate as an attachment or execution, and is no more than a sequestration of property for safekeeping, leaving the question as to who is entitled thereto for subsequent determination. Johnson v. Garner, 233 Fed. 756.

The effect of the appointment of a receiver, in a suit brought by one partner against another for the dissolution of the partnership and the settlement of its affairs, has been considered in a series of cases in California. The court held

Of course the best practice in case a receiver is in possession of property claimed by a third person is for

that until the dissolution of the partnership is decreed and the pro rata distribution of its assets ordered among the creditors, they are, notwithstanding the appointment of a receiver, at liberty to pursue their remedies at law, and entitled to retain any liens resulting from their diligence in such pursuit. The court was of the opinion that the creditors were not interested in the outcome of the suit, that the partners had control of the proceedings, and until a dissolution of the partnership had been decreed the partnership business was still in force. Adams v. Hackett, 7 Cal. 187; Adams v. Woods, 8 Cal. 152, 68 Am. Dec. 313; Adams v. Woods, 9 Cal. 24.

In Petaluma Sav. Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177, a receiver was appointed over the property of the husband in a suit for divorce which had been pending a long time, but prior to the appointment of the receiver a judgment had been rendered in another county in the state against the husband, which judgment was unsatisfied; transcripts of the judgment had been filed in several counties in which the judgment debtor owned land. The receiver was not in the actual possession of any of the land. The judgment creditor, while disclaiming any intention to submit itself to the jurisdiction of the court in the divorce action in which the receiver had been appointed, prayed the court to make an order directing its receiver not to interfere with the officers of the several counties wherein the judgment debtor had land in the lawful execution of the judgment. The trial court, however, refused to so order on the ground that the original judgment in the divorce suit, which was prior to the other judgment, was a prior lien on the property of the debtor whereupon the judgment creditor commenced mandamus proceedings, alleging that the judgment debtor was insolvent, had no personal property, and petitioner had no other remedy for the enforcement of its legal rights. The petitioner asked the court to determine whether it had a right to execute the judgments without leave of court, or if leave was necessary to issue its writ of mandate as prayed on the ground that the trial court had no discretion in the matter but to grant the request. The court, in holding that the judgment creditor had a right to execute the judgment without leave of court said:

"The only authority for the appointment of a receiver in a divorce suit is to be found in section 140 of the Civil Code, which reads as follows: 'The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.' So far as I am advised, this section has not been the subject of judicial construction, and the powers and duties of a receiver appointed in

such person to seek the permission of the receivership court to assert his claim in whatever form of proceeding

pursuance of its provisions have not been defined; but it would not seem difficult to determine in what cases and for what purposes he is to be appointed. The whole object of his appointment is to provide security for the payment of such allowance as is made for the maintenance of the divorced wife, and this would be accomplished by investing him with the title and control of some productive property of the husband, out of the income of which he could pay such allowance, or by authorizing the sale of property to create a fund, the income of which would be applied to the same purpose. In either event, or in any case, the receiver would take the property of the husband, or such portion of it as the court might designate, subject to all prior liens and encumbrances, and the right to enforce such liens could not be made to depend upon the mere volition of the court or judge making the appointment. It would necessarily follow, therefore, either that such judge would be invested with authority to determine the validity and priority of all liens upon the property and that all holders and claimants of such liens must make themselves parties to the divorce suit, and submit themselves to the jurisdiction of the court in which it was pending, or that they must have the right, with or without asking leave of the court, to take such proceeding elsewhere as the law exacts for preserving and enforcing their liens according to their priority. Which of the two positions is assumed by respondent is not, as above stated, very clearly indicated by the argument of counsel, and neither is it very clearly to be implied from the order denying plaintiff's application for leave to sell, or the ground upon which it was based, viz., that the interlocutory judgment of May 15, 1889, in the case of White v. White, was a lien prior in time and in right upon the property of George E. White. I shall not, therefore, devote much space to the discussion of a doctrine which is not distinctly asserted, and has nothing to support it. It is enough to say that there is nothing in the law of California to justify the contention—if such is the contention—that when a wife sues her husband for a divorce, and obtains the appointment of a receiver of his property for her benefit, not only their community property, but his entire separate estate, are effectually sequestrated in the hands of the court in which the action for divorce is pending as they would be in case of death or insolvency; and that henceforth all his creditors must come into that court and by motion or petition in that action seek, not the relief to which in the ordinary course of law they would be entitled, but such relief as it may adjudge and be able to afford in the exercise of a plenary power to dispose of the impounded estate and distribute its proceeds. This proposition being disposed of, the alternative above stated alone remains: It

appears to be most appropriate under the procedure in

must be true that the holders and claimants of prior liens and encumbrances upon the property held or claimed by the receiver, not being proper parties to the divorce suit or subject to the jurisdiction of the court in which it is pending, have the right to take such proceedings elsewhere as the law exacts for preserving or enforcing their liens according to their priority. If, for instance, real property has been mortgaged, the holder of the mortgage must commence his action to foreclose in the county where the land is situate within a limited time, or his security and claim are lost, just as, in the present case, the plaintiff must sell the lands subject to the lien of its judgments within two years or lose its security. And, if these steps must be taken, what right has the court appointing the receiver to prevent them? What discretion has it to refuse leave to proceed, if leave must be requested? Certainly not an absolute discretion, for that would amount to a power of confiscation of property rights, which are as full, as complete, and as much entitled to protection as any that exist. It must be, then, that such discretion as the court appointing the receiver has to prevent proceedings by adverse claimants to the property in the custody of the receiver is a regulated discretion which can not be abused. This proposition I do not understand to be contradicted, but the respondent contends that there has been no abuse of discretion, and that even if there had been, mandamus will not lie to compel a judge to make an order which he can only make in his judicial capacity, and which, acting in such capacity, he has refused to make. As to whether there has been any abuse of discretion, that depends upon the scope of the inquiry which a court is entitled to make in passing upon such an application as the plaintiff presented to respondent. It is undoubtedly the prevailing doctrine that courts of equity will not permit their receivers to be sued, or property in their possession to be seized or sold, without leave asked and granted, but since the refusal of leave to sue in other tribunals or to enforce the judgments of other courts would in many cases destroy or impair rights which the court appointing the receiver has no power to conserve, it is the boast of such courts that they never refuse leave in a proper case. If a claimant of real property, under title adverse to that of the parties represented by the receiver, asks leave to commence his action of ejectment, no court would hesitate to grant his motion. It would not attempt to try the question of title—a question appertaining to another forum—with a view in denying leave to sue, if, in its opinion, the title asserted was not a good one.

"Upon the same principle, if a receiver of a superior court of San Francisco should be in possession of land situate in some other county, and subject to a mortgage, the application of the mortgagee for leave to make the receiver a defendant would be granted without any attempt to

inquire into the validity of the mortgage, or its priority as a lien, for those are precisely the questions to be determined in the action to foreclose, which, by the express mandate of the constitution, must be commenced in the county where the land is situated (Const., art. VI., sec. 5). If, in such a case, the court appointing the receiver should require the mortgagee to satisfy it of the validity of the mortgage, or, in other words, to litigate the whole question of the mortgagor's liability, and to establish it on the motion as a condition precedent to any permission to sue the receiver in the county where the land was situate, it would be as much an abuse of discretion as if it should make its leave to sue conditional upon a waiver by the mortgagee of all claim of priority as against the receiver; for the doctrine to be deduced from the authorities cited in the briefs is, that whenever the case is such that the court appointing the receiver can not protect an asserted right in the cause before it, the party will be allowed to proceed in the proper forum to establish his right if he can, and to enforce it by appropriate means. But the plaintiff here is not asking leave to sue the receiver. It merely asks permission to take the step which the statute makes imperative in order that it may preserve such right as it has, and the fact that its liens may be subsequent and subordinate to the lien claimed by Frankie White does not seem to be a sufficient ground for destroying them altogether. The holder of a second lien is entitled to protect it, and to preserve such rights as it gives him, and the only way this plaintiff can preserve what it has is to sell the land subject to its liens within the two years prescribed by the statute (Code Civ. Proc., sec. 671). If it can not sell without leave, and no leave is granted, its liens, such as they are, will soon expire, after which it will become a mere general creditor holding a claim subordinate, not only to the supposed lien of Frankie White, but to all liens of subsequent mortgagees and judgment creditors, if any such there be. What excuse, then, does the assumed priority of Frankie White's lien afford for subjecting the plaintiff to this loss, or risk of loss? If her lien is prior, the sale of the land will not destroy her priority; it will merely preserve and perpetuate such rights as the plaintiff has, and will enable it, after her claims are satisfied, to take what may be left of White's estate in preference to those whose liens are of lower rank, or who have no liens at all, and the refusal itself—on the assumption that leave to sell is necessary—was clearly an abuse of discretion. This brings us to the question whether leave to sell was necessary, and, if so, whether mandamus lies to compel the respondent to make the order. To my mind it seems clear that if the first question were answered in the affirmative the second must receive the same response, for if the exercise by plaintiff of its clear legal right to preserve its liens depends upon the permission of the respondent, it can not deny the exercise of such right for a reason that is absolutely futile and groundless. But I am of the opinion that no leave to sell was required,

force in the jurisdiction,[4] since any other practice would give rise to conflicts of jurisdiction between the courts which would have a tendency to impair the preservation of the property.[5]

Of course in accordance with the general rule that the appointment of a receiver will not deprive any one of any liens already in existence, the lien acquired by the issuance of an execution will not be lost by the appointment.[6]

§ 31. Time of Vesting of Possession of Receiver.

As has been seen in the preceding sections, the time when a receiver is entitled to the possession and has taken possession of the property belonging to the receivership is highly important in fixing the priority of claims against the estate. The gist of the question lies in the fact that the property does not come into the custody of the court until it comes into the possession of the receiver who is the arm of the court. From the principle that the receiver holds the property for the benefit of

either to avoid the commission of a contempt or in order to pass a title strictly corresponding to the actual rank of plaintiff's lien, as to which it is unnecessary to express an opinion. A sale by plaintiff would involve no physical disturbance of such possession as the receiver may have, and, therefore, would be no contempt of court. The rights and relative positions of the parties would not be changed. The title transferred would be good as against subordinate liens, and subject to such as were superior, and the question of title would be the proper subject of litigation in actions commenced in the counties where the lands are situate between those claiming under the receiver and those claiming through the execution sales, as was the case in Wiswall v. Sampson, 14 How. (55 U. S.) 52"; 14 L. Ed. 322.

4 Dugger v. Collins, 69 Ala. 324; St. Louis etc. R. Co. v. Hamilton, 158 Ill. 366, 41 N. E. 777; Riggs v. Whitney, 15 Abb. Pr. (N. Y.) 388; Thompson v. McCleary, 159 Pa. St. 189, 28 Atl. 254; In re Day, 34 Wis. 638.

5 Robinson v. Atlantic etc. Ry. Co., 66 Pa. St. 160.

6 Re Muehlfeld etc. Piano Co., 12 App. Div. 492, 42 N. Y. Supp. 802.

the party whom the court may ultimately decree to be entitled to it, it naturally follows that the possession of the prevailing litigant will be related back to the time of the appointment of the receiver whenever to do so will benefit him,[1] although for some purposes, such as in the case of claiming damages on account of the receivership, it will not be held that his possession was continuous.[2]

The general rule is that right of possession to the property constituting the receivership vests by relation back to the time of the original order of appointment even though the proceedings are not perfected until a later date. In other words, after the time of the signing of the order of appointment, the possession of the receiver is held to be superior to that of persons who thereafter seek to obtain a lien by means of attachment, judgment, or execution.[3] The decisions supporting this

1 Beverley v. Brooke, 4 Gratt. (Va.) 187, 212.

2 Sturgis v. Knapp, 33 Vt. 486.

In the case of In re Butters' Estate, 13 Ir. Ch. (N. S.) 456, it was said: "The general proposition is, that the possession of the receiver is that of all parties to the suit, according to their titles. As between the owner and incumbrancers, it is for some purposes the possession of the incumbrancers, who have obtained or extended the receiver; as between the owner whose possession has been displaced and a third party, it is the possession of the former. The receiver is in fact his agent; all rents are applied to his use, either by paying his debts or paramount charges, or by being handed over to him."

3 Saginaw County Sav. Bank v. Duffield, 157 Mich. 522, 133 Am. St. Rep. 354, 122 N. W. 186; Maynard v. Bond, 67 Mo. 315; Generotzky v. Barnay Hotel Co., 85 N. J. Eq. 63, 95 Atl. 865; In re Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665; In re Schuyler's etc. Boat Co., 136 N. Y. 169, 20 L. R. A. 391, 32 N. E. 623; Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45; Roberts v. Bowen Mfg. Co. 169 N. C. 27, 85 S. E. 45; Ardmore Nat. Bank v. Briggs Machinery & S. Co., 20 Okla. 427, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, 94 Pac. 533; Pope v. Ames, 20 Ore. 199, 25 Pac. 393; Clinkscales v. Pendleton etc. Co., 9 S. C. 318; Regenstein v. Pearlstein, 30 S. C. 192, 8 S. E. 850; Connecticut River Banking Co. v. Rockbridge, 73 Fed. 709.

After the appointment of a receiver, the property to which the receivership relates is in the custody of the law, even before he qualifies, so as to exempt it from

rule are based on the idea that the receivership proceed-

the levy of an attachment, and such levy can confer no right on the attachment creditor or on those claiming under him. Texas etc. Ry. Co. v. Lewis, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647.

A receiver's right to the possession of the property of the party of which he is receiver dates from his appointment as such and not from the commencement of the action in which he is appointed. American Clay Machinery Co. v. New England Brick Co., 87 Conn. 369, 87 Atl. 731.

Where the court in a suit to set aside a preferential assignment by one of the partners and appoint a receiver made an order for the appointment, but referred the question who should be appointed to a master, the title of the receiver was held to refer back to the order for the appointment and thereby defeat an attempted levy made after the original order. Rutter v. Tallis, 5 Sandf. (N. Y.) 610.

Where an appeal is taken from the order of appointment and a stay of proceedings granted, the receiver does not take possession until the appeal has been heard and decided. Cook v. Cole, 55 Iowa 70, 7 N. W. 419.

It is not necessary for the receiver to make an actual seizure of the property in order to become vested with the right to its possession. Longstaff v. Hurd, 66 Conn. 350, 34 Atl. 91; Richards v. People, 81 Ill. 551; Mosher v. Supreme Sitting etc., 88 Hun 394, 34 N. Y. Supp. 816; People v. Central City Bank, 53 Barb. (N. Y.) 412; In re Schuyler's etc. Boat Co., 64 Hun 384, 19 N. Y. Supp. 565 (affirmed in 136 N. Y. 163, 20 L. R. A. 391, 32 N. E. 623); McDonald v. Charleston etc. R. Co., 93 Tenn. 281, 24 S. W. 252; Vermont etc. R. Co. v. Vermont Central R. Co., 46 Vt. 792; Hagedon v. Bank of Wisconsin, 1 Pinn. (Wis.) 61, 39 Am. Dec. 275.

But actual possession may be required in some cases where constructive possession would work a hardship upon other parties. Thus in the case of the appointment of a receiver to foreclose a railroad mortgage which as between the mortgagor and mortgagee covered after acquired property, but did not so cover as to third parties, it was held necessary for the receiver to take actual possession of the after-acquired in order to defeat the levy of an execution on it after his appointment. Mississippi Valley Co. v. Chicago etc. R. Co., 58 Miss. 896, 38 Am. Rep. 348.

Rights of receiver become fixed at date of appointment, and liens and priorities acquired before appointment will not be disturbed. P. E. Payne Hardware Co. v. International Harvester Co., 110 Miss. 783, 70 So. 892.

The qualified title of a receiver to the property of the receivership dates from the time of his appointment, and actual seizure by him is not necessary to prevent the attachment of rights or liens thereafter; and, if the order of appointment requires him to give bond, his title when so qualified relates back to the date of

ings operate as an equitable lien or sequestration in

appointment, and cuts off all intermediate rights. Horn v. Pere Marquette R. Co., 151 Fed. 626.

An attorney who received a check from a corporation as a retainer for services to be rendered, and who presented and received payment of the check after he had knowledge that a receiver had been appointed for the property of the corporation, will be required to turn over the sum so received to the receiver. Bowker v. Haight & Freese Co., 146 Fed. 257.

An order appointing a receiver vests title in the receiver when it was signed by the judge, although not filed on the same day, and though signed in a county other than that in which the action was pending, but in the same judicial district. Exchange Nat. Bank v. Northern Idaho Pine Lumber Co., 24 Ida. 671, 135 Pac. 747.

The court in the case last cited said: "There is but one question involved, and that is whether the order of District Judge Flynn is made when the judge by judicial act signs the order, or whether it is made when the clerk by ministerial act files the order. In other words, whether the order of Judge Flynn appointing George Ott became effective on the instance of the signing of the order, or whether the order became effective when the same was filed and the receiver qualified as such and took possession of the property.

"Section 4880, Rev. Codes, provides: 'Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.'

"Section 4881, Rev. Codes, provides: 'Motions must be made in the county in which the action is pending, or any county in the same judicial district. Orders made out of court may be made by the judge of the court in any part of the state.'

"The motion made at Sandpoint, Bonner county, during the morning of the 24th of August, 1911, being in a county in the same judicial district in which the action was pending for the appointment of a receiver, an order was thereupon made by the court at chambers by a judge signing the order. The fact that it was not filed on the same day would not affect the order or the power of the court to take possession at that time of the property, by the signing of the order."

In Matter of Lewis etc. Mfg. Co., 89 Hun 208, 34 N. Y. Supp. 983, the court in upholding the levy of an execution after the order of appointment of a receiver in voluntary dissolution of a corporation, but before he had filed his bond, said: "The execution upon the judgment of Boyle and Macy was executed and issued to the sheriff on the twenty-first day of January, in the forenoon as we have seen. The receiver had not then taken possession of the property, and was not entitled to do so until he had filed his bond, which he did the next day. Boyle and Macy acquired a lien upon the personal property of the company upon the

delivery of their execution to the sheriff, but when the bond of the receiver was filed his title related back to the time of his appointment, which was anterior to the lien of Boyle and Macy under their execution. In re Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665. Their lien was therefore divested, if the doctrine of relation is allowed its full force against them. That doctrine is a fiction of law which was adopted for the advancement of right and justice, and resort is made to it for no other purpose. It is not adopted where third parties, who are not parties or privies, will be prejudiced thereby. In fact, fictions in law are never to be implied to perpetuate a wrong or defeat collateral acts which are lawful and concern strangers. Pierce v. Hall, 41 Barb. (N. Y.) 142, 146; Jackson v. Davenport, 20 Johns. (N. Y.) 537, 551; Heath v. Ross, 12 Johns. (N. Y.) 140. It will therefore be no violation of the principles which underlie the doctrine of relation to exempt the judgment of Boyle and Macy from its operation, and subject the title of the receiver to the lien of their judgment. On the contrary, it would be quite inconsistent with the doctrine of relation to subordinate the rights of Boyle and Macy to the title of receiver. Fiction is not fact. It is not equivalent to fact. The fact was that plaintiffs Boyle and Macy acquired a lien upon the property of the defendant on the 21st day of January, 1895, at ten-thirty-five o'clock in the forenoon. At that time the receiver had no title to the property of the defendant, and no right to interfere with it in any manner or for any purpose. On the 22d day of January, 1895, the receiver filed his official bond, and the title to the property vested in him in fact and in law at that time. By a fiction of law, his title related back to the day of his appointment for some purposes, such as its preservation and protection, but not for the purpose of destroying vested rights, or for any other unjust purpose. It would be unjust and wrong to permit the vested rights of the plaintiffs Boyle and Macy which they had acquired by virtue of the execution upon their judgment, to be vested by fiction."

So also in a suit brought by one lien holder to have the property sold for the purpose of paying off all liens on it and making the other lien holders parties to the proceeding. The filing of the bill and service of process constitutes an equitable levy upon the property and a receiver appointed subsequently by another court in a proceeding by one of the defendants will be obliged to yield to the receiver appointed in the first proceeding, even though he was appointed after the one in the second suit. Adams v. Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1.

A contrary rule prevails in some states to the effect that the title of the receiver does not vest until it goes into the actual possession of the property. This rule is based on the theory that the court could not furnish by contempt proceedings an interference with the receiver's possession until he is in actual possession. Farmers Bank

respect to the property covered by the proceeding.[4] Some confusion has occurred among the decisions caused by a failure to observe the distinction between different classes of receivers, such as when appointed for pur-

v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226.

In the last cited case the court said: "It is time that money or effects in the hands of the assignee of the bankrupt, or the trustee of an insolvent debtor, can not be attached, not only because such property stands assigned by operation of law, but because the allowance of such attachments would utterly defeat the whole policy of the bankrupt or insolvency laws. Nor can money taken by a sheriff in execution, or money paid into court. Serg. on Attach. 89. But we apprehend that the appointment and bonding of receivers does not work such disability. The property by the order is not taken under the protection of the court, and until taken in charge by the receivers its summary jurisdiction could not be interposed to punish such as might cover it, or portions of it, by execution or attachment. The period when it might or ought legally to be considered as under the mantle of legal protection should be the time when a court of chancery would interpose by attachment for disturbing or interfering with the possession of the receiver. Innocent third persons might be grievously affected by extending this doctrine further. It has been argued, and we think with much force, that there is, and ought to be, an analogy in this respect between the law applicable to receivers and sequestrators. As regards the latter, the Court of Kings Bench have decided that where a sequestration is awarded to collect money to pay a demand in equity, if it is not executed—that is, if the sequestrators do not take possession, and a judgment creditor take out execution, notwithstanding a sequestration awarded—there may be a levy under the execution. 9 Ves. Jr. (Eng.) 335. So here, the receivers never obtained possessions of the credits of the Elkton Bank of Maryland, its books and papers, or its evidence of debt."

On the receiver qualifying by the filing of his bond, the property is deemed in the custody of the court as of the date of his appointment. In re Lenox Corporation, 57 App. Div. 515, 68 N. Y. Supp. 103; In re Hoagland, Robinson Co., 36 Misc. Rep. 28, 72 N. Y. Supp. 435.

[4] Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Smith v. New York etc. Stage Co., 28 How. Pr. (N. Y.) 377; Wickens v. Townshend, 1 Russ. & M. 361; In re Birt, 22 Ch. D. 604.

Ordinarily the rights of the receiver do not relate back to the commencement of the suit so as to defeat a levy or attachment made prior to the actual appointment. Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553; Smith v. Sioux City Nursery etc. Co., 109 Iowa 51, 79 N. W. 457.

poses of general liquidation and when appointed for some temporary or specific purpose. In the former case the receiver is generally conferred the legal title to the receivership property by the order of appointment or by virtue of the statute allowing the appointment, while in the latter case, the position of the receiver is that of a mere custodian of the property.[5] The observance of

[5] If the appointment is made under statutory authority, it often happens that the title of the receiver will relate back to the date of the filing of the suit. Jones v. Arena Pub. Co., 171 Mass. 22, 50 N. E. 15.

Where a receiver is appointed in foreclosure proceedings, the property involved will be regarded in the custody of the court to the extent that it will be exempt from the process of a court having concurrent jurisdiction from the time of the commencement of the suit even though the receiver is not appointed at once. Farmers' Loan etc. Co. v. Lake M. etc. R. Co., 177 U. S. 51, 44 L. Ed. 667, 20 Sup. Ct. 564.

The property over which the receivership extends varies according to the nature of the proceeding. Sometimes, as in the case of mortgage foreclosures, it merely extends to the rents and profits of the mortgaged premises, sometimes to the whole property as in partnerships, corporations, etc., and sometimes to only sufficient property to satisfy the demand of encumbrancers. Re Schuyler Steam Tow Boat Co., 43 N. Y. St. Rep. 163, 18 N. Y. Supp. 89; Showalter v. Laredo Imp. Co., 83 Tex. 162, 18 S. W. 491; Magrath v. Veitch, 1 Hog. 110. In a railroad foreclosure the receiver has no custody or control except of the property covered by the mortgage. Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637.

The appointment of a receiver to foreclose a mortgage against a lessee will not deprive the lessor of the right to obtain possession of the premises under forcible entry proceedings. Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860.

Sometimes from the nature of the property or the business, such as in cases of insurance or beneficial societies, the property has been held to have come into the custody of the court at the time of filing the receivership proceedings or service of process therein. Burdon v. Massachusetts Safety Fund Assn., 147 Mass. 360, 1 L. R. A. 146, 17 N. E. 874; Fogg v. Supreme Lodge etc., 159 Mass. 9, 33 N. E. 692; Merrill v. Commonwealth etc. Ins. Co., 171 Mass. 81, 50 N. E. 519.

The appointment of a receiver for the purpose of liquidation operates as a general sequestration of the property and no liens against the property can be created between the time of the appointment and the qualification of the receiver. Merrill v. Commonwealth etc. Ins. Co., 166 Mass. 238,

these distinctions will tend to harmonize any variations of the decisions in respect to the extent of the rights of receivers. The diversity of opinion in respect to this question, it is quite apparent, arises because of different notions by the courts as to the meaning of custody of the court *(custodia legis)* and as to when property

44 N. E. 144; Riesner v. Gulf etc. Ry. Co., 89 Tex. 656, 59 Am. St. Rep. 84, 33 L. R. A. 171, 36 S. W. 53; Temple v. Glasgow, 80 Fed. 441, 25 C. C. A. 540.

In Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814, this distinction was adverted to in connection with the appointments of receivers upon dissolution proceedings against corporations.

In Bank of Woodland v. Heron, 120 Cal. 614, 52 Pac. 1006, the court said: "There are, no doubt, authorities—and perhaps a weight of authorities, although there are cases the other way—to the point that the appointment of a receiver operates as a sequestration of the property mentioned in the order of appointment (Beach on Receivers, sec. 205); still it will be found that the cases in which complaints at whose instance the receivers were appointed had some estate in or some right to or lien upon the property involved prior to and independent of the appointment of the receiver. Familiar instances of that character are actions to wind up insolvent corporations, to dissolve partnerships, to administer assets or distribute a fund in which all the parties have an interest, or to foreclose a mortgage where, by the provisions of the instrument or the law obtaining in the jurisdiction, the mortgagee has a lien upon the very property sought to be subjected to the receivership. (See, Klinkscales v. Pendleton Mfg. Co., 9 S. C. 318; Wiswall v. Sampson, 14 How. (55 U. S.) 52, 14 L. Ed. 322.) In all such cases the complainants have estates or interests in the property, or liens thereon, independent of and not created by the receivership, and the receiver is appointed to preserve and enforce their pre-existing rights. But in the case at bar the appellant, under his mortgage contract and the laws of this state, had no estate or interest in or lien upon the growing crop prior to and independent of the receivership, and the rule contended for by him as above stated should not be extended to such a case. If he could acquire any lien through a receiver, it would be a new lien, not pre-existing or created by the mortgage; it would be analogous to a writ of attachment, and would be effective only after possession taken by the receiver, as the writ of attachment would be only after levy."

In Merrill v. Commonwealth etc. Ins. Co., 171 Mass. 81, 50 N. E. 519, it was held in a corporate receivership that the right of the receiver to the possession related back to the commencement of the proceedings. The same rule was held in Hutchinson v. American Palace Car Co., 104 Fed. 182.

comes into such custody. This question naturally must be decided by the decisions of each particular state construing the nature of the action in which the appointment of a receiver is sought. The history and development of the law on this subject were very well set forth by Mr. Justice Savage of the Supreme Court of Maine in a comparatively recent case,[6] in which he laid great

[6] In Cobb v. Camden Sav. Bank, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667, the court said: "The plaintiffs contend that the property was in custodia legis, both at the time of the seizure by the sheriff and at the time of the sale, although they were not appointed receivers until after the sale. In the very recent case of Chalmers v. Littlefield, 103 Me. 271, 69 Atl. 100, it was held, in accordance with practically universal authority, that property in custodia legis is not subject to seizure and sale on execution, and that such a sale, without leave of the court first obtained, is wholly illegal and void. In view of this rule, the question to be answered in the case is, whether this property under the circumstances, was in custodia legis. First, what is the custody which the law intends? The oft-repeated expression is that the custody of the receiver is the custody of the court, and that is custodia legis. But when can it be said that the receiver has custody? Must he take actual physical possession? Does his title date from the time of his appointment, or does it relate back to the beginning of the proceedings? Or to the time when the court took cognizance of the bill by issuing process? Or to the time when the process was served? Does he take title by the decree of appointment or is a conveyance to him necessary? All these questions are more or less involved in the present inquiry, and upon all of these there is more or less diversity, and even contrariety, of judicial expression in the reported cases. But we think that a careful analysis of the cases will show that some, though not all, of this diversity is due to the varied kinds of receivership proceedings to which the rules have been applied. In attempting to answer these questions, while due regard must be paid to established rules of equity procedure general, we must not lose sight of the purpose of the statute, which is judicial sequestration and distribution of the entire corporate estate, nor of the equitable principles applicable to such a statute. It should be remembered that the proceedings under which these receivers are acting are statutory in their origin and character. It is not a creditor's bill. It is not a proceeding at common law. It is not a supplementary proceeding to a suit, like those in many of the cases in other jurisdictions. And, too, we may in a measure eliminate a line of cases in which receivers sought to invalidate exe-

stress upon the purpose of the receivership being a controlling factor in determining when the property came

cution sales of personal property which had been levied upon and was in the lawful possession of the sheriff prior to the appointments of receivers, for this case relates to real estate. See Varnum v. Hart, 119 N. Y. 101, 23 N. E. 183; In re Hall & Stilson Co., 73 Fed. 527; Alderson on Receivers, 229. In former days, in common law proceedings, it was generally held that the appointment of a receiver did not operate to convey to him the title of real estate, but in modern times the doctrine has grown up, and appears to be well established, that at least in statutory proceedings for the dissolution of corporations, the decree of appointment, ipso facto, vests the title to the real estate in the receiver. Attorney General v. Atlantic Mut. L. Ins. Co., 100 N. Y. 279, 3 N. E. 193. See, also, Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510. The statute in this case makes no mention of a deed, but gives the trustee absolute power to sell the real estate. And having the title, we think he should be deemed to have possession, as against those merely having liens, but who are not in possession, even though a technical 'seizure' on execution has been made, for that is not possession, so as to prevent a receiver from taking possession. Wiswall v. Sampson, 14 How. (55 U. S.) 52, 14 L. Ed. 322; Oldham v. Scrivener, 3 B. Mon. (42 Ky.) 579; Ensworth v. King, 50 Mo. 477, 482; In re Hall & Stilson Co., 73 Fed. 527; Alderson on Receivers, 200. It is sufficient if the receiver's possession be either actual or construc tive. Pelletier v. Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837.

"The next question is from what time does the receiver's title to real estate, and consequent possession, dates? There are many cases which hold that he takes title from the time of his appointment. Most of these are cases at common law, in creditors' bills, or supplementary or other proceedings in which one creditor seeks to enforce a specific claim upon the debtor's estate. 4 Pomeroy's Eq. Jurisprudence, secs. 1333, 1334. If successful, this necessarily works a preference. And in a race between creditors, equity does not take sides. Until the court appoints a receiver, the first one who comes is served. And in some cases this rule has been applied in statutory proceedings. But a later, and we think a better, rule is, that in statutory proceedings for the sequestration and winding up of corporate estates and the distribution of their proceeds, the title of the receiver relates back, either to the filing of the bill, or the issuing of process by the court, or to the service of process (and it is immaterial which, in this case), and that from that time on the property is considered to have been in the custody and protection of the court for the purpose of being administered according to the statute. Fogg v. Supreme Lodge etc., 159 Mass. 9, 33 N. E. 692; Jones v. Arena Pub.

into the custody of the court. This rule is based upon reason and in its observance would preserve the rights of the litigants.

It has been suggested in several cases that the test as to the possession of the receiver, or in other words custody of the court, is whether one could be punished for contempt of court for asserting his lien or possessory rights to it,[7] but these decisions do not take into consideration the fact that actual knowledge of the order is

Co., 171 Mass. 22, 50 N. E. 15; Merrill v. Commonwealth Mut. F. Ins. Co., 166 Mass. 238, 44 N. E. 144; Merrill v. Commonwealth Mut. F. Ins. Co., 171 Mass. 81, 50 N. E. 519; Illinois Steel Co. v. Putnam, 68 Fed. 515, 15 C. C. A. 556; Hutchinson v. American Palace Car Co., 104 Fed. 182; Farmers' L. & T. Co. v. Lake St. El. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Wiswall v. Sampson, 14 How. (55 U. S.) 52, 14 L. Ed. 322; Doane v. Millville Mut. M. & F. Ins. Co., 43 N. J. Eq. 521, 11 Atl. 739; Miller v. Sherry, 2 Wall. (69 U. S.) 237, 249, 17 L. Ed. 827, 830; Riesner v. Gulf etc. Ry. Co., 89 Tex. 656, 36 S. W. 53, 33 L. R. A. 171, 59 Am. St. Rep. 84; Alderson on Receivers, 219. And the property is sequestrated as of that time. And the reason for this rule is obvious. If it were otherwise, the whole purpose of the statute might be frustrated. That purpose is a ratable distribution of the corporate funds, after payment of priorities, among the creditors. If, after the bill is filed, and before the receiver is appointed, the property is not within the protection of the court, creditors may create new liens by attachment, may levy executions, and thus may entirely dissipate the fund, before the arm of the court can reach it. Since the beginning of proceedings is likely to awaken creditors to the enforcement of their claims, if they should attach or levy meanwhile, the statute might in many instances prove self-destructive. . . . It must be conceded that this is not the universal rule. In some cases the distinction which we have pointed out has been disregarded, and the rule in common law cases followed. In others a different rule has been applied growing out of statutory provisions. As for instance, in Squire v. Princeton Lighting Co., 72 N. J. Eq. 883, 68 Atl. 176, 15 L. R. A. (N. S.) 657, the New Jersey court held, under the statute of that state, that the property was in custodia legis from and after an adjudication of insolvency but not before. Out statute contains no such provision."

7 Farmers' Bank v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Defries v. Creed, 11 Jur. N. S. 360; see, also, Edwards v. Edwards, 2 Ch. D. 291, and In re Rollason, 34 Ch. D. 495.

not always essential, although such want of knowledge might be very proper to be considered upon the question of punishment of the contemner.

No act on the part of the defendant is necessary to vest the receiver with the right to possession.[8] It must, however, be remembered that the appointment of the receiver does not destroy liens, whether by judgment, attachment, levy of execution, or other recognized methods of obtaining priority, but merely suspends their enforcement in the usual way and requires the lien creditors to apply to the receivership court for leave to enforce their rights, which that court is bound to grant since it is obliged to give effect to liens which existed when the property passed into the custody of the law.[9]

Pending an application in one court for the appointment of a receiver and the assumption by such court of

[8] Board of Chosen Freeholders v. State Bank, 29 N. J. Eq. 268.

[9] In Cobb v. Camden Sav. Bank, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667, the court said: "It merely suspended the enforcement of it in the usual way. The receiver took only such estate as the corporation had—and subject to its liens. Kittredge v. Osgood (Page v. Supreme Lodge etc.), 161 Mass. 384, 37 N. E. 369; Garham v. Mutual Aid Soc., 161 Mass. 357, 37 N. E. 447; Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823; Kneeland v. American Loan & T. Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379. But while the property is in the custody of the law, the right to enforce liens, without leave of court, is suspended. Liens creditors must apply to the court, which is bound to give effect to liens which existed when the property passed into the custody of the law. Duryee v. United States Credit System Co., 55 N. J. Eq. 311, 37 Atl. 155; Oakes v. Myers, 68 Fed. 807; Alderson on Receivers, 198."

A lien upon funds is followed into the hands of a receiver as where a dividend has been declared and set apart for stockholders. In re Le Blanc, 14 Hun (N. Y.) 8.

The receiver is the hand of the law and the law conserves and enforces rights—never destroys them. His appointment determines no right and in no way affects the title of any party to the litigation. Von Roun v. San Francisco Superior Court, 58 Cal. 358.

While property is in the hands of a receiver, no execution can be levied upon it, but the fi. fa. creates a lien thereon. Davis v. Bonney, 89 Va. 755, 17 S. E. 229.

jurisdiction over his property by the issuance of an injunction in regard to it, the permission by another court of the right to sequester the property by means of a subsequent attachment would give rise to complications and jurisdictional confusions which ought not to be encouraged.[10]

In some instances the statutes provide that upon the appointment of a receiver, as for instance in respect to an insolvent debtor, the receiver shall be placed in possession of all of the property of the defendant even though attached or levied upon for a certain period before the filing of the petition for a receiver,[11] or protect *bona fide* purchasers prior to the actual appointment.[12]

So also where one of the defendants in the receivership proceedings has appeared in the proceedings, the order of appointment will relate back to the time of his appearance so as to defeat efforts on his part and those with like notice to defeat the possession of the receiver.[13]

Where the effect of the filing of the petition for a receiver is like that of an equitable attachment of the property of the defendant, whether by reason of statutory provisions or the general rules of equity, it has been held that the possession of the receiver will relate back

10 City Nat. Bank v. Merchants' Nat. Bank, 7 Tex. Civ. 584, 27 S. W. 848.

11 Whipple v. Babcock, 18 R. I. 611, 30 Atl. 464.

12 In some instances the statutes make special provisions for the protection of bona fide purchasers of personal property prior to the appointment of a receiver, but after the commencement of supplementary proceeding in which the appointment is made. In re Clover, 154 N. Y. 443, 48 N. E. 892 (affirming 8 App. Div. 556, 40 N. Y. Supp. 886).

13 Where one of the defendants in the receivership who had voluntarily appeared executed a chattel mortgage on his property to secure a pre-existing creditor who also had notice of the receivership suit, it was held that the order of appointment would relate back to his appearance at least. Powell v. National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536.

even to the time of the filing of the bill or service of process, though the decisions are not in accord upon the subject, often, however, by reason of variant ideas as to when the property came into the custody of the court.[14]

14 Atlas Bank v. Nahant Bank, 23 Pick. (40 Mass.) 480; Fogg v. Supreme Lodge etc., 156 Mass. 431, 31 N. E. 289; Merrill v. Commonwealth etc. Ins. Co., 166 Mass. 238, 44 N. E. 144; Riesner v. Gulf etc. Ry Co., 89 Tex. 656, 33 L. R. A. 171, 59 Am. St. Rep. 84, 36 S. W. 53.

There are instances in which levies, after the institution of proceedings for the dissolution of a corporation but before the appointment of a receiver, have been sustained. Minchin v. Second Nat. Bank, 36 N. J. Eq. 436; Matter of Waterbury, 8 Paige Ch. (N. Y.) 380; Matter of Gies etc. Co., 7 App. Div. 550, 40 N. Y. Supp. 146; Matter of Muehlfeld etc. Piano Co., 12 App. Div. 492, 42 N. Y. Supp. 802.

There are, however, many instances in which the courts have refused to allow the order of appointment to relate back to the time of the commencement of the suit. Minchin v. Second Nat. Bank, 36 N. J. Eq. 436; Graham Button Co. v. Spielmann, 50 N. J. Eq. 120, 24 Atl. 571; Van Alstyne v. Cook, 25 N. Y. 489; Becker v. Torrance, 31 N. Y. 631; Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Hamilton's Assignment, 26 Ore. 579, 38 Pac. 1088.

The title of a receiver appointed to take charge of the effects of an insolvent corporation does not relate back to a date on which the order to show cause why a receiver should not be appointed was issued, where the court, which might have determined summarily the question of insolvency, and might have appointed a receiver forthwith without notice to the corporation, made no adjudication of insolvency, and imposed no general restraint upon the corporation, aside from restricting the contracting or payment of debts, the collection of money, or the sale or transfer of its property. Squire v. Princeton Lighting Co., 72 N. J. Eq. 883, 15 L. R. A. (N. S.) 657, 68 Atl. 176.

The mere fact that a receiver is sought for a gas company will not prevent the company from making such contracts for the management and control of its business as are necessary to protect its property. "If this were not the law, the property would be subject to waste and destruction pending the proceedings for the appointment of a receiver. . . . If it had not the authority to do these things, the property may have become lost to its creditors." Cook v. Cole, 55 Iowa 70, 7 N. W. 419.

But where the purpose of the receivership was merely to prevent mismanagement of corporate affairs and not to wind up its affairs, it was held that the corporation could transfer property

§ 32. Effect of Receiver Being Required to Furnish Bond.

Under the general practice of courts of equity and also under most of the statutory provisions bearing upon the subject, it is a requisite that the receiver shall furnish a bond in an amount required by the court before he is put into possession of the receivership property. The general rule is that where he is so required to give a bond before entering into possession of the property, upon furnishing such bond his possessory rights to the property will relate back to the time of the order of appointment.[1]

§ 33. Effect of Order of Appointment Being Stayed.

Where the order of appointment of a receiver is stayed by an appeal and supersedeas or stay bond, the order will be deemed to be suspended pending such stay and

in payment of debts subsequent to the commencement of the suit, since its property was not in the custody of the court from the time of filing the suit. Illinois Steel Co. v. Putnam, 68 Fed. 515, 15 C. C. A. 556.

1 Matter of Lenox Corp., 57 App. Div. 515, 68 N. Y. Supp. 103 (affirmed in 167 N. Y. 623, 60 N. E. 1115); Pickert v. Eaton, 81 App. Div. 423, 81 N. Y. Supp. 50; Ardmore Nat. Bank v. Briggs Mach. etc. Co., 20 Okla. 427, 16 Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 94 Pac. 533; Pope v. Ames, 20 Ore. 199, 25 Pac. 393; Regenstein v. Pearlstein, 30 S. C. 192, 8 S. E. 850; Texas Trunk Ry. Co. v. Lewis, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647; Baldwin v. Spear Bros., 79 Vt. 43, 64 Atl. 235; Temple v. Glasgow, 80 Fed. 441, 25 C. C. A. 540; Horn v. Pere Marquette R. Co., 151 Fed. 626.

In Steele v. Sturges, 5 Abb. Pr. (N. Y.) 442, the court said: "When the court, in such cases, appoints a receiver, it is because the court has first adjudged that the property is no longer to be under the control of the parties to the suit, but it is thenceforth to be, and is, in the custody of the court. The receiver becomes then merely an agent through whom the court acts; and whether he be forthwith appointed by the court, as in this case, or a reference be made to a master or referee to appoint one, in either case the effect is the same; the title of the receiver is of the date at which it is ordered that a receiver shall be appointed. Then the title of the partners to control dies, and then the title of the court and of its agent or officer immediately succeeds."

the property covered by the receivership order will not be deemed in the custody of the court as far as the maintenance of suits for its protection is concerned by the defendant,[1] but it will be otherwise as far as the right of creditors to acquire liens upon the property during such period.[2]

§ 34. General Rule as to Liability of Receiver on Contracts of Defendant.

The respective rights of the parties to the receivership litigation are preserved as they existed when the receiver was appointed but are ordinarily not determined until the final hearing of the matter.[1] Where the obligation of the defendant has become a vested right on the part of his creditor, the estate will be bound by the obligation existing against the defendant at the time of the appointment of the receiver.[2]

1 Boston etc. Min. Co. v. Montana Ore Purchasing Co., 27 Mont. 431, 71 Pac. 471.

2 Ex parte Tillman, 93 Ala. 101, 9 So. 527; Stanton v. Heard, 100 Ala. 515, 14 So. 359.

1 Mueller v. Stinesville etc. Stone Co., 154 Ind. 230, 234, 56 N. E. 222; American Trust etc. Bank v. McGettigan, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793; Strebel v. Bligh, 183 Ind. 537, 109 N. E. 45.

2 In a suit against the maker of a note containing a stipulation for the payment of attorney's fees, when he has been served in accordance with law with notice of the holder's intention to sue on the note, and the principal and interest of the note have not been paid on or before the last return day of the term of the court, the plaintiff's right to recover for attorney's fees is not affected by the fact that after service of the notice, a court of equity appointed receivers, who took possession of the assets of the debtor; nor is it necessary that the receivers be thereafter served with the statutory notice in order to fix the liability for attorney's fees. Guarantee Trust & Banking Co. v. American Nat. Bank, 15 Ga. App. 778, 84 S. E. 222.

A pre-existing debt against the property is as much of a liability against the receiver as is a debt contracted by him for the benefit of the property. In determining his liability the court will only determine the liability of the property. Peoples v. Yoakum, 7 Tex. Civ. App. 85, 25 S. W. 1001.

Negotiations failed for a tripartite agreement whereby one party was to manufacture lumber from timber cut on complainant's land and to sell to defendant at fixed

The claims of creditors are presentable when the receiver is appointed, and that date fixes their status and amount regardless of when they are in fact presented.[3]

The general rule, however, is that a receiver is not bound by the unperformed contracts of the party whose property is placed in a receivership unless he has adopted them.[4] Where, however, the contract creates an

prices, complainant agreeing to sell the timber for a certain amount advanced for such party by defendant. Complainant then agreed to pay the party a fixed price for manufactured lumber, and later a quantity of lumber was sawed and piled, defendant making advances in the meantime, which were paid to complainant on orders of the party. Complainant also made advances to the party. Held, on suspension of operations and receivership against the lumber, that defendant is entitled to reimbursement in full for his advances with interest. A. B. Smith Lumber Co. v. Adams, 100 Miss. 30, 56 So. 265.

A receiver held bound by subsisting contracts under which rights and obligations have become fixed, but not by executory contracts, if in his opinion performance would not be profitable or desirable. Coy v. Title Guarantee & Trust Co., 198 Fed. 275.

Where contractor with a city had assigned its claim against the city, the contractor's receiver who completed the contract was properly required to pay over the proceeds of the warrant received from the city to the assignee. McGill v. Brown, 72 Wash. 514, 130 Pac. 1142.

3 People v. American Loan etc. Co., 172 N. Y. 371, 65 N. E. 200.

4 Russ Lumber etc. Co. v. Muscupiabe Land etc. Co., 120 Cal. 521, 65 Am. St. Rep. 186. 52 Pac. 995. Wells v. Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599; Scott v. Rainier Power etc. Co., 13 Wash. 108, 42 Pac. 531, Central Trust Co. v. East Tennessee Land Co., 79 Fed. 19; Central Trust Co. v. Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235.

The general rule upon the subject of the liability of the receiver upon the contracts of the debtor, in the absence of a lien, is that he is not liable. This rule is based upon the fact that the receiver is not the representative of the debtor for the fulfillment of his contracts except in such cases as he may adopt the contract as his own. Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Commonwealth v. Franklin Ins. Co., 115 Mass. 278; Brown v. Warner, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032; Central Trust Co. v. Marietta & N. G. R. Co., 51 Fed. 15, 16 L. R. A. 90; Southern Exp. Co. v. Western N. C. R. Co., 99 U. S. 194, 25 L. Ed. 320; Central Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. 566.

equitable lien upon funds in his possession or which will come into his possession by reason of the contract as a

Where a paper mill company was under contract to purchase large quantities of pulp, its receiver, where the receivership property is not sufficient to pay creditors, may elect not to perform the contract. Wells v. Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599.

Where pending the partial completion of a contract, a receiver is appointed, the contractor may consider the contract as abandoned or he may wait a reasonable time to find what the receiver will do in respect to it. Commonwealth R. Co. v. North American Trust Co., 135 Fed. 984, 68 C. C. A. 418.

A contract of employment with a corporation ceases upon the appointment of a receiver, such a termination being impliedly within the contemplation of the parties. Sullivan etc. Co. v. Black, 159 Ala. 570, 48 So. 870; Du Pont v. Standard etc. Co., 9 Del. Ch. 315, 81 Atl. 1089; Commonwealth v. Eagle etc. Ins. Co., 96 Mass. (14 Allen) 344; Lenoir v. Linville Imp. Co., 126 N. C. 922, 51 L. R. A. 146, 36 S. E. 185; Law v. Waldron, 230 Pa. St. 458, Ann. Cas. 1912A, 467, 79 Atl. 647; Williamson County etc. Trust Co. v. Roberts etc. Co., 118 Tenn. 340, 12 Ann. Cas. 579, 9 L. R. A. (N. S.) 644, 101 S. W. 421.

A contrary rule prevails in New Jersey. Spader v. Mural etc. Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378; Rosenbaum v. United States etc. Co., 61 N. J. L. 543, 40 Atl. 591.

The appointment of a receiver for a corporation terminates a contract made by the corporation employing a general counsel, which was terminable at will. Burton v. Bay State Gas Co. of Delaware, 188 Fed. 161, 110 C. C. A. 197.

A receivership for a corporation, which results in the distribution of all of its property among its creditors, has the same effect as its bankruptcy would have had upon its unperformed contracts, and an employee, under an unexpired contract of employment which has not been adopted by the receiver, may treat the contract as broken and prove a claim for damages for the breach against the estate, provided the amount of such damages can be determined by recognized methods of computation within the time allowed for proving claims. Isaac McLean Sons Co. v. William S. Butler & Co., 227 Fed. 325.

The court in the above case said: "Although the receivers might have adopted the contract, they were not bound to do so; their decision not to adopt was made without delay, and in the absence of adoption by them the receivership must be regarded as having prevented the company from performing it. In the case of an uncompleted contract of employment like this, a receivership of the employer's property and business has been regarded as preventing completion by operation of law, leaving neither party further bound by it, and leaving the employee no allowable claim for damages. People v. Globe etc. Ins. Co., 91 N. Y. 174. This case

security for its performance the receiver will be held

has been followed in Malcomson v. Wappoo Mills, (C. C.) 88 Fed. 680, where the unperformed contract was for the sale and delivery of goods; also in Re Inman & Co., 175 Fed. 312, a bankruptcy case, where the effect of the seller's bankruptcy upon a like contract was in question.

"But, in bankruptcy, the view taken in this circuit has been, in cases like the two last cited, that the purchaser's bankruptcy is the equivalent of disenablement and repudiation on his part, which the seller may treat as a breach and thereby acquire a provable claim for his damages. Re Swift, 112 Fed. 315, 50 C. C. A. 264; Re Pettingill & Co., 137 Fed. 143, 144; Pratt v. Auto etc. Co., 196 Fed. 495, 116 C. C. A. 261. The same effect upon the contract is given, by a recent decision of the Court of Appeals for the Seventh Circuit, to the bankruptcy of a tranfer company which was under contract with a hotel to furnish service for a term of years, unexpired at the bankruptcy, and to pay for the exclusive privilege of doing so. Re Frank E. Scott Transfer Co., 216 Fed. 308, 132 C. C. A. 452

"A receivership resulting, as this is to result, in the distribution by the court of all the defendant's property, pro rata, among its creditors, is to be regarded as having the same effect as its bankruptcy would have had upon its unperformed contracts like the one here in question. See Pennsylvania Steel Co. v. New York etc. R. Co., 198 Fed. 721, 743, 117 C. C. A. 503; in the Court of Appeals for the Second Circuit. In this case, as in that, there was no appointment of a receiver over 'an objection corporation'; but the defendant is to be regarded for the purposes of the present question, as having participated in bringing on the appointment. Its answer admitted the allegations of the bill. Its consent is recited in the decree making the appointment. . . . But for the purposes of a distribution to be made as the result of receivership proceedings in equity such as these, liabilities from which the debtor may be discharged under the Bankruptcy Act are not the only liabilities to be considered. Claims, immature or contingent at the time of bankruptcy, if such that their worth or amount can be determined by recognized methods of computation, as of some date within the time limited for the presentation of claims by the court and without hindering expeditious administration, and if of a nature such as equitably entitles them to share in the distribution, are no less entitled to recognition, upon equitable principles, than are fixed liabilities absolutely owing at the institution of the proceedings. The Court of Appeals for the Second Circuit has, in Pennsylvania Steel Co. v. New York etc. R. Co., 198 Fed. 721, 739, 740, 117 C. C. A. 503, after careful consideration of the questions involved, thus allowed damages for breach of an unexpired contract, whereby the railroad company in receivership had granted, for 20 years, the exclusive right of mov-

bound by the contract.[5] The receiver is not bound to adopt

ing express matter over its lines, and agreed to furnish cars therefor, in consideration of a percentage of the gross earnings, to be proved against the fund for distribution. This decision, in the absence of any to the contrary in this circuit, is to be regarded as controlling so far as it applies.

"In Ex parte Pollard, 2 Lowell 411, Fed. Cas. No. 11252, above referred to, Judge Lowell declined to regard such a claim as this as contingent. A different view upon this question appears to have been taken in the above cited decisions under the present Bankruptcy Act. But that the amount of damages for the breach of such a contract is, at any rate, capable of being determined by recognized methods of computation, no doubt was entertained, and it is believed that there can be no such doubt. If there had been no receivership, but the Butler Company had discharged the employee without sufficient reason on the same day, there would have been no difficulty, in a suit by her for damages, as to their assessment. In this and in the similar cases below mentioned the agreed period of employment had not long to run. They all expire before any decree of distribution could be reached, and the ascertainment of damages involves comparatively little speculation regarding the future."

[5] Wood v. McCardell etc. Co., 49 N. J. Eq. 433, 24 Atl. 228.

The distinctions in this respect were shown by the court in Howe v. Harding, 76 Tex. 17, 18 Am. St. Rep. 17, 13 S. W. 41, where the court held that the court could not in every case refuse to execute contracts of the defendant.

A fund in a bank to be delivered to the person entitled becomes a trust fund in the hands of a receiver. Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 115.

The receiver of a corporation succeeds to the title of property of the corporation in possession of a factor, subject to the lien for advances in favor of the latter with which it was burdened before his appointment. Cameron v. Crouse, 11 App. Div. 391, 42 N. Y. Supp. 58.

Where a party, having a contract for the employment of claimant and for assignment of certain of his patent rights, went into the hands of a receiver, who transferred the property to a purchaser on September 1, 1910, but did not actually deliver the property until September 22, 1910, claimant's contract rights, in theory at least, not being affected under the transfer, he was entitled to recover against the receivers for the 22 days in September during which they had possession of the property, and neglected or refused to employ him, and deprived him of his rights under the contract, and also for any damage he can show he suffered by the action of the receivers in transferring the property to the purchaser, as well as for past-due payments under his contract. Ely v. Van Kannel Revolving Door Co., 184 Fed. 459.

The receiver is not bound by a contract made by the company

the contracts of the defendant, or in other words step

before his appointment which does not constitute a lien on the property, and he can not be compelled to perform it. Union Trust Co. v. Curtis, 182 Ind. 61, L. R. A. 1915A, 699, 105 N. E. 562.

Where an agent of a newspaper publishing company had a contract with it under which he was its agent for a certain period to procure advertisements, fix rates and collect the bills, and apply the collections to repay a loan made by him to it, upon the appointment of a receiver, the agent is entitled to have the contract enforced as an equitable pledge of the receipts from the advertisements for its purposes. Commercial Pub. Co. v. Beckwith, 167 N. Y. 329, 60 N. E. 642.

Where certain accounts were assigned as security for certain loans and such assignment was accepted by the debtor, the receivers were held bound by it as it constituted an equitable assignment of a certain fund and vested the assignee with a power coupled with an interest in the fund. Curtis v. Walpole Tire etc. Co., 218 Fed. 145, 134 C. C. A. 140.

In the case just cited the court said: "We are, however, of the opinion that the District Court did not err in this particular, and that the writings of April 16th and April 23d, when read together and taken in connection with the transaction which the parties were undertaking to carry out, show that it was intended to assign the entire account as then due and to become due from the Foster Company to the Tire Company to secure the claimant's note. By their delivery to the claimant with this intention there was an actual appropriation of the account as it then existed, and a constructive appropriation of it as to sums that might become due in the future. The transaction was not a mere promise to pay the note out of a particular fund. Field v. Mayor etc. of City of New York, 6 N. Y. 179, 57 Am. Dec. 435; Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Ingersoll v. Coram, 211 U. S. 335, 368, 29 Sup. Ct. 92, 53 L. Ed. 208; Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530; Peugh v. Porter, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. Ed. 859; 3 Pomeroy's Eq. (2d ed.), §§ 1235, 1236, 1237. The Tire Company retained no right to collect the account for its own benefit, or to revoke the disposition promised as to the future. By the assignment an equitable interest in the account as it then stood, and as it might thereafter accrue, passed to the claimant as security for his note, together with a power to collect the account and apply the proceeds in satisfaction of the note. As the assignment vested in the claimant an equitable interest in the account, with a power to collect the same, he thereby became possessed of a power coupled with an interest in the account assigned, which was irrevocable. Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 175, 5 L. Ed. 589.

"Being of the opinion that the claimant obtained an assignment

into his shoes in respect to his prior contracts, and he is entitled to a reasonable time to elect whether to adopt

of the entire account as it stood on April 16th, and as it might thereafter accrue, and the sum turned over to the receivers being more than sufficient to pay the claims of the Traders' Company and of the claimant in full, many of the questions argued by counsel for the receivers and the creditor pass out of the case, and it is unnecessary to consider them."

So also in a case where there was a bill in equity by an express company against the receiver of a railroad company to compel specific performance of a contract, made before the appointment of the receiver, to carry freight for the complainant, the court in refusing to grant specific performance said: "The road is in the hands of a receiver in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license, as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receivers would be a form of satisfaction or payment, which he can not be required to make. As well might he be decreed to satisfy appellee's demand for money, as by the service sought to be enforced." Southern Express Co. v. Western etc. R. Co., 99 U. S. 191, 199, 25 L. Ed. 319, 320.

The same principles were recognized in Ellis v. Boston etc. R. Co., 107 Mass. 1; Commonwealth v. Franklin Ins. Co., 115 Mass. 278; Re Brown, 3 Edw. Ch. (N. Y.) 384.

In Ellis v. Boston etc. R. Co., 107 Mass. 1, the court said: "The receivers are officers of the court for this purpose [that of preserving the property] and act under its direction and control. They continue the operation of the road, and conduct its business, because this is essential to its proper preservation. They may fulfill the contracts of the corporation so far as beneficial. They may not pay its debts or fulfill contracts which are burdensome, or tend to diminish the value of property under their control, unless such contracts are charged as incumbrances in the property, or are necessary to its proper preservation and security."

Upon the appointment of a receiver the contract of employment of the general manager ceases, such termination being impliedly within the contemplation of the parties when the contract was made. Du Pont v. Standard etc. Co., 9 Del. Ch. 315, 81 Atl. 1089.

Where the president of a corporation by a verbal agreement grants permission to another to box and gather the turpentine from the pine trees growing on the land of the corporation, such verbal permit amounts only to a license, which terminates on the appointment of a receiver for the properties of such corporation at the suit of its creditors. McKinnon-Young Co. v. Stockton, 53 Fla. 734, 44 So. 237.

or repudiate such contracts,[6] but this power on the part of the receiver to adopt or reject such contracts does not apply to the other party to the contract. The theory of the law in this respect is that the receiver is appointed for the purpose of preserving the property and that if he did not have the right to terminate the contract the assets of the receivership might be wasted and dissipated by the performance of unprofitable contracts. In other words, he is not to adopt the contract unless it appears that to do so will benefit the receivership.[7] The mere fact that the receiver has taken possession of property does not of itself prove that the contract in regard to it has been adopted by him.[8]

6 Kansas Pac. Ry. Co. v. Bayles, 19 Colo. 348, 35 Pac. 744; In re Seattle Lake Shore etc. Ry. Co., 61 Fed. 541; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. Ed. 1025, 12 Sup. Ct. 235; United States Trust Co. v. Wabash etc. R. Co., 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. 86.

A receiver may adopt a contract of his predecessor, either expressly or by implication. Crawford v. Gordon, 88 Wash. 553, L. R. A. 1916C, 516, 153 Pac. 363.

A receiver, of course, holds the funds under his control subject to the orders of the court. Adams v. Woods, 15 Cal. 206; Johnson v. Gunter, 6 Bush (69 Ky.) 534; In re Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809; Penn v. Whiteheads, 12 Gratt. (Va.) 74.

The receiver may avail himself of the rights which the defendant had to enforce or defend against instruments executed by the defendant. Williams v. Babcock, 25 Barb. (N. Y.) 109; Bell v. Shibley, 33 Barb. (N. Y.) 610.

7 A receiver is not bound to accept property of an onerous and unprofitable nature which would be a burden instead of a benefit to the estate. Shreve v. Hankinson, 34 N. J. Eq. 413; Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96; McMinnville & M. Railroad v. Huggins, 3 Baxt. (62 Tenn.) 177; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915, 12 Sup. Ct. 104; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; American File Co. v. Garrett, 110 U. S. 288, 28 L. Ed. 149, 4 Sup. Ct. 90. This species of unprofitable property is termed by Lord Kenyon damnosa hæreditas, cited in 7 East 342.

Re Thames etc. Co. v. The Company, 106 L. T. Rep. 674.

In Suydam v. Receivers, 3 N. J. Eq. 114, the court says of a "clearly unlawful" (but moral) contract entered into prior to the receivership: "But the receivers might have ratified it in their discretion on the ground of expediency."

8 Scott v. Rainier Power etc. Co., 13 Wash. 108, 42 Pac. 531; Craw-

If the receiver could be held to the performance of an uncompleted contract, the performance of the contract

ford v. Gordon, 88 Wash. 553, L. R. A. 1916C 516, 153 Pac. 363.

In Peabody Coal Co. v. Nixon, 226 Fed. 20, 140 C. C. A. 446, the court said: "On the hearing before the master it appeared that under the old contract the railroad company had bound itself to purchase and receive from the coal company f. o. b. mines for its fuel purposes not less than 450 and not more than 900 tons of mine-run coal per day produced from the mines of the coal company. The price for the coal was 'to be determined by adding ten cents per ton to the average actual cost to the coal company per ton of coal produced from all such mines during such month.'

"The contract set forth in detail the items which were to enter into the cost of production and the way in which the average actual cost of production per ton should be ascertained. The items thus entering into the price to be paid by the railroad company included rentals, royalties, depreciation, interest on part of the investment, insurance premiums, cost of maintaining, repairing and renewing plant (in part), wages and salaries of employees, payments made as damages, cost and attorneys' fees for claims for personal injuries to employees, for insurance against such claims, net cost of props, and all other supplies and material used during such month, wages and salaries of officers, and all other proper expenses usually chargeable to the operation of coal mines, all of which were to be distributed pro rata over the entire production at all of the coal company's mines, to which was to be added ten cents on each ton taken by the railroad company.

"The first impression is, that this is unlike an agreement between parties dealing at arms length. The coal company was on the ground, the railroad company was not. It bought the supplies, hired and paid the labor, and did everything else about cost of production, and kept the books. There was the implied right to re-check, but that would be an additional expense and hardly satisfactory to a business man. The face of the contract was a representation that there was a profit of only ten cents a ton, but it turned out from the proof to be much more, as measured by the market.

"The master began the hearing on September 3d following the reference. The coal company attempted to show and induce the master to believe that the old contract was beneficial to the receivers and ought to be affirmed, but the master found from the evidence that appellant's coal under the old contract would cost the receivers $1.25 per ton, that they could obtain the coal they needed in operation at $1 per ton and thus save annually about $50,000 to the trust estate. He recommended that an order be entered approving the renouncement of the contract. . . .

"We had occasion in another case (Kansas City So. R. Co. v. Lusk et al., 224 Fed. 704, 140

by him would be equivalent to a payment or satisfaction of the contract indebtedness, and in the absence of adequate funds for that purpose, the court will not require him to do so.[9]

C. C. A. 244) at this term to observe that it is not the rule that the contract of the owner of a trust estate is binding on the receivers until renounced, but, contra, that the receivers are not bound by the contract until they have affirmed it and assumed its burdens under the direction of the court. We need not say much more. There can be no claim on the facts of an affirmance by conduct or an estoppel against renunciation. Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250; Nelson v. Kalkhoff (In re Bishop), 60 Minn. 305, 62 N. W. 335; Commercial Pub. Co. v. Beckwith, 167 N. Y. 329, 60 N. E. 642; Howe v. Harding, 76 Tex. 17, 13 S. W. 41, 18 **Am. St. Rep.** 17. The receivers were entitled to a reasonable time within which to investigate and determine what course they would take, for the engagements of the great railway system which the court took in hand were multitude. With this in mind the court granted them six months to act. Within one month after their appointment they decided that the contract between appellant and the owner of the trust estate was burdensome and determined that it should be renounced, and immediately petitioned the court for an approval. They also gave notice within the month to appellant that they would not affirm the contract and assume its burdens, and continued thence to assert their renouncement until their action was confirmed by the court, which would have been doubtless granted shortly after their request but for the resistance of the appellant and its persistent effort to convince that the affirmance of the contract would be beneficial to the trust estate. The facts and the law are against the appellant. Ames v. Union Pac. R. Co., (C. C.) 60 Fed. 966, 970; Mercantile Trust Co. v. Farmers' Loan & Trust Co., 81 Fed. 254, 258, 26 C. C. A. 383; Dayton Hydraulic Co. v. Felsenthall, 116 Fed. 961, 966, 54 C. C. A. 537; General Electric Co. v. Whitney, 74 Fed. 664, 20 C. C. A. 674; Coy v. Title etc. Trust Co., (D. C.) 198 Fed. 275, 280, and authorities cited in those cases."

Receiver of corporation may proceed with a contract partly performed until he has ascertained that its performance would not be beneficial to the estate, and he is entitled to be paid on a quantum meruit for the work so performed. Butterworth v. Degnon Contracting Co., 214 Fed. 772, 131 C. C. A. 184 (reversing judgment (D. C.) 208 Fed. 381).

But if the receiver has not ratified the agreement and has in effect suspended its operation, he may be held to the reasonable value of property or service furnished to him. Odell v. Bedford Co., 224 Fed. 996.

[9] Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Commonwealth v. Franklin Ins. Co.,

The receiver has no right to impeach or disaffirm the legal and authorized acts of a corporation, as where a corporation had surrendered a note upon which the receiver subsequently brought suit, no fraud or mistake of fact being shown,[10] for in such a case the receiver is as much bound by the act of the company as the company would be. He may, however, avoid the illegal and unauthorized act of the company.[11]

115 Mass. 278; Ellis v. Boston etc. R. Co., 107 Mass. 1; Berry v. Gillis, 17 N. H. 9, 43 Am. Dec. 584; Gillet v. Moody, 3 N. Y. 479; Brown v. Warner, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032. See, contra, Howe v. Harding, 76 Tex. 17, 18 Am. St. Rep. 17, 13 S. W. 41; Fidelity Safe Deposit & T. Co. v. Armstrong, 35 Fed. 567; Southern Express Co. v. Western etc. R. Co., 99 U. S. 191, 25 L. Ed. 319; Central Trust Co. v. Marietta & N. G. R. Co., 51 Fed. 15, 16 L. R. A. 90; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; American File Co. v. Garrett, 110 U. S. 288, 28 L. Ed. 149, 4 Sup. Ct. 90; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915, 12 Sup. Ct. 104.

As to leasehold estates, Mr. Chief Justice Fuller, in Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787, says: "If the order of court under which the receiver acts embraces the leasehold estate it becomes his duty of course to take possession of it. But he does not by taking such possession become assignee of the term in any proper sense of the word. He holds that as he would hold any other personal property for and as the hand of the court and not as the assignee of the term." Re Oak Pits Colliery Co., L. R. 21 Ch. Div. 322.

10 Hyde v. Lynde, 4 N. Y. 387. As to the right of a receiver of a railroad to sever the connection between it and another railroad, for non-payment of the sums agreed to be paid by the latter for the privilege of running over the road—determined, in a case depending upon particular facts, see Elmira Iron & S. Roll. Mill Co. v. Erie Ry. Co., 26 N. J. Eq. 284.

A receiver represents both the creditors and their debtor, the insolvent, he being the trustee of both and bound to serve both, but his right to represent the creditors in opposing a contract entered into by the debtor is generally limited to questions of fraud, though he may be heard individually when he asserts a personal right, although precluded from being heard as a receiver. In re Pleasant Hill Lumber Co., 126 La. 743, 52 So. 1010.

11 A receiver represents and stands in the place of the corporation over which he is receiver and can enforce only such contracts and rights as the corporation itself could enforce. Russell v. Bristol, 49 Conn. 251; Greene v. A. & W. Sprague Mfg. Co., 52 Conn. 330; Coope v. Bowles, 42 Barb. (N. Y.) 87; Leavitt v. Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Gillet v. Moody,

The functions of the receiver are merely to marshal the assets and distribute the assets of the receivership to the creditors as directed by the court according to their respective rights and interests. He is, as a general rule, but the agent of the court, and is not the agent of the owner of the property for the fulfillment of his contracts, except where he makes the contracts his own by some act of adoption.[12]

If the receiver were required to complete the unfinished contract of the owner the effect in many cases would be to make a preference in favor of a simple contract creditor as against a lien holder, and thus change the rights of the parties as they exist at the time of the receiver's appointment.[13]

3 N. Y. 479; Brouwer v. Hill, 1 Sandf. (N. Y.) 629.

Although the general rule is that a receiver takes the title of the person or entity whose receiver he is, subject to the defenses existing against them, still he may, in the interest of creditors, disavow contracts of the debtor which are in fraud of the rights of the creditors. Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519; Curtis v. Leavitt, 15 N. Y. 9.

A receiver in a foreclosure proceeding has no power to contract for municipal aid in the construction by him of the unfinished portion of a branch road. Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637.

As to the liability of the receiver for work partially completed when appointed and continued by the contractor thereafter until ordered to suspend, see Girard Life Ins. A. & T. Co. v. Cooper, 51 Fed. 332, 2 C. C. A. 245, 4 U. S. App. 631.

12 Hoyt v. Stoddard, 2 Allen (84 Mass.) 442; Ellis v. Boston etc. R. Co., 107 Mass. 1; Commonwealth v. Franklin Ins. Co., 115 Mass. 278; Re Brown, 3 Edw. Ch. (N. Y.) 384; Woodruff v. Erie R. Co., 93 N. Y. 609; Re Otis, 101 N. Y. 580, 5 N. E. 571; Brown v. Warner, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032; St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. Ed. 690, 12 Sup. Ct. 795; United States Trust Co. v. Wabash etc. R. Co., 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. 86; Seney v. Wabash Western R. Co., 150 U. S. 310, 37 L. Ed. 1092, 14 Sup. Ct. 94; Peoria & P. U. R. Co. v. Chicago, P. & S. W. R. Co., 127 U. S. 200, 32 L. Ed. 110, 8 Sup. Ct. 1125; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. Ed. 1025, 12 Sup. Ct. 235; Turner v. Richardson, 7 East 335.

13 Olyphant v. St. Louis Ore & S. Co., 28 Fed. 729; Southern Express Co. v. Western etc. R. Co., 99 U. S. 191, 25 L. Ed. 319. In this case there was a contract between a railroad company and an express

The court, however, may order the receiver to complete unfinished contracts if by so doing the interests of all parties will be better conserved, and, in such case, whatever is done by the receiver in the performance of such contracts becomes an obligation upon the receivership and its property to be protected by the court.[14]

It is, however, as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities, as it is to make a just distribution among the general creditors.[15]

§ 35. Performance by Receiver of Executory Contracts.

Following the rules set forth in the preceding section, it is apparent that unless there is some equitable lien upon the receivership property which demands the performance of the contract as part of its obligation, the receiver is under no obligation to perform an executory contract entered into by the defendant prior to his appointment. He may proceed with the contract if he deems such continuance to be beneficial to the estate

company by which the latter loaned the former a sum of money to be expended in repairing and equipping the road in consideration of the privileges and facilities of express business over the road. Foreclosure proceedings were instituted and a receiver appointed, who refused to perform the contract. A bill for specific performance of the contract was filed by the express company. The court held that a specific performance if decreed would be a form of satisfaction or payment, and declined to grant the relief.

14 Florence Gas, E. L. & P. Co. v. Hanby, 101 Ala. 15, 13 So. 343; Suydam v. Bank of New Brunswick, 3 N. J. Eq. 114; Olyphant v. St. Louis Ore & S. Co., 28 Fed. 729. But see Elmira Iron & S. Roll. Mill Co. v. Erie Ry. Co., 26 N. J. Eq. 284.

15 American etc. Bank v. McGettigan, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793.

A receiver's exclusive possession of property does not interfere with or disturb any pre-existing liens, preferences, or priorities. He simply holds the property intact until the relative rights of all parties can be determined, and prevents the sacrifice of assets by a multiplicity of suits and executions. Pelletier v. Greenville Lumber Co., 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855.

or abandon it if he deems it not beneficial to the receivership.[1] The privilege of a receiver in this respect is for the purpose of acting in the best interests of the receivership estate and its creditors and it extends not only to the right to elect what contracts he will adopt but also to making such election without subjecting the receivership fund to the satisfaction of existing claims of creditors for damages arising from the breaches of their contracts.[2]

Although the receiver may not be bound by the contract of the defendant with other parties, his appointment will not nor can any act on his part impair the obligations of the contract as between the original parties to it and therefore the injured party to the contract may recover damages against the defendant for its

1 Where the receiver of a corporation, when appointed, found a contract for the transportation of large quantities of stone partly performed, it was his duty to proceed with the contract if beneficial to the estate, and to abandon it if not beneficial. Butterworth v. Degnon Contracting Co., 214 Fed. 772, 131 C. C. A. 184, reversing judgment (D. C.) 208 Fed. 381.

Receiver of estate of insolvent corporation has the right to question a transaction in which insolvent borrowed money, paying an alleged usurious rate of interest. James Bradford Co. v. United Leather Co., (Del. Ch.) 95 Atl. 308.

In Southern Express Co. v. Western etc. R. Co., 99 U. S. 199, 25 L. Ed. 319, the court said: "A specific performance by the receiver would be a form of satisfaction or payment which he can not be required to make. As well might he be decreed to satisfy appellee's demand by money as by the service sought to be enforced."

A receiver who comes into possession of unfulfilled contracts, although not bound to perform them if he deems it unprofitable to the estate, must nevertheless investigate the matter and determine what he should do in the best interests of the receivership. Harrigan v. Gilchrist, 121 Wis. 127, 352, 99 N. W. 909, 978.

The non-performance of a contract can not be recovered for if caused by the appointment of a receiver and injunction against the further transaction of business. Malcomson v. Wappoo Mills, 88 Fed. 680.

A guaranty of coal that may be bought may be enforced by a receiver, although the guaranty was before the receivership, and the sale of coal was by the receiver himself. Philadelphia etc. Iron Co. v. Daube, 71 Fed. 583.

2 Wells v. Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599.

breach and the receiver is not a necessary party to such an action.[3]

The application of the rules discussed in these sections to specific subjects, such as in respect to leases and public service corporations and the like, will be treated more fully in the sections devoted to such subjects.

§ 36. Effect of Receiver Adopting Prior Contracts.

Where a receiver having a right to repudiate a contract of the defendant in the receivership proceeding adopts the contract, either expressly or by such implied acts as leave no question of the adoption, he must comply with all of its terms and burdens. He can not, under such circumstances, accept its benefits without also assuming its burdens.[1] Where the receiver has adopted

3 Wolf v. National Bank, 178 Ill. 85, 52 N. E. 896; Chemical Nat. Bank v. Hartford Deposit Co., 156 Ill. 522, 41 N. E. 225 (affirmed in 161 U. S. 1, 40 L. Ed. 595, 16 Sup. Ct. 439).

Money due upon contracts entered into prior to the receivership and which do not constitute a lien on the property of the receivership, constitutes merely a part of the general indebtedness of the receivership. A payment of such indebtedness by the receiver before a general distribution would in effect be giving a preference to creditors who were not entitled to a preference. Ellis v. Boston etc. R. Co., 107 Mass. 1 (same case under the name of Graham v. Boston etc. R. Co., 118 U. S. 161, 30 L. Ed. 196, 6 Sup. Ct. 1009).

No act of a receiver could relieve a party from obligations arising from a valid contract, made before the receivership. Arlington Heights Realty Co. v. Citizens' Ry. & Light Co., (Tex. Civ.) 160 S. W. 1109.

Where an executory contract made by a corporation is terminated by its receivers on its insolvency, a claim by the other party for damages for loss of expected future profits is not provable against the insolvent estate. In re New York City Ry. Co., 188 Fed. 339; Pennsylvania Steel Co. v. New York City R. Co., 188 Fed. 343.

1 De Wolf v. Royal Trust Co., 173 Ill. 435, 50 N. E. 1049; Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250; Nelson v. Kalkhoff (In re Bishop), 60 Minn. 305, 62 N. W. 335; Commercial Pub. Co. v. Beckwith, 167 N. Y. 329, 60 N. E. 642; Sumner Iron Works v. Wolten, 61 Wash. 689, 112 Pac. 1109; Street v. Maryland Central R. Co., 59 Fed. 25; Central Trust Co. v. Continental Trust

the contract, he can not refuse to be bound by the terms fixed by it and be willing to merely pay a "reasonable

Co., 86 Fed. 517, 30 C. C. A. 235; Dayton etc. Co. v. Felsenthall, 116 Fed. 961, 54 C. C. A. 537; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. Ed. 1025, 12 Sup. Ct. 235; Eames v. H. B. Claflin Co., 220 Fed. 190.

When, however, a receiver adopts a contract of the defendant, he then becomes mutually bound by its terms with the other party. General Electric Co. v. Whitney, 74 Fed. 664, 20 C. C. A. 674.

He will be directed to pay claims made on account of material furnished to and accepted by him as such receiver, and which are either admitted by him to be due or which have been properly verified and presented for payment. Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188.

A receiver of a party to a contract has a reasonable time within which to elect to adopt or perform the contract, where performance is necessary; and he can not be put in default for not adopting, or performing, or tendering such performance, before such reasonable time has expired. Rogers v. Union Iron & Foundry Co., 167 Mo. App. 228, 150 S. W. 100.

In this connection see also Butterworth v. Degnon Const. Co., 208 Fed. 381.

In Easton v. Houston etc. Ry. Co., 38 Fed. 784, the original contract, whereby certain Pullman cars were transferred from plaintiff to the railway company, imposed certain burdens upon the latter. The subsequent receivers of the railway, while retaining the cars, declined to assume such burdens, having never themselves made any contract or agreement with the claimants. But the court held the receivers bound to perform the covenants of the previous agreement, saying:

". . . the receivers, with full knowledge of the obligations of the railway company, and the condition of the property furnished thereunder, did take possession of the lease and leased property, and operated the same, enjoying all the advantages thereof, and all for the benefit of the trust fund. It would seem that, under this state of facts, the receivers, fully authorized thereto, became the assignees of the railway company, and thereby legally and equitably obligated themselves to perform the several covenants undertaken by the company as to the care and return of the leased property. The lease in question was an entirety; of necessity an assignment or assumption thereof was of the whole, and not of any particular part." (Citing authorities.)

In Girard Life Ins. etc. Co. v. Cooper, 162 U. S. 529, 538, 40 L. Ed. 1062, 16 Sup. Ct. 879, where the receivers accepted the benefits of the performance of a contract entered into prior to their appointment, which contract was unenforceable against them, the Supreme Court of the United States said:

"It is true that the company, in December, 1890, was put into the hands of receivers; but, with full knowledge of all that was being

price" to be fixed by the court for the materials bought, services rendered, rentals or other things of value re-

done, they allowed the work to continue without interruption, until June 3, 1891, and were justly held to be liable for what had been done up to that time, according to the terms of the contract."

In Central Trust Co. v. Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235, the Eighth Circuit Court of Appeals, after holding that a prior lease contract is not valid as against the receivers, says:

". . . but if, after due investigation, the receiver decides that it is best not to sell or surrender the leasehold interest, because it is indispensable to the successful operation of the trust estate, and the court, on consideration, so determines, and notifies the lessor, and thereafter continues the possession, such acts would constitute an adoption of the lease, and, of consequence, carry with it the obligation of the receiver to pay according to the stipulations of the lease."

The court then mentions the fact that "the law implies the fact of adoption from the mere refusal of the court to surrender possession to the lessor upon his application" (p. 526), and concludes:

"If the lease was adopted, the law fixed the rental specified in the lease as the amount of compensation to be rendered."

In Dayton etc. Co. v. Felsenthall, 116 Fed. 961, 54 C. C. A. 537, the receivers did not take actual possession of the previously leased premises, and upon demand by the claimants refused either to surrender the premises or to pay rent, as provided in the lease. The lower court finally ordered the premises surrendered to claimants, but declined to order any payment of rent. The Circuit Court of Appeals, in reversing this judgment, held that the refusal of the receiver to return the property amounted to an election to retain it, and rendered him liable to perform the covenants of the lease rather than for a reasonable rental. The late Mr. Justice Lurton, speaking for the court, after remarking that the controversy in a case of this kind is usually "whether rent should be paid according to the stipulations of the contract between lessor and lessee, or upon a basis of a reasonable compensation to the lessor," says:

"His (the receiver's) whole conduct was that of one who was neither willing to give up the premises, nor to make the lease his own. . . . These considerations lead us to the conclusion that the receiver has appropriated the premises to the use of the other properties committed to his charge, in the way in which it was most useful, by retaining his hold upon the term, and his constructive possession of the premises; and that from July 16, 1896, he ought to compensate the lessor by paying the rents stipulated in the lease, and the taxes."

Where a receiver comes into the possession of an executory contract for the sale of corporation stock or land, he obtains no greater rights under it than the

ceived by him under the contract. The fundamentals going to the make-up of a contract are not abrogated

purchaser has under its provisions. He can not obtain the property described in the contract without paying for it any more than can the original purchaser under the contract. Continental Trust Co. v. Brown, (Tex. Civ.) 179 S. W. 939.

In the case just cited the court said: "Since this stock contract is executory, whether it be Hildebrand, Hopkins, or the Boston & Texas Corporation, they neither had the legal title to the property, but only the right to complete the purchase by paying the price and then obtain a title. It is not different from a man who buys land, and the vendor's lien and superior title are reserved until the balance of the purchase money is paid. The title there remains in the seller; the purchaser only having the right to complete the purchase and obtain a title by paying the price. It would be a monstrous proposition of law if the purchaser of this stock could demand and receive the stock without first paying for same. And here payment of the $175,000 is not even tendered; but it is proposed to do, through a receiver, what no one would contend that Hopkins or Hildebrand would have the right to do as individuals, namely, get possession of the stock without first paying for it. A receiver takes no greater title to or right in property than the owner had prior to the receivership. The appointment of a receiver does not do away with rights fixed by contract, and the very same contract under which right to the stock is here asserted provides that the executor should hold same until the purchase money should be paid."

In Commercial Pub. Co. v. Beckwith, 167 N. Y. 329, 60 N. E. 642, the defendant made a loan to the publishing company under a contract which constituted defendant the agent for the publishing company in certain territory to secure advertisements, and to make and apply the collections therefor to the repayment of his loan. Defendant secured advertisements and received payments from the advertisers for them. A receiver was then appointed for the publishing company, and he took advantage of defendant's labor in securing the advertisements by publishing them and earning their price. The defendant then claimed that the amounts collected for the advertisements could be retained by him under the contract and applied to the loan. The receiver repudiated the contract and brought suit for these proceeds. But the New York Court of Appeals held that the receiver could not receive the benefits of defendant's performance of the contract (securing the advertisements) and repudiate the burdens and obligations of the same contract. The court, in holding against the receiver, said:

"As receiver he could refuse to carry out or execute the contract of the defendant, and by so doing leave him with his claim for damages for a breach of the contract; or, if he saw fit, he could carry

merely because a court through its receiver has become a party to the contract.[2] The rule in this respect was

out and perform the contract of the corporation, and thus prevent any claim for damages. He could not, however, perform the contract and receive the benefits without satisfying the obligations of the company thereunder. When, therefore, the receiver accepted and published the advertisements procured by the defendant, he must be deemed to have done so under the contract which the defendant had with the corporation; and under that contract the defendant had the right to collect the moneys accruing for such advertisements, and to retain out of such collections a sum not to exceed $1000 per month, to be applied upon the loan."

The case was affirmed by the Supreme Court of the United States. Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 47 L. Ed. 598, 23 Sup. Ct. 382.

[2] In Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250, the claimant and the corporation entered into a contract for the lease of a concession at the World's Fair for the stipulated price of 25 per cent of the gross receipts. The corporation became insolvent and a receiver was appointed to carry on its business. The receiver continued to occupy the premises but insisted that he should be required to pay only a reasonable rental for the premises and not the 25 per cent of the gross receipts stipulated for in the original contract, the very contention of the receivers at bar. But the court held that the receiver, having taken the benefits, must also assume the burdens and pay the amount fixed by the contract rather than a "reasonable" price to be fixed by the court. After deciding that the contract was not originally valid as against the receivers, who could have repudiated it, the court says:

". . . the question is whether, after it had taken possession, and under the order of the court carried on the business as it had theretofore been carried on by the insolvent company, until the end of the term, and received all the benefits and profits of the contract from thenceforward, it should not also, in view of the circumstances shown in the record, be required to assume the burdens and pay the stipulated price for the part of the term it so carried on the business and received the receipts. . . . But appellant insists that if the receiver was bound to pay anything, it was bound to pay only a reasonable compensation for the privileges enjoyed, and was in no wise bound by the price stipulated in the contract; and insists that it is shown by the pleadings upon which the question arises that the contract price was unreasonable and excessive, and that the court erred in refusing to refer the cause to the master to take proof as to the reasonable value of the privileges the receiver enjoyed. This position can not be sustained on this record. . . . But we have been referred to no cases holding that, where the lease or contract is of itself a thing of value to the

well stated by Mr. Chief Justice Start of the Supreme

creditors, and the receiver, under the order of the court, takes possession of the premises, and conducts the business which the insolvent had been unable to continue, and, without any act of disaffirmance or notice that he would not be bound by the contract, completes the term, and receives profits, and all the benefits, from such possession and continuance of the business, the receiver may then repudiate the contract, and pay only on the basis of a quantum meruit. . . . In view of the above-recited facts we do not deem it important whether appellee had a right of re-entry or not for non-payment of the percentages reserved in the contract, or whether or not it had the right to declare a forfeiture; for, if the receiver, by the consent of the creditors, elected to take the place of the insolvent, and to perform the contract for the remainder of the term, and did so, receiving the benefits therefrom, a court of equity would not permit its said receiver, at the end of the term, when it would be too late for the other party to take any action it might think proper for the protection of its own interests, to say that it had not assumed the obligation to pay at the contract price."

In De Wolf v. Royal Trust Co., 173 Ill. 435, 50 N. E. 1049, the court said:

"The only question here is whether the court erred in . . . holding the receiver not bound by the covenants of the lease. The decision, in effect, was, that the receiver could accept the leasehold interest vested in it by the order of appointment without becoming bound by the terms of the lease, and could remain in occupancy under the lease for so much of the term as it might choose, and, at its pleasure and election, abandon the premises and surrender the lease."

The court then recognizes the fact that the contract was not originally enforceable as against the receiver, and proceeds:

"If he [the receiver] remains in possession beyond a reasonable time to make the election, he, by implication, elects to accept the lease, and becomes bound, as receiver, under its terms; and the remedy of the landlord for rent may be sought against the estate of which he is receiver. If a receiver elects to adopt a lease, he becomes vested with a right to the leasehold estate; and a privity of estate is thereby created between him and the lessor, by which he becomes liable upon the covenant to pay the rent. United States Trust Co. v. Wabash W. R. Co., 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. 86. Neither courts nor receivers have any right to disregard contracts or violate obligations. The only question open here was whether the receiver would take the lease. The stipulation in the case is that the receiver, at the time of its appointment, elected to take possession of the premises, and occupy the same, and did occupy them for three months. This was for more than one-half of the term remaining at the time of the appointment, and that length of time was not necessary for the purpose of determin-

Court of Minnesota in a case [3] involving a lease, wherein he observed:

"When the receiver took possession of the demised premises in this case, it was under the lease, otherwise he was a trespasser; for the court had no power by its receiver to take possession of the property of a third party without his consent, and then make its own terms as to the compensation to be paid for the use thereof. The receiver having taken possession and occupied the premises by virtue of the lease, the appellants are equitably entitled to rent at the stipulated rate, unless some new arrangement as to the amount to be paid for the use of the premises was entered into between the parties. . . . The duty of the receiver, failing to se-

ing whether it would take the lease."

The court then approved Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250, and concludes:

"The rule does not disregard the rights of the landlord, and a receiver can not be permitted to use his situation as an officer of the court to sequester property of a landlord, and hold the same without his having any redress. . . . The receiver could not take, and the court could not authorize it to take, that estate, except as a whole, and upon the terms of the lease."

[3] Nelson v. Kalkhoff (In re Bishop), 60 Minn. 305, 62 N. W. 335. In this case the receiver took possession of claimant's premises, occupied them for a month, and then notified claimant that he would not recognize the previous lease, as the rent reserved therein was greater than the reasonable rental value of the premises, but would pay a reasonable rental therefor. No agreement could be reached between the receiver and the claimant. Upon settlement the claimant petitioned that the receiver comply with the covenants in the lease. The receiver urged that he was liable for a reasonable rental only. It was admitted that a reasonable rental was $300 a month, while the lease stipulated for $500 a month. The lower court upheld the receiver's contention. Upon appeal Chief Justice Start for the Supreme Court of Minnesota, in reversing the cause, said:

"Are the appellants equitably entitled to be paid rent as reserved in the lease for the time the premises were in the possession of the receiver? This is the only question in the case, and we answer it in the affirmative. . . ."

The court then proceeded to hold that the lease was not originally valid as against the receiver.

cure more favorable terms than those in the lease, was either to surrender the premises at once, or retain them at the stipulated rent, if he deemed it for the interest of the trust estate so to do. It is true that the appellants' petition is addressed to the equitable side of the court, but equity must regard the contract rights of the appellants, and it would clearly be inequitable for the receiver to take possession of the premises by virtue of the lease, enjoy its benefits, then repudiate its burdens and ask the court to make a new contract for the parties, which the appellants refused to make."

And on the other hand, the receiver will not be allowed to exercise his judgment without the approval of the court in adopting a contract in which he as an individual is a party and in which contract he is to obtain compensation for services which he should perform in his capacity of receiver. He must, in adopting or rejecting such contracts, be guided solely by the question whether the contract will or will not operate beneficially on behalf of the receivership.[4] Where several contracts

[4] In appeal of Pramuk, 250 Pa. 45, 95 Atl. 326, the receiver of a brewing company had prior to the receivership a contract for a commission upon certain sales of beer which he controlled, but this contract was substituted by another in which he accepted a salary of $600 a month in lieu of his commissions. During his receivership, which continued for thirty-five months, he paid himself $21,000 by way of salary under this contract, he having been authorized by the court to continue the business as a going concern. He conducted the business in better shape than before the receivership. The court disallowed him the $21,000 which he paid to himself, saying: "A receiver is an officer of the court; and, by accepting such appointment, he accepts the responsibilities of his office, which involves the exercise of his best business experience and influence for the benefit of the company in the same manner as if he were the sole owner of the business. For these services the law recognizes the justice of compensation measured by the circumstances of the case. Beyond such compensation, the receiver may not profit by his position to the detriment of the creditors or owners of the business. The very fact of his ability to control trade or his familiarity with the business might have been and probably was the inducement for appellant's appointment by the

relative to a matter exist but are severable and not connected with each other, an acceptance of one is not necessarily an adoption of the other. Thus where a corporation accepts orders sent in by the general sales agent, but before they are filled the company goes into the hands of a receiver, he may, if he does not adopt the general sales contract with the agent, fill the orders on hand without being liable as receiver for the commissions of the agent under the contract; the agent as to such commissions being in the same position as other creditors.[5]

§ 37. Conditional Sales, Consignments, and Purchases with Knowledge of Insolvency.

Where property is sold under a contract conditioned that the title to it shall remain in the seller until it is paid for, title does not pass to the buyer until the conditions are fulfilled, and in the event of a receiver being appointed for the buyer, such receiver is entitled to a reasonable time within which to elect whether he will adopt the contract or return the property, paying, of course, the stipulated rental for the property for the time during which he has used it. If he elects to take the property subject to the conditions named

court as a person most likely to successfully wind up the affairs of the corporation, especially where, as here, the purpose was to keep it a going concern. If appellant could not afford to undertake the duties required by the appointment at the compensation usually allowed under such circumstances, the time to make this known was when the appointment was made by the court. Not having done so, and having accepted the appointment, his duty to the court required of him the exercise of his utmost ability and influence in closing the business, for which service he would be entitled to receive the compensation usually allowed receivers. In view of the fact that his entire time was not employed in the performance of his receivership duties, the compensation of $15,000 allowed him by the auditor was both ample and reasonable under the circumstances, and the surcharge of the $21,000, which he paid to himself under his contract with the company at the time of his appointment as receiver, was entirely proper."

[5] Brandenburg v. Coxe, 228 Pa. 212, 77 Atl. 455.

in the contract he is bound to perform the conditions before he can obtain title to it.[1] Where, however, the

1 Commonwealth v. Franklin Ins. Co., 115 Mass. 278; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. Ed. 1025, 12 Sup. Ct. 235; Turner v. Richardson, 7 East 335.

Where the seller of property reserves title to it until the payment of the purchase price, the receiver of the purchaser obtains no greater title to the property than the purchaser had and hence can not convey title to the property. Sayles v. National Water etc. Co., 62 Hun 618, 16 N. Y. Supp. 555, 41 N. Y. St. Rep. 856 (affirmed by memorandum opinion in 141 N. Y. 603, 36 N. E. 740).

Seller under conditional sale contract is entitled to retake from receiver or trustee in bankruptcy property not paid for. In re Wegman Piano Co., 221 Fed. 128.

If a receiver purchases personal property, but fails to make payment therefor, the vendor may, as in the case of a sale to a private person, resell the property for the best price he can obtain, for the purpose of ascertaining his damages, and without first applying to the court for permission to make such sale. Moore v. Potter, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271.

In Street v. Maryland Cent. R. Co., 59 Fed. 25, the court said: "The New York Equipment Company furnished for the use of the railroad certain locomotives and cars, under contracts of lease and conditional sale, retaining the title to the property and the right to reclaim the property upon default in payment of the installments of purchase money. The Morton Safety Heating Company supplied heating apparatus for passenger cars under similar contracts. All this property is now in possession of the receiver, and he can not operate the road without it. He can not retain it without complying with the contracts, and must pay the current installments and those which have fallen due since the property has been in his hands."

In Sumner Iron Works v. Wolten, 61 Wash. 689, 112 Pac. 1109, the appellant had sold to the corporation some machinery under a conditional bill of sale, reserving title in the seller until paid. A receiver of the insolvent purchasing corporation was subsequently appointed, who took possession of the machinery. The vendor then filed his claim in the receivership proceeding and asked that either the property be returned to it or that it be secured in the payment of the purchase price. The lower court dismissed the claim. But the court in disposing of the matter by reversing the action of the trial judge, said:

"It would have been the court's duty to thereupon inquire into the demand, and if it found it well taken, to order the receiver to comply therewith and surrender the machinery or pay the balance due. The receiver could obtain no better or different title or claim to the machinery than the insolvent lumber company. Its rights were his rights; no more, no less. . . . The appointment of a re-

statute requires such conditional contracts to be executed in a certain manner and recorded, it is necessary that the seller has complied with the statute in order to recover the property from the receiver.[2]

ceiver could not give the lumber company any additional contractual rights, nor deprive it of any old ones. . . . it was right and proper to pray the court which had, by its adjudication of insolvency and appointment of receiver, assumed jurisdiction over all property and property rights of the insolvent debtor, to uphold the contract and enforce its rights."

And Mr. Justice Chadwick (concurring) said:

"On its face, it (the petition) discloses a clear right in the appellant to either a return of its property or the payment of the balance due on the purchase price."

[2] Under Rev. St. 1908, §§ 5523-5525 (Mills' Ann. St. 1912, §§ 6172-6174), a seller of locomotives to railroad under a conditional sale contract duly recorded, pursuant to the statute, on which balance remained unpaid, is entitled to possession as against receivers. Central Locomotive & Car Works v. Smith, 27 Colo. App. 449, 150 Pac. 241.

Though Code 1906, § 3101, by recording notice as prescribed, gives the seller a right to reserve title to chattels sold as security for the purchase price, when such reservation relates to property sold to special receivers to be used by them in the original construction of a manufacturing plant, subject to prior liens and to the paramount lien of receivers' certificates, fixed by decree under which such receivers are authorized to act, such reservation of title to the property sold and affixed to the plant will be protected only when it can be done without detriment to the rights of such prior lienors. Lazear v. Ohio Valley Steel Foundry Co., 65 W. Va. 105, 63 S. E. 772.

A receiver appointed to convert into money the property of an insolvent debtor can avoid, under Rev. St. Mo. 1909, § 2889, the unrecorded condition in a contract of conditional sale to the debtor of personalty found in his possession. T. L. Smith Co. v. Orr, 224 Fed. 71, 139 C. C. A. 517.

Where, in replevin against a receiver for goods conditionally sold his insolvent on a contract, the rights of insolvent under which had been forfeited by insolvent, defendant defends on the ground that there were certain named creditors, and perhaps others, of insolvent, who became such after the sale, relying on insolvent's ownership of the property, so that, under Laws 1903, p. 6, ch. 6, the contract not being on file, the sale became absolute so far as concerns such creditors, they may not intervene, it being unnecessary; they being represented by the receiver. Springer v. Ayer, 50 Wash. 642, 97 Pac. 774.

The receiver of a corporation to which personal property is sold

In other words, the receiver's rights in the property taken in possession by him are subject to all the existing equities against the defendant.[3]

Hence where property found by the receiver in possession of defendant was purchased by him subject to trial and acceptance the same rule applies as in respect

on condition that the title shall pass only on payment of a specified price is not the "personal representative" of the corporation, within Conn. Pub. Acts 1895, ch. 212, sec. 2, providing that all conditional sales of personal property which are not made in conformity with the provisions of sec. 1 shall be held to be absolute sales, except as between the vendor and the vendee or their personal representatives, and all such property shall be subject to attachment and execution for the debts of the purchaser the same as any other unexempt property. Re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163.

In North Coast Dry Kiln Co. v. Montecoma Inv. Co., 82 Wash. 247, 144 Pac. 58, the plaintiffs had sold machinery to a corporation on a conditional bill of sale, but failed to record it in the proper county. The corporation continued in business thereafter, and incurred other debts and then became insolvent and went into the hands of a receiver. The court decided that the conditional bill of sale not having been filed as required by statute, the penalties of the statute applied and the sale became absolute as to the subsequent creditors of the vendee corporation, and that therefore the receiver, representing such creditors, could assert this absolute title in the property, as authorized by the statute. The court further held that the question of the vendor's preference as a general claimant over certain other claimants should have been litigated all in one proceeding and could not be asserted in a different proceeding as against a bona fide purchaser of the property from the receiver.

[3] Hyde v. Lynde, 4 N. Y. 387, 392; Ford v. Cobb, 20 N. Y. 344, 348.

Where a receiver was a mere bailee as to property in his possession, equity would restore possession to the intervener, who proved a title superior, to all others, except a conditional seller, who had the legal title until the balance of the price was paid by intervener. Penton v. Hall, 140 Ga. 576, 79 S. E. 465.

The seller is entitled to have the property, on which his privilege rests, seized and sold forthwith and the proceeds distributed to him. J. P. Hudson & Sons v. Uncle Sam Planting & Mfg. Co., 136 La. 1071, 68 So. 129.

A creditor for coal furnished before the receivership to carry on the business has an equitable lien on the earnings prior to the rights of bondholders under a mortgage covering income and profits. Homer v. Baltimore Refrigerating & Heating Co., 117 Md. 411, 84 Atl. 176.

to property sold on conditional contracts, and the seller may compel the return of the property since, as was said by the chancery court of Delaware:[4]

"Though the seller might have regarded the detention and use as unreasonable and chosen to regard it as an acceptance, it may not choose to do so, and it remains unaccepted so far as the seller is concerned. The buyer can not by his unreasonable detention acquire against the will of the seller a right to the goods sold on trial. The seller may acquire a right against the buyer by the detention, but not the buyer against the seller. This is both a reasonable and just principle. Title did not, therefore, pass to the buyer, even if there had been an agreement as to the prices."

Where goods are received by a party under a selling agreement under which he is to sell them to the public but does not undertake to safe-keep the funds received from such sales, but on the contrary mingles such funds with his own and such mingling is in fact stipulated in the contract, the only express duty being to account for them at agreed times, no such trust relation in regard

[4] James Bradford Co. v. United Leather Co., (Del. Ch.) 97 Atl. 620; see, also, Wolf Co. v. Monarch etc. Co., 252 Ill. 491, 50 L. R. A. (N. S.) 808, 96 N. E. 1063, to the same effect.

Where, however, property is sold on sixty days' time, but is used for nearly a year and the seller had made unconditional demands for the payment of the price, it was held that the unqualified demands for payment put an end to the trial period and the title of a trustee in bankruptcy was absolute. In re Downing Paper Co., 147 Fed. 858.

In re George M. Hill Co., 123 Fed. 866, 59 C. C. A. 354, where a machine sold on trial was used by the buyer until it became bankrupt, and with continued refusals to accept, or pay for the machine. When the buyer was adjudicated a bankrupt, the seller sought to reclaim the machine. It was held that there was no acceptance which under the contract was essential to constitute a completed sale to divest the title of the seller, and the seller having refused to accept until bankruptcy, whether, or not, the refusal was justified or made in bad faith, neither the bankrupt, nor its trustee, could claim an acceptance as a basis of reclamation of the machine.

to them is established as will give the seller a specific interest or equitable charge upon the funds received for the goods as against the receiver of the buyer.[5]

But where one sells goods to a merchant without knowledge of his insolvency and before the goods are delivered a receiver is appointed for such merchant the receiver can not keep the goods unless he pay for them in accordance with the purchase agreement.[6]

§ 38. General Liability of Receiver on His Own Contracts.

A receiver is not individually liable on contracts made by him in his official capacity under the orders of the court. The only remedy which the other contracting party has under such circumstances must be sought in the receivership proceeding.[1]

5 Isaac McLean Sons Co. v. William S. Butler & Co., 208 Fed. 730.

6 Where, on a creditors' bill to sequestrate the assets of an insolvent corporation, receivers were appointed, and thereafter, but before the receivers had filed their bond or taken possession of the property, a seller, who had contracted to sell merchandise to the corporation, and who had no knowledge of the insolvency or receivership, delivered the merchandise to the corporation, the receivers could not retain possession thereof without paying the purchase price, whether their possession related back to their appointment or not, since the corporation could not accept possession after the decree appointing the receivers had been made, unless the receivers rejected the contract of purchase and, if the receivers elected to accept the contracts as assets of the corporation, they must also accept the burdens of such contracts. The retention of the goods delivered in these circumstances must be deemed an election to accept the contracts. The receivers must either pay for the goods the contract price or abandon all claim to them and allow the sellers to retake them. Eames v. H. B. Claflin Co., 220 Fed. 190.

1 Bayles v. Kansas Pac. R. Co., 13 Colo. 181, 197, 5 L. R. A. 480, 22 Pac. 341; Brown v. Wabash R. Co., 96 Ill. 297; Ellis v. Little, 27 Kan. 707, 41 Am. Rep. 434; Avey v. Burnley, 167 Ky. 26, 179 S. W. 1050; Arnold v. Suffolk Bank, 27 Barb. (N. Y.) 424, 425; Farmers' Loan etc. Co. v. Central R. Co., 7 Fed. 537, 2 McCrary 181.

Thus, where the receiver sold certain judgments which were part of the assets of the receivership, and in his official capacity covenanted that they were due and unpaid, he can not be held personally responsible on the cov-

Persons contracting with a receiver are chargeable with notice that contracts made by him must be authorized or ratified by the court.[2] A court may modify or repudiate contracts made by its receiver without its sanction or approval.[3]

If no advantage accrues to the receivership fund from obligations or disbursements by the receiver, the court will not approve his account including them.[4]

A receiver may be personally liable in a contract entered into by him without the sanction of the court even though in relation to a matter which otherwise would be a charge against the receivership.[5] But a receiver who is managing a receivership as a going concern has implied power to make such reasonable contracts as are necessary for the proper management of the receivership.[6]

enant. Livingston v. Pettigrew, 7 Lans. (N. Y.) 405.

2 Hendrie & Bolthoff Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113; Tripp v. Boardman, 49 Iowa 410; Ellis v. Little, 27 Kan. 707, 41 Am. Rep. 434.

3 Mooney v. British Commercial Life Ins. Co., 9 Abb. Pr. (N. S.) (N. Y.) 103.

4 Schwartz v. Rosetta Gravel etc. Co., 110 La. 619, 34 So. 709.

5 Allen v. Kittrell (Tex. Civ.), 162 S. W. 397.

6 Jourdan v. Long Island R. Co., 42 Hun 657, 6 N. Y. St. Rep. 89; Dahlstrom v. Hudelson, 80 Ore. 520, 157 Pac. 798; Central Trust Co. v. Wabash etc. R. Co., 52 Fed. 908.

A court of equity has power to authorize its receiver to purchase goods or make contracts for the benefit of the property in his hands. John H. McGowan Co. v. Ingalls, 60 Fla. 116, 53 So. 932.

Where a receiver enters into contracts under the express or implied authority of the court, they can not be annulled at the pleasure of the court. Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; State Bank v. Domestic Sewing Machine Co., 99 Va. 411, 86 Am. St. Rep. 891, 39 S. E. 141.

A receiver of a railway, even though authorized by the court to make all contracts necessary in carrying on the business of the road, has no authority to lease offices for a term of years without the authority of the receivership court. Chicago Deposit etc. Co. v. McNulta, 153 U. S. 554, 14, Sup. Ct. 915, 38 L. Ed. 819; Braman v. Farmers' Loan etc. Co., 114 Fed. 18, 51 C. C. A. 644.

The receiver and manager of a corporation may contract for supplies but not for ten months in advance without the sanction of the court. Brunner etc. Co. v.

Where the contract is made with the authority of the court it will require the receiver to perform it.[7] Of course, it is not required that a receiver should be obliged to go to the court for an order for every trifling matter. It is the practice in such cases for the receiver to act as he would in conducting his own affairs having in mind that he is acting in a trust capacity and that his acts require the approval of the court in order to relieve him from individual responsibility.[8] Where there are two receivers and one receiver enters into a contract with the sanction and approval of the court, the contract is enforceable notwithstanding that the other receiver did not join in the contract.[9]

The rule in short is, that if a receiver contracts debts on behalf of the receivership without having been authorized by the court or without his acts in so doing having been ratified by the court, he will be personally responsible to the creditors for the debts so incurred, but if, however, he has been previously authorized or his acts have been ratified by the court, the creditor will be obliged to look to the receivership fund for his payment unless the receiver has in his individual capacity guaranteed the debts. In other words, a creditor in dealing with a court acting through its receiver is bound to use the same common sense in extending credit as he would expect to use in dealing with an individual, namely, look to the assets behind the individual or take chances upon the individual not succeeding with the enterprise which he is conducting. It is, of course, true, as we will find when considering the issuance of receiver's certificates, that courts ought not to place themselves in the humiliating position of con-

Central Glass Co., 18 Ind. App. 174, 63 Am. St. Rep. 339, 47 N. E. 686.

[7] Farmers' Loan etc. Co. v. Burlington etc. Ry. Co., 32 Fed. 805.

[8] State Central Sav. Bank v. Fanning Ball Bearing Chain Co., 118 Iowa 698, 92 N. W. 712

[9] Girard Life Ins. etc. Co. v. Cooper, 162 U. S. 529, 16 Sup Ct. 879, 40 L. Ed. 1062 (affirming 51 Fed. 332, 2 C. C. A. 245).

tracting debts which they can not liquidate, and without doubt, on account of the dignified and peculiar position of courts in their functions toward the public, they ought to be very astute not to allow their receivers to incur obligations with only their hope of being able to pay as their principal asset.

§ 39. Binding Force of Contracts of One Receiver on His Successor.

A receivership is continuous notwithstanding that there is a change of receivers during the course of the administration of the receivership.[1] It has, however, been held that one receiver who succeeds another is not liable on the contracts of his predecessor, since he can not be said to be the representative of his predecessor in the legal sense of the term.[2] But we do not understand the courts to hold that where the contract has been authorized or ratified by the court, any one who happened to be

1 Knickerbocker v. Benes, 195 Ill. 434, 63 N. E. 174.

2 Kansas Pac. Ry. Co. v. Bayles, 19 Colo. 348, 35 Pac. 744; Crawford v. Gordon, 88 Wash. 553, L. R. A. 1916C, 516, 153 Pac. 363.

It was held, however, by the same court in Kerr v. Little, 42 N. J. Eq. 528, 9 Atl. 110, that a suit for damages could be maintained against a receiver for the non-performance of the contract of a former receiver.

In Lehigh Coal etc. Co. v. Central R. Co., 38 N. J. Eq. 175, the court said: "It is certain the present receiver is no party to these contracts. He neither negotiated them nor assented to them. He has not been directed by the chancellor to perform them. It is not possible, therefore, for me to see how he was under the least legal duty to perform them, nor under what legal rule he can be held liable, at law, for not performing them. He can not be said to have broken them, because he was under no obligation to perform them. He had promised nothing, and could not therefore be required to perform anything. He is not the representative of his predecessor. In his character as receiver, his predecessor can have no representative, in the legal sense of that term. He was, at best, a mere agent or instrument, and when he died, his power died also, and he left nothing behind him, as receiver, of either property or power, in which he can be represented so as to make his acts binding on his successor."

receiver at any subsequent time would not be bound by it since it is clear that a properly authorized contract is not that of an individual receiver but that of the court, and if the receivership continues regardless of changes in the personnel of the receiver the contract if originally valid will continue to be valid.[3] If a receiver has any doubts about the validity or fairness of a contract made by a preceding receiver he may refuse to perform it until he has sought the advice of the court.[4] A remarkable case along these lines was that of Crawford *v.* Gordon,[5]

[3] Farmers' Loan etc. Co. v. Burlington etc. R. Co., 32 Fed. 805.

[4] Re Angell, 131 Mich. 345, 91 N. W. 611; Haines v. Buckeye Wheel Co., 224 Fed. 289, 139 C. C. A. 525.

[5] Crawford v. Gordon, 88 Wash. 553, L. R. A. 1916C, 516, 153 Pac. 363.

In the course of the opinion in the above case the court said:

"No cases just like the case at hand have been cited, nor have we found any. But if authority be essential, the principle involved may be sustained by reference to analogous cases. We see no difference between this case and one where a receiver comes into a property burdened with a lease or a contract providing for payments under an extended term or an executory contract that puts a burden upon the trust property. When a receiver comes into possession of property which is held under contract, it is his duty primarily to take possession of it, but he does not, by such act, adopt the contract. Scott v. Rainier Power & Railway Co., 13 Wash. 108, 42 Pac. 531; Casey v. Northern Pacific Ry. Co., 15 Wash. 450, 48 Pac. 53. But all the books hold that a contract that is voidable—that is no contract if the receiver elects so to declare—may be ratified by conduct as well as by an express affirmation. The rule and its limitation are stated in the case of Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250. The limitation is thus expressed:

" 'But we have been referred to no case holding that where the lease or contract is of itself a thing of value to the creditors, and the receiver, under the order of the court, takes possession of the premises and conducts the business which the insolvent had been unable to continue, and, without any act of disaffirmance or notice that he would not be bound by the contract, completes the term and receives the profits and all the benefits from such possession and continuance of the business, the receiver may then repudiate the contract and pay only on the basis of a quantum meruit.'

"See, also, High on Receivers (4th ed.), p. 273; Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503; Street v. Maryland Central Ry. Co. (C. C.), 59 Fed. 25; Sunflower Oil

which recently came before the Supreme Court of the State of Washington in which it was contended by re-

Co. v. Wilson, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025; Central Trust Co. v. Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235; De Wolf v. Royal Trust Co., 173 Ill. 435, 50 N. E. 1049; Easton v. Houston etc. Ry. Co. (C. C.), 38 Fed. 784; Dayton Hydraulic Co. v. Felsenthall, 116 Fed. 961, 54 C. C. A. 537, Ann. Cas. 1912C, 949, note.

"So, too, it is generally held that a receiver is not bound by contracts made by a preceding receiver, and that a succeeding receiver is not liable in damages for refusing to perform the contracts of his predecessors.

"Stripping this case to its bare elements, we have the same situation as if the present receivers were repudiating a contract made by their own predecessors, for whatever process of reasoning we employ, it all comes down to this, that here is a transaction that the present receivers were not bound, in law, to carry out.

"In Kansas Pac. Ry. Co. v. Bayles, 19 Colo. 348, 35 Pac. 744, a contract made by prior receivers and repudiated by a present receiver was considered by the court, and although it was held that the contract made by the prior receivers was a valid contract, it did not follow that it was binding upon their successors. The court quoted from the Lehigh Coal & Navigation Co. v. Central Railroad Co., 38 N. J. Eq. 175: . . .

"In this case the receivers, being in essentially the same position, did not repudiate the contract but, by every act that would mark an affirmance and ratification of it if this were a controversy between private parties, adopted and acted upon it.

"Counsel meets these cases by the suggestion that in all of them there was a valid subsisting contract which, but for the receivership, would have been binding upon the insolvent estate and a charge in equity upon its property. This may be admitted without doing violence to the principle invoked. The fact remains that in all cases where the question has arisen there was either a voidable contract or one subject to repudiation. If it be said that in the cases cited the contract was valid as against the company or party but for the receivership, it may be said likewise that the contract in this case would have been valid if the federal court, which, barring the fact that there had been a prior assertion of jurisdiction on the part of the state courts, had continued to administer the trust through its own receivers. That court had jurisdiction of the subject-matter, and jurisdiction to determine its own jurisdiction, and while its receivers were in charge of the property, they were at least de facto officers of a court of competent jurisdiction. In finally deciding that it had no jurisdiction to proceed as against the state court, it had no power or authority to hold anything beyond the fact that it had acted without jurisdiction. The appellants were not parties to that proceeding, and the legality and binding force of their contract was and is a mat-

ceivers appointed by a state court that they were not bound to pay the agreed purchase price of certain railway cars bought by receivers appointed in a federal court on credit under a conditional contract whereby the seller retained title until paid. They contended that they had a right to retain the property and pay merely a reasonable price regardless of the price and conditions in the contract. This contention on the part of the receivers was based on the point that a succeeding federal judge had reversed the order appointing the receivers who had purchased the property under the authority of the appointing court on the ground that there the federal court had no jurisdiction because there had been a prior application for a receiver pending in the state court. Thereupon the federal court annulled all the receivership proceedings had in the federal court. The receivers appointed by the state court took possession of the cars from the federal receivers and subsequently were notified by the seller of the conditional agreement respecting the cars. The receivers in the State Court did not formally adopt the agreement, but used the cars for a long period and in answer to the claim of the seller for compensation asserted that the purchase by the federal receivers was void because the court had no jurisdiction to appoint them and that their own possession was the result of a conversion by themselves which was subject to a judgment for the reasonable value of the cars. The sellers contended that the receivers had impliedly adopted

ter for the state court to determine under the general rules of law and equity.

"Suppose the appellants had not delivered the cars and the receivers had brought an action setting up the contract and the initial payment, and undertook to put the owners to the hazard of a trial to determine the reasonable value of the property, instead of offering to pay the contract price. We think it can be said with entire assurance that the complaint would be held bad on demurrer. A court would necessarily say that if the receivers did not want to take the property under the contract and pay such price as the owners were willing to take, they would be under a legal duty to repudiate the contract in toto."

the contract and were obliged to either return the cars or pay for them in accordance with the contract. The trial court, however, ruled against them, but the Supreme Court very properly held that the receivers were bound by the contract of purchase, and Mr. Justice Chadwick in the course of his opinion said:

"We know of no case holding, nor has any been cited by counsel that will allow an agent or an officer of the court to plead his own tort to defeat a contract. Such, in effect, is the receiver's present attitude. Not having disaffirmed the contract promptly or within a reasonable time, they will not now be heard to say: We repudiate the written contract under which you reserved title; we will deny you a recovery upon your contract and compel you to affirm our tort and take whatever may be awarded to you upon a *quantum valebant.*

"The title to the cars is in appellants. They did not part with it when they sold to the federal receivers, nor will the law compel them to part with it by resort to the fiction of a conversion. Having title, they may select their own remedy, and although the contract of sale may have been a voidable thing, they can not be compelled to accept a contract in lieu thereof which has been made for them by the receivers; that is to say, take a substitution of a contract to sell upon *quantum valebant* for a contract to sell at an agreed price. Courts have great power, but they can not make contracts. If they can not, it follows that their agents and servants can not coerce others into an involuntary contract.

"The receivers knew the sale was voidable. They had the property in possession and in use, and it was up to them to repudiate it within a reasonable time or to bring it to the notice of the court. When they said, 'Proof required,' and then continued to use the property without calling for proof beyond the *prima facie* case made by the appellants, they ratified the contract.

"It would not be fair dealing, either on the part of individuals or the officers of the court, to hold property parted with in good faith upon a contract merely voidable, upon the theory that the seller is remediless, and therefore bound to resell upon such terms as his adversary may dictate. The power of the receiver is the power of the court, and we are not disposed to sanction by judicial decree anything done, or omitted to be done, by the court's officers which would put the court in the attitude of sanctioning a tort.

"Neither do we think that appellants were bound to elect whether they would stand upon their contract or waive it and take the reasonable value of their property. The duty to elect within a reasonable time was upon the receivers.[6] They were bound to deny or affirm the contract under which the property had come to the estate which was subject to their administration. They did not disaffirm until called to the bar of the court. As against this tardy disaffirmance, we must measure the continued use and assertion of ownership in the property."

The receivers in this case also took the position that the sellers in case they desired the return of the cars should have returned the money paid on account, but the court held that they had no right to repudiate the contract on the theory that it was void, that having been solely a privilege which could have been exercised by the receivers.[7]

[6] Citing United States Trust Co. v. Wabash W. Ry. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915, Sunflower Oil Co. v. Wilson, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025.

[7] The court in this respect said:

"Counsel for respondents say in their briefs:

" 'If they [meaning appellants] desire the return of the cars, they should have returned the money paid them under the terms of the void obligation.'

"Counsel have failed to appreciate the exceptions to the general rules of law as they are applied to receivership cases. Appellants had no lawful right to repudiate the contract upon the theory that it was void. The re-

We have given considerable attention to the case of Crawford v. Gordon because it covers points of law on questions of great importance in respect to the relations of receivers toward parties with whom they have contractual relations. The question which probably was most confusing in the case was that relating to the effect of the order in the Federal Court annulling the appointment of the receivers and all proceedings had by them. The receivers in the State Court failed to realize that if they had any title to the property it must have been through the contract rather than by wrongfully holding the property by way of conversion.

Although subrogation is not founded upon contract but upon principles of equity, and may be enforced where no contract or privity of any kind exists between the parties, still it is well settled that where the liability of a party is fixed by contract or by statute, courts will not resort to equity to either enlarge or defeat them.[8]

§ 40. Effect of Order of Appointment as Res Judicata.

It is, of course, elementary that where a court has jurisdiction of the subject-matter and the parties to the action that its orders and decrees in the suit are not sub-

ceivers alone were privileged to do that.

"'The rule which gives to the receiver the right to adopt or reject the contracts of the defendant is not reciprocal, and hence is anomalous. It does not matter how burdensome the contract may be to the latter, he must render performance, if the receiver so demands. The power to adopt or reject the defendant's contracts, to accept those which are of advantage to the trust estate, and reject the burdensome ones, is restricted to the receiver.' Beach on Receivers, Alderson's Edition, § 328, p. 332.

"It is because of the rule which binds the adversary party to his contract that the principle of ratification is held to apply to receivers. The rule that binds the adversary party to his contract, while making it optional with the receiver, compels its corollary, in proper cases; that is, that the receiver must elect whether he will ratify or reject the contract, and that within a reasonable time."

8 Southwestern Surety Ins. Co. v. Pacific Coast etc. Co., 92 Wash. 654, 159 Pac. 788.

ject to collateral attack. If the court appointing a receiver has jurisdiction of the parties and the subject-matter of the suit, its order making the appointment will not be subject to collateral attack even though it be invalid and voidable on a direct attack.[1] Where, however,

[1] In First Nat. Bank v. United States Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846, it is held that an erroneous appointment of a receiver is not void, but voidable, as where the court had jurisdiction of the subject-matter and of the parties. Cook v. Citizens' Nat. Bank, 73 Ind. 256; Howard v. Whitman, 29 Ind. 557; Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682.

In O'Mahoney v. Belmont, 62 N. Y. 133, it is held that in the matter of the county and a person appointed receiver it is no objection that the appointment was void in a case where it appeared that the receiver was appointed and obtained control of the fund without the consent, and contrary to the wishes, of the parties.

An appointment of a receiver upon the application of plaintiff is not invalid because of the erroneous overruling of a previous motion by defendant to require plaintiff as a non-resident to file a bond for costs under Ind. Rev. Stat. 1894, § 598. Galloway v. Campbell, 142 Ind. 324, 41 N. E. 597.

In Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420, it is held that where the court, appointing a receiver for an insolvent corporation, has jurisdiction of the subject-matter and of the parties, the order appointing him can not be questioned collaterally, no matter how erroneous it may be. It can not be attacked upon appeal from an order refusing to give an intervening petitioner a preference in payment on his claim of an equitable lien on the assets of the corporation. See, also, Richards v. People, 81 Ill. 551; Comer v. Bray, 83 Ala. 217, 3 So. 554; Florence Gas etc. Co. v. Hanby, 101 Ala. 15, 13 So. 343; Lowenstein v. Finney, 54 Ark. 124, 15 S. W. 153; Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60; Title Ins. etc. Co. v. Girdner, 152 Cal. 746, 94 Pac. 601; Ward v. Farwell, 97 Ill. 593; Great Western etc. Co. v. Gray, 122 Ill. 630, 14 N. E. 214; Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; Equitable Trust Co. v. Wilson, 200 Ill. 23, 65 N. E. 430; Vandalia v. St. Louis etc. R. Co., 209 Ill. 73, 70 N. E. 662; Bodkin v. Merit, 102 Ind. 293, 1 N. E. 625; Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682; First Nat. Bank v. United States Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846; Hatfield v. Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231, Metropolitan Nat. Bank v. Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Paine v. Mueller, 150 Iowa 340, 130 N. W. 133; Greenwalt v. Wilson, 52 Kan. 109, 34 Pac. 403; State v. Judge of Civil Dist. Court, 45 La. Ann. 1418, 14 So. 308; Converse v. Ayer, 197 Mass. 443, 84 N. E. 98; Skinner v. Lucas, 68 Mich. 424, 36 N. W. 203; Basting v. Ankeny, 64 Minn. 133, 66 N. W. 266; Whitney

the court making the order of appointment was without

v. Hanover Nat. Bank, 71 Miss. 1009, 23 **L. R. A.** 531, 15 So. 33, Keokuk N. L. Packet Co. v. Davidson, 13 Mo. App. 561; Neun v. Blackstone etc. Assn., 149 Mo. 74, 50 S. W. 436; State (ex rel. Connors) v. Shelton, 238 Mo. 281, 142 S. W. 417; Andrews v. Steele City Bank, 57 Neb. 173, 77 N. W. 342; Murphy v. Fidelity etc. Ins. Co., 69 Neb. 489, 95 N. W. 1022; Dean v. Thatcher, 32 N. J. L. 470; Scott v. Dunscombe, 49 Barb. (N. Y.) 73; Whittlesey v. Frantz, 74 N. Y. 456; Stanley v. National Union Bank, 115 N. Y. 122, 22 N. E. 29; Jones v. Blun, 145 N. Y. 333, 39 N. E. 954; Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; Threadgill v. Colcord, 16 Okla. 447, 85 Pac. 703; Thompson v. Holladay, 15 Ore. 34, 14 Pac. 725; First Nat. Bank v. Mack, 35 Ore. 122, 57 Pac. 326; Eichman v. Hersker, 170 Pa. St. 402, 33 Atl. 229; Edrington v. Pridham, 65 Tex. 612; New Britain Mach. Co. v. Watt (Tex. Civ.), 180 S. W. 624; Radebaugh v. Tacoma etc. R. Co., 8 Wash. 570, 36 Pac. 460; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089; Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854; Carroll v. Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32; Wood v. Blythe, 46 Wis. 650; Neeves v. Boos, 86 Wis. 313, 56 N. W. 909; Davis v. Shearer, 90 Wis. 250, 62 N. W. 1050; Gunby v. Armstrong, 133 Fed. 417, 66 C. C. A. 627; Mercantile Trust Co. v. Pittsburgh & W. R. Co., 29 Fed. 732.

A creditor who has brought suit against a private corporation in a federal court, and caused its property to be attached and sequestered on a vendor's lien, which property is subsequently ordered to be surrendered to a receiver previously appointed in a state court, can not successfully assail the order of appointment for informality in the proceedings, without asking judgment on its demand, or disclosing a well-grounded claim for damages against the receiver personally. Remmington Paper Co. v. Watson, 49 La. Ann. 1296, 22 So. 355.

An order directing a receiver to distribute certain funds in his possession, even though erroneous, can not be questioned in a collateral proceeding. Platt v. New York etc. Co., 170 N. Y. 451, 63 N. E. 532.

Under N. Y. Stat., vol. w., p. 463, sec. 36, it was held that if the appointment was binding upon the corporation no one else could question it. Whittlesey v. Frantz, 74 N. Y. 456; Peters v. Carr, 2 Dem. (N. Y.) 22; Barnett v. Nelson, 54 Iowa 41, 37 **Am. Rep.** 183, 6 N. W. 49; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.

But a contract by receivers, whose appointment it was subsequently declared was not authorized, to purchase necessary property is not void, but only voidable, and may be ratified. Crawford v. Gordon, 88 Wash. 553, **L. R. A.** 1916C, 516, 153 Pac. 363.

Where a federal court having jurisdiction over the subject-matter attempted to appoint a receiver, but subsequently revoked the appointment, because the state courts had already acquired jurisdiction over the suit, such re-

such jurisdiction of the subject-matter and parties, the

ceiver is at least a de facto officer, and a contract entered into by him under the authority of the court is not void, but merely voidable, and may be ratified. Crawford v. Gordon, 88 Wash. 553, L. R. A. 1916C, 516, 153 Pac. 363.

Under Code, 574, authorizing the appointment of a receiver without notice, and section 922, permitting chancellors of districts other than that in which the suit is pending to act, an order of appointment reciting that such appointment was made in a cause pending in another district, and that the chancellor of the district was ill, and absent, will be presumed to have been made on a sufficient showing. Pearson v. Kendrick, 74 Miss. 235, 21 So. 37.

Where testimony is introduced on an application for a receiver before a court of competent jurisdiction, and the court, after finding insolvency, appoints a receiver, the proceedings are not null and void and are not subject to collateral attack. W. L. Nelson & Co. v. Adolphe Rocquet & Co., 123 La. 91, 48 So. 756.

Where an order appointing a receiver showed on its face that it was not made and signed until the bill had been filed, such order, on being filed and entered, became a judicial record importing absolute verity, which could not be impeached, either by parol, by a statement of the chancellor, or otherwise, except for fraud. Bank of Meadville v. Hardy, 94 Miss. 587, 48 So. 731.

Where a receiver is appointed over an insurance company on the ground of its insolvency, the insolvency being admitted by the company, a policy holder can not in a suit against him to collect an assessment question the appointment of the receiver on the ground that the company was not in fact insolvent. Eichman v. Hersker, 170 Pa. St. 402, 33 Atl. 229.

The order appointing a receiver can not be questioned on a writ of error to review an order authorizing the issuance of receiver certificates where the court had jurisdiction of both the subject-matter and parties. Vandalia v. St. Louis etc. R. Co., 209 Ill. 73, 70 N. E. 662.

A decree appointing a receiver in an administration suit can not be attacked collaterally by mandamus proceeding, where no appeal has been taken therefrom and it stands unreversed. Ex parte Hurt, 157 Ala. 368, 47 So. 264.

Nor is the appointment invalidated by irregularity or error in the proceeding. As where one of the firm is not made a party to the proceeding, it not appearing that he was within the jurisdiction of the court, or had a substantial interest in the partnership. Stelzer v. La Rose, 79 Ind. 435. Or where the court fails to require adequate security. Nesbitt v. Turrentine, 83 N. C. 535. Nor does the fact that an execution was not sued out and returned nulla bona, in a creditor's proceeding, where no objection was interposed at the time of the appointment, and where according to the facts and admissions it would have been an idle ceremony and of no benefit. Sage v. Memphis & L. R. R. Co.,

order is void and may be attacked in a collateral pro-

125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. 887. Nor where the clerk of court is appointed in violation of the statute. Moore v. Taylor, 40 Hun 56. Nor the failure to give notice as required by law. Corbin v. Berry, 83 N. C. 27. Nor where the findings of the court are not reduced to writing until three or four days after the entry of the order. Forsaith Mach. Co. v. Hope Mills L. Co., 109 N. C. 576, 13 S. E. 869. Nor where the order did not specify the newspapers in which it was to be published, as required by the code. In re Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665. Nor by reason of defects in the averments of the bill. Comer v. Bray, 83 Ala. 217, 3 So. 554. See, also, Stith v. Jones, 101 N. C. 360, 8 S. E. 151. Nor where the receiver neglects to be sworn, as required by statute. American Bank v. Cooper, 54 Me. 438.

One intervening in receivership proceedings with knowledge of the application for the receivership and the answer thereto, which he claims show upon their face fraud in appointing the receiver, can not thereafter attack the appointment of receiver on that ground. Dilley v. Jasper Lumber Co. (Tex. Civ.), 114 S. W. 878.

The Supreme Court will not review the question whether the appointment of a receiver is void in an action against the sureties on a bond of the original defendant to effectuate a stay pending an appeal from the order of appointment where the court has previously affirmed the order appointing the receiver, and such has been held to be the rule even where the record on the appeal from said order was such as to preclude a review of the merits of the action of the court in making it and the decision was in fact made to rest on the legal presumption of the due regularity of the proceeding culminating in the making of the order, since the affirmance of the order involves a conclusive determination of the question and is consequently res adjudicata. Borges v. Hillman, 29 Cal. App. 144, 154 Pac. 1075.

The appointment of a receiver for a private corporation by a state court of general jurisdiction having power under the state statutes to make such appointment in a proper case is a judicial act, which can not be questioned collaterally by any other court. In re Benwood Brewing Co., 202 Fed. 326.

The order of appointment can not be collaterally attacked in a court other than the one in which the appointment was made on the ground of having been made without proper notice. McKay v. Van Kleeck, 133 Mich. 27, 94 N. W. 367.

In a suit by a receiver of a mutual fire insurance company to recover an assessment, defendant can not question the right of the plaintiff on the ground that the receiver was appointed as successor of a prior one without notice. Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704.

In a suit by a receiver in relation to matters connected with his trust the order of appointment will be conclusive. Neeves v. Boos, 86 Wis. 313, 56 N. W. 909; Vermont & C. R. Co. v. Vermont C. R.

Co., 46 Vt. 792; Attorney General v. Guardian Mut. L. Ins. Co., 77 N. Y. 272; Stanley v. National Union Bank, 115 N. Y. 122, 22 N. E. 29; Block v. Estes, 92 Mo. 318, 4 S. W. 731; Cox v. Volkert, 86 Mo. 505; Keokuk N. L. Packet Co. v. Davidson, 13 Mo. App. 561; Richards v. People, 81 Ill. 551; Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 **Am. St. Rep.** 331, 31 N. E. 420; Barbour v. National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5; Beverley v. Brooke, 4 Gratt. (Va.) 187; Neall v. Hill, 16 Cal. 145, 76 **Am. Dec.** 508. It can not be attacked in a matter relating to the compensation of the receiver; nor by a creditor who accepts a dividend from the receiver. Greeley v. Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429. Nor by one consenting to the appointment. Russell v. White, 63 Mich. 409, 29 N. W. 865. Nor, in the absence of fraud or mistake, can a purchaser of the receiver deny the validity of his appointment. Stelzer v. La Rose, 79 Ind. 435. See, generally, Lowenstein v. Finney, 54 Ark. 124, 15 S. W. 153; Florence Gas, Elec. L. & P. Co. v. Hanby, 101 Ala. 15, 13 So. 343; Comer v. Bray, 83 Ala. 217, 3 So. 554; Moore v. Taylor, 40 Hun (N. Y.) 56; Case v. Marchand, 23 La. Ann. 60; Edrington v. Pridham, 65 Tex. 612; Texas etc. Ry. Co. v. Gay, 86 Tex. 571, 25 **L. R. A.** 52, 26 S. W. 599; Wilson v. Barney, 5 Hun (N. Y.) 257.

The possession of a receiver appointed by the court is the possession of the court; and the right of the court to grant the receivership can not be questioned in proceedings for contempt by disturbing such possession. Albany City Bank v. Schermerhorn, 9 Paige (N. Y.) 372, 38 **Am. Dec.** 551.

The proper record evidence of an appointment as receiver is conclusive evidence of the right to act as such, until it is impeached. It is immaterial whether the order of appointment was erroneous or improper; while it is a subsisting order the receiver will be sustained in his possession of property. Vermont & C. R. Co. v. Vermont C. R. Co., 46 Vt. 792; Pressley v. Lamb, 105 Ind. 171, 203, 4 N. E. 682; Bodkin v. Merit, 102 Ind. 293, 298, 1 N. E. 625; First Nat. Bank v. United States Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846; Thompson v. Holladay, 15 Ore. 34, 14 Pac. 725; Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; Greenawalt v. Wilson, 52 Kan. 109, 34 Pac. 403; Radebaugh v. Tacoma & P. R. Co., 8 Wash. 570, 36 Pac. 460; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.

The appointment of a receiver can not be collaterally attacked in an action by the receiver to recover an assessment, where the court appointing him had jurisdiction of the subject-matter and of the parties. Rand, McN. & Co. v. Mutual F. I. Co., 58 Ill. App. 528.

A party to a proceeding for the appointment of a receiver, who contests the application and fails to appeal from the order of appointment, can not afterwards assert a claim based on the irregularity or wrongfulness of the appointment. Saunders v. Kempner (Tex. Civ. App.), 32 S. W. 585.

A judgment appointing a receiver in purely statutory proceedings in which such appointment is not authorized is void, and may be

ceeding.[2] And where the court was without jurisdiction

collaterally assailed. Murray v. American Surety Co., 70 Fed. 341, 17 C. C. A. 138.

An insurance company does not have such an interest in an assignment by a corporation, by reason of a suit against it on a policy by a receiver to whom the assignee was directed to deliver all the property of the corporation, as will authorize it to intervene in the receivership proceedings for the purpose of having the appointment of the receiver and all proceedings taken by him set aside. Barth v. Enger-Kress Co. (American Ins. Co.), 92 Wis. 225, 65 N. W. 1035.

A levying creditor can not intervene to attack the appointment of a receiver on the ground of want of jurisdiction. Holmes v. Knapp Electrical Works, 59 Ill. App. 58.

If the court had jurisdiction of the subject-matter the validity of the appointment can not be questioned in an action by the receiver. Davis v. Shearer, 90 Wis. 250, 62 N. W. 1050.

An erroneous appointment on an inadequate showing will not affect the jurisdiction of the court over the subject-matter. Id.

Appointment can not be attacked in a collateral proceeding. State v. Scarritt, 128 Mo. 331, 30 S. W. 1026. See State v. Ross, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947; Yore v. Superior Court, 108 Cal. 431, 41 Pac. 477; Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854.

A judgment creditor not a party by intervention or otherwise can not appear in the action without leave and move to vacate the order of appointment. Wooding v. J. Wooding & Co., 10 Wash. 531, 39 Pac. 137.

[2] St. Louis etc. Min. Co. v. Sandoval Coal etc. Co., 111 Ill. 32; Whitney v. Hanover Nat. Bank, 71 Miss. 1009, 23 L. R. A. 531, 15 So. 33; Smith v. Ely etc. Dry Goods Co., 79 Miss. 266, 30 So. 653; State v. Ross, 122 Mo. 435, 23 L. R. A. 534, 25 S. W. 947; State v. District Court, 21 Mont. 155, 69 Am. St. Rep. 645, 53 Pac. 272; Gibson v. Sexson, 82 Neb. 475, 118 N. W. 77; Texas etc. Ry. Co. v. Gay, 86 Tex. 571, 25 L. R. A. 52, 26 S. W. 599.

A collateral attack on the appointment of a receiver may be made only when the court making the appointment was without jurisdiction. Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 232, 80 Atl. 805.

If it appears upon the face of the proceedings that a court's order appointing a receiver was without authority of law, and therefore void, the order may be assailed collaterally by any one. State v. District Court, 21 Mont. 155, 69 Am. St. Rep. 645, 53 Pac. 272.

The appointment of a receiver by a federal court in an action to foreclose a mortgage is absolutely void and subject to collateral attack, where the court never acquired any jurisdiction of the cause. Thurber v. Miller, 11 S. D. 124, 75 N. W. 900.

Where a receiver appointed to collect the rents and profits of mortgaged property pending foreclosure brought an action to recover possession of certain cattle claimed by him to be part of the

to appoint a receiver, the order of appointment as well as

rents and profits of the mortgaged property, the defendant may show in such action that the appointment was void on the ground that the court had no jurisdiction to make such appointment. Baker v. Varney, 129 Cal. 564, 79 **Am. St. Rep.** 140, 62 Pac. 100.

The jurisdiction of the court to appoint the receiver may be questioned collaterally in any action in which the appointment or the alleged receiver's title is involved. In an action of claim and delivery against an alleged receiver, it may be shown that he wrongfully seized possession under a void order of appointment. And where the court vacated the void order of appointment, the receiver was thereby deprived of any semblance of authority to retain the possession of property seized thereunder. He can neither justify under the void order, nor insist that authority must first have been granted before suing him in claim and delivery. He thereafter holds the property seized only in his individual capacity, and the true owner may reclaim the same. Bibby v. Dieter, 15 Cal. App. 45, 113 Pac. 874.

And where a receiver was appointed over a corporation on the application of the corporation but without filing a bill and without notice, the order of appointment will be subject to collateral attack, although the proceeding in which the attack was a writ of prohibition which appears to have been regarded as a direct attack on the order. State v. Ross, 122 Mo. 435, 23 **L. R. A.** 534, 25 S. W. 947.

But in First Nat. Bank v. Mack, 35 Ore. 122, 57 Pac. 326, in a case where the receiver had been appointed in a suit commenced by a stockholder on the sole ground of its insolvency, the court held the validity of the order of appointment could not be raised in a suit by the receiver to have a certain judgment declared not a lien upon the assets of the receivership.

The appointment of a receiver of a dissolved corporation without notice to it is void where the appointment is made without requiring the complainant to give bond, in violation of Ala. Acts, 1894-95, p. 226, although such corporation may have been in contempt in joining in a request in another court for the appointment of a receiver. Capital City Water Co. v. Weatherly, 108 Ala. 412, 18 So. 841.

In St. Louis etc. Min. Co. v. Sandoval Coal etc. Co., 111 Ill. 32, the doctrine is laid down that a judgment or decree rendered where jurisdiction is wanting of either the subject-matter or parties is void and a nullity, and all acts performed under it are void and no right can be devested by it or acquired thereunder. Cf. Mulford v. Stalzenback, 46 Ill. 303, 306; Campbell v. McCahan, 41 Ill. 45; Johnson v. Baker, 38 Ill. 98, 87 **Am. Dec.** 293; Chambers v. Jones, 72 Ill. 275; Grand Tower Min., Mfg. & T. Co. v. Schirmer, 64 Ill. 106; Haywood v. Collins, 60 Ill. 328; Chase v. Dana, 44 Ill. 262; White v. Jones, 38 Ill. 159; Curtiss v. Brown, 29 Ill. 201, 229; Pardon v. Dwire, 23 Ill. 572.

Otherwise, however, where there is a mere error or irregularity.

everything done in the alleged receivership is void and subject to impeachment in a collateral proceeding.[3] So also where a person has by some act on his part recognized the validity of the order appointing the receiver, he will be precluded from thereafter questioning it in

Adams v. Larrimore, 51 Mo. 130; Wenner v. Thornton, 98 Ill. 156; Harris v. Lester, 80 Ill. 307; Wing v. Dodge, 80 Ill. 564; Hernandez v. Drake, 81 Ill. 34. Cf. Neeves v. Boos, 86 Wis. 313, 56 N. W. 909; Stanley v. National Union Bank, 115 N. Y. 122, 22 N. E. 29; Greenawalt v. Wilson, 52 Kan. 109, 34 Pac. 403.

In Texas & P. Ry. Co. v. Gay, 86 Tex. 571, 25 L. R. A. 52, 26 S. W. 599, the court exhaustively discusses the question of jurisdiction, not only as between courts, but also as to what constitutes jurisdiction over the subject-matter, as well as jurisdiction over the parties to the suit, and also holds that a receiver appointed under a void order must be deemed to have been simply the agent of the railway company over whose property he was appointed, and it is liable for injuries resulting from his management of the railway to the same extent and in the same manner as if such receiver were made agent in the ordinary course of business; and the same rule applies where the receiver is appointed by collusion, in such case he being treated as the agent of the parties procuring the appointment.

So, also, where the appointment of a receiver of an insolvent corporation was made ex parte and without the filing of a bill, the order of appointment is subject to collateral attack. Smith v. Ely etc. Co., 79 Miss. 266, 30 So. 653.

Goods taken by a receiver under an appointment which is void need not be restored before hearing another application for the appointment of a receiver, as void appointments may be entirely disregarded and a second appointment made without vacating the first. Nor does such an appointment of a receiver by a void order disqualify him from being appointed under a second order, under Ind. Rev. Stat. 1894, § 1237, providing that no party, attorney, or "other person interested" in any action shall be appointed receiver therein. Robinson v. Dickey, 143 Ind. 214, 42 N. E. 638.

3 Jones v. Schaff Bros. Co., 187 Mo. App. 597, 174 S. W. 177.

Where an order appointing a receiver was without jurisdiction subsequent orders approving his acts, allowing and approving his expenditures and authorizing him to issue receivership certificates therefor, were erroneous. Anderson v. Robinson, 63 Ore. 228, 126 Pac. 988 (rehearing denied, 127 Pac. 546).

Where the court appointing a receiver had no jurisdiction, it can not claim jurisdiction over the property seized without jurisdiction, and pay costs and expenses of the receivership therefrom. Hawes v. First Nat. Bank of Madison, 229 Fed. 51, 143 C. C. A. 645.

accordance with the general rules relating to the law of estoppel.[4]

[4] The doctrine of estoppel applies also to receivers. Wilmington Star Min. Co. v. Allen, 95 Ill. 288; Peabody Coal Co. v. Nixon, 226 Fed. 20, 140 C. C. A. 446.

Consent or long acquiescence in the appointment will estop a party from questioning the legality of the appointment where the court had jurisdiction. Pagett v. Brooks, 140 Ala. 257, 37 So. 263; Dickerson v. Cass County Bank, 95 Iowa 392, 64 N. W. 395; Post v. Dorr, 4 Edw. Ch. (N. Y.) 412; Zieverink v. Kemper, 50 Ohio St. 208, 34 N. E. 250; Pitts v. New Mammoth etc. Min. Co., 23 Utah 623, 65 Pac. 1076; Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. Ed. 1021, 10 Sup. Ct. 604.

The legality of an appointment of a receiver made in open court, in the presence of the adverse party, without objection or exception, can not be raised by motion to set it aside. Gray v. Oughton, 146 Ind. 285, 45 N. E. 191.

Creditors who have admitted the necessity of an appointment of a receiver, and who have made application for another appointment than that made, can not urge successfully that the proceedings for the prior appointment are null, because of defect or insufficiency in the pleadings. McGilliard v. Donaldsonville Foundry etc. Wks., 104 La. 544, 81 Am. St. Rep. 145, 29 So. 254.

A creditor who has brought suit against a private corporation in a federal court, and caused its property to be attached and sequestered on a vendor's lien, which property is subsequently ordered to be surrendered to a receiver previously appointed in a state court, can not successfully assail the order of appointment for informality in the proceedings, without asking for judgment on its demand, or disclosing a well-grounded claim for damages against the receiver personally. Remington Paper Co. v. Watson, 49 La. Ann. 1296, 22 So. 355.

Where parties stipulate that a receiver acted as such and should be protected, the validity of the appointment can not be questioned. Kelsey v. Sargent, 40 Hun (N. Y.) 150.

A lien creditor of a judgment debtor, who was not a party to the proceedings in which the judgment was rendered, is not, by consenting to the appointment of a receiver in aid of execution, estopped to object to the possession and control of the property by the receiver. First Nat. Bank v. Cook, 12 Wyo. 492, 2 L. R. A. (N. S.) 1012, 76 Pac. 674, 78 Pac. 1083.

Where receivers within the time allowed by the court for that purpose therefor petitioned the court for approval of their disaffirmance of a contract, there could be no claim of an affirmance by conduct or an estoppel against disaffirmance. Peabody Coal Co. v. Nixon, 226 Fed. 20, 140 C. C. A. 446.

The appointment of, or refusal to appoint, a receiver pending determination of an action, does not conclude either of the parties upon the ultimate question involved. Lyon v. United States F. & G. Co., 48 Mont. 591, Ann. Cas. 1915D, 1036, 140 Pac. 86.

The recital of jurisdictional facts in the order of appointment is *prima facie* evidence of the existence of such facts.[5] The validity of the order must be determined by

The vendee of a receiver can not, in the absence of fraud or mistake, deny the validity of the appointment, where possession has been taken by the receiver. Stelzer v. La Rose, 79 Ind. 435; Jay v. DeGroot, 17 Abb. Pr. (N. Y.) 36, note; Storm v. Ermantrout, 89 Ind. 214.

Giving a bond to release a vessel for which a state court has appointed a receiver in a proceeding under a state statute to enforce a lien for injury done by it to a bridge, waives any question of the regularity of the receivership. West v. Martin, 51 Wash. 85, 21 L. R. A. (N. S.) 324, 97 Pac. 1102.

Plaintiff's assignor having been a party to proceedings by which the receiver took charge of the assets of defendant corporation under the orders of a Mississippi court, the assignor thereby recognized the jurisdiction of that court, and would not be in a position to invoke the rule that local creditors are entitled to a preference over foreign creditors in regard to funds in the jurisdiction of courts of this state. De Mattos v. Camp & Hinton Co., 129 La. 251, 55 So. 832.

Where creditors, in proceedings to perfect a lien, sued both the debtor corporation and receivers which had been appointed to conserve its property, they can not, in a subsequent proceeding, attack the validity of the receivership. State (ex rel. Connors) v. Shelton, 238 Mo. 281, 142 S. W. 417.

Where an order appointing a receiver is void, it is not made valid by a motion to quash the order and acquiescence in the order of the court denying the motion. "To move to strike from the record a void order does not make the order valid, nor does it estop the moving party from questioning subsequent acts of the court based on the order." State v. Superior Court, 86 Wash. 584, 150 Pac. 1153.

Plaintiff was not estopped to question the propriety of the appointment of a receiver, by his failure to appeal from an order refusing to vacate the receivership. Lyon v. United States F. & G. Co., 48 Mont. 591, Ann. Cas. 1915D, 1036, 140 Pac. 86.

Where parties stipulate that a receiver acted as such and should be protected, the validity of the appointment can not be questioned. Kelsey v. Sargent, 40 Hun (N. Y.) 150.

And the mere failure to appear and contest the appointment of a receiver does not preclude the party from asserting the invalidity of the appointment. Albritton v. Lott-Blackshear Commission Co., 167 Ala. 541, 52 So. 653.

[5] Starr v. Bankers' Union of the World, 81 Neb. 377, 129 Am. St. Rep. 684, 116 N. W. 61.

The general presumption applicable to courts of general jurisdiction is that proof without which the judgment could not have been given was duly made at the hearing. Cole v. Price, 22 Wash. 18, 60 Pac. 153.

the proceedings upon which it is based and it can not be validated by any subsequent proceedings.[6] A denial by the court of an application for the appointment of a receiver will be controlling in respect to a subsequent application based upon the same grounds.[7]

The same general principles of law, of course, apply to orders appointing receivers in respect to their void and voidable character as apply to other orders and decrees, and the same loose language on the part of the courts in dealing with the subject of collateral attacks on such orders is found in respect to orders appointing receivers as is often found in many of the decisions on the general subject. There is often a careless use on the part of judges in writing their opinions of the terms void and voidable in characterizing orders or decrees under consideration, and language is used which is good law in the particular case at bar, but which is unsound if applied as a general statement of the law on the general subject.

§ 41. Source and Extent of Possessory Rights of a Receiver.

The powers of the receiver are derived from the order appointing him, and he is, therefore, entitled to take possession of all the property described in the order of appointment.[1]

He is appointed on behalf of all parties and not of the complainant or defendant only. He is appointed for the

6 Bibby v. Dieter, 15 Cal. App. 45, 113 Pac. 874.

7 Dudley v. Platt, 70 Misc. Rep. 322, 127 N. Y. Supp. 154.

1 Quincy etc. R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787.

A receiver can not be sued individually upon a contract made by him as a receiver. Avey v. Burnley, 167 Ky. 26, 179 S. W. 1050.

A receiver being the arm of the court which appoints him, whatever he does under the order of the court regarding the property in his hands is the act of the court itself. State (ex rel. Sullivan) v. Reynolds, 209 Mo. 161, 123 Am. St. Rep. 468, 14 Ann. Cas. 198, 15 L. R. A. (N. S.) 963, 107 S. W. 487.

benefit of all parties who may establish rights in the cause. He has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court.[2] And an order of appointment which is *prima facie* regular and valid is a sufficient justification for his acts as a receiver.[3] The extent of the powers of a receiver under the order of his appointment was well set forth by the late Mr. Chief Justice Beatty in the case of Havemeyer v. Superior Court,[4] in which he said:

"When a receiver holds by a valid appointment containing no directions in excess of the jurisdiction of the court, so long as he acts in pursuance of the orders of the court he can not ordinarily invade the rights of parties or strangers to the litigation. If he does an injury, he does it by exceeding his authority. In such case the fault is his, and his alone. If he attempts to take property lawfully in the possession of another and to which he is not entitled, his attempt may be resisted, and the person defending his lawful possession is not brought in

2 Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155.

In Buckley v. George, 71 Miss. 580, 15 So. 46, it is held that where an order appointing a receiver is appealed from and a supersedeas granted the effect is to retroact and suspend the order by which the receiver was appointed by which there was no longer any efficacy in the decree to uphold the possession of the receivers, and the right of the party from whom the property is taken is revested in him. Cf. State v. Johnson, 13 Fla. 33; Blondheim v. Moore, 11 Md. 365; Everett v. State, 28 Md. 190. See, also, Johnson v. Powers, 21 Neb. 292, 32 N. W. 62.

3 Edee v. Strunk, 35 Neb. 307, 53 N. W. 70.

In Holcombe v. Johnson, 27 Minn. 353, 7 N. W. 364, a receiver was appointed in a supplementary proceeding over specific property of the judgment debtor and the order appointing the receiver was subsequently reversed on appeal. It was held that the action of the lower court was not void, but remained in force until reversed, and furnished a protection to the receiver for acts done under it in strict conformity with the requirements of the order as long as the order was in force.

4 Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

conflict with the court. If he by any means gains possession of the property claimed by a stranger, the court will either order him to restore it, or if the title is in doubt, permit an action to be brought against him to try the title. But when the court has exceeded its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the injury that results is directly due to the action of the court; the wrong is in the order of the court, not in the receiver's transgression of the order. In such case it seems clear that the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain the judicial action, and not in the sort of resistance that may be opposed to an ordinary wrong-doer, or in such an action as may be brought against a private person who has committed a trespass. However confident he may be of his right to resist, no prudent man will take the risk of resisting the plain terms of an order of court, and no rule of practice should be laid down which will compel a man in that situation to defend his possession by force in order to avoid the necessity of resorting to an action to recover it. On the contrary, all men should be encouraged to avoid forcible resistance to orders of courts, no matter how plainly in excess of jurisdiction, by firmly upholding and freely administering the remedies provided for the summary correction of such excesses."

A receiver can not ordinarily take into custody property found in possession of a stranger to the record claiming title, although where the stranger intervenes and submits his rights to the receivership court, he is not entitled to a writ of prohibition to restrain the court from determining those rights.[5]

Except where power is given to the receiver in the

[5] State v. McClure, 17 N. M. 694, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744, 133 Pac. 1063.

order of appointment or by statute, the proper practice is for the receiver to apply by petition to the court for specific authority and direction in all matters involving his official action and duty where the result of his action may seriously affect the receivership property or fund. The interest of the parties and his responsibility to the court require this. In such case the order of court is based upon the petition and should so recite.[6]

The powers of a receiver are derived from two general sources, and are to be determined from the nature of the proceeding and the duties imposed upon him, by virtue of his office. As we have seen, the appointment of a receiver is the exercise of a purely provisional remedy by a court of chancery. The courts of chancery, both in this country and in England, by a long line of decisions reaching back for more than two centuries, have marked out the jurisdiction exercised by courts in this respect and defined, with tolerable accuracy, the cases in which this extraordinary power is exercised.[7] So that as a primary source of power we are to look to the rules of practice as established by courts of equity in the appointment of receivers. In those states and countries where no chancery courts exist as distinctive courts of general jurisdiction, the common law courts of general jurisdiction are vested with chancery powers and administer this branch of equity jurisprudence, but nevertheless are still

6 Cammack v. Johnson, 2 N. J. Eq. 163; Curtis v. Leavitt, 1 Abb. Pr. (N. Y.) 274; Missouri Pac. R. Co. v. Texas & P. R. Co., 31 Fed. 864; People v. St. Nicholas Bank, 76 Hun (N. Y.) 522, 28 N. Y. Supp. 114; Re Van Allen, 37 Barb. (N. Y.) 225.

He has no powers except such as are conferred on him in the course and practice of the court. He has very little discretion. Blair v. Core, 20 W. Va. 265; Fulton v. Egberts Woolen Mills Co., 31 Misc. Rep. 523, 64 N. Y. Supp. 466.

The office of receiver had its origin in equity practice, and to that practice we must look to ascertain his rights and duties when not prescribed by statute. State (ex rel. Fichtenkamm) v. Gambs, 68 Mo. 289; Wilder v. New Orleans, 87 Fed. 843, 848, 31 C. C. A. 249.

7 Corey v. Long, 12 Abb. Pr. N. S. (N. Y.) 427.

guided by the general principles established by the courts of chancery. With the introduction of the code practice in most of the states of this country, and the modifications of the common law practice, by statutory enactments, the jurisdictions of courts in the appointment of receivers have been somewhat enlarged, as well as the scope and powers of receivers, in some particulars, but the general scope of the law of receivership practice and powers of receivers remains comparatively unaffected by the code enactments. In many of the states, however, are found special statutes relating to insolvency, corporations, and kindred matters wherein are special provisions relating to the appointment of statutory receivers, their functions, powers, duties, and official relations, which are *sui generis*, and are treated of herein under special chapters. Of such character are the Companies Act, and various winding-up acts of England, principally relating to corporations, in which the ministerial officers charged with specific duties analogous to those of receivers, and designated as liquidators, are appointed, sometimes by the corporations, and sometimes by the courts.

§ 42. Manner of Determining Extent of a Receiver's Power.

Owing to the nature of the proceeding, and the objects sought to be accomplished by the receivership, and to the fact that the appointment of a receiver rests, in all cases, in the sound judicial discretion of the court, the receiver's powers and duties should be embodied in the order of appointment.[1] The order of appointment should point

[1] The rules and orders of the courts constitute the law for the direction of such receivers, who are officers of the court which appointed them, and always act under its direction. The court may, by general or special rule or order, authorize its receiver to receive and collect all rents payable to the debtor, or to make leases from time to time as may be necessary. Shreve v. Hankinson, 34 N. J. Eq. 413.

Grant v. Davenport, 18 Iowa 179; Davis v. Gray, 83 U. S. (16 Wall.) 203, 21 L. Ed. 447; Hooper

out distinctly the general scope of the receiver's powers and duties so that, at least in a general sense, he will be enabled to understand the official duties imposed upon him, and for the faithful discharge of which he is to become responsible. By the earlier English practice the receiver was supposed to occupy a position of such extreme indifference as between the parties that all applications to the court for directions to the receiver were to be made by the proper parties to the suit, and the receiver was not permitted to apply to the court for directions until he had first made request of the plaintiff or defendant to make the desired application and had been refused by him.[2] This rule of practice, however,

v. Winston, 24 Ill. 353. In this case it was contended that the powers of the receiver were enlarged and extended by stipulation of the parties, and that by reason thereof he was vested with larger discretionary powers than ordinarily attach to a receivership. But the court say: "We do not deny that he had some discretion in this matter, but it was very limited. We hold, being an officer of court, he should have applied to the court for leave to make these expenditures, and he is answerable to the court for the exercise of all his powers." In Benneson v. Bill, 62 Ill. 408; Yeager v. Wallace, 44 Pac. 294, 296; People v. St. Nicholas Bank, 76 Hun (N. Y.) 522, 28 N. Y. Supp. 114; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438, 452; Re Colvin's Estate, 3 Md. Ch. 278. See discussion of the powers of temporary and permanent receivers in Herring v. New York, L. E. & W. R. Co., 105 N. Y. 340, 12 N. E. 763.

As to what is embraced in the scope of the order, see Benneson v. Bill, 62 Ill. 408; American Const. Co. v. Jacksonville, T. & K. W. R. Co., 52 Fed. 937. While it is true that the receiver is an officer of the court, yet that fact does not confer upon him any special privileges so far as rights of action are concerned over other persons bringing suit. State Bank at New Brunswick v. First Nat. Bank, 34 N. J. Eq. 450. Such a receiver has only the power and authority given him in his orders. Chautauqua County Bank v. White, 6 Barb. (N. Y.) 589; Republic L. Ins. Co. v. Swigert, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680.

Whether the order be comprehensive in regard to the power given the receiver, or his power be given from time to time, as occasion requires, the court is in fact the real custodian of the property, and the acts of the receiver are acts of the court designed to preserve the property for the benefit of the parties subsequently shown to be entitled to it. Devendorf v. Dickinson, 21 How. Pr. (N. Y.) 275.

2 Parker v. Dunn, 8 Beav. 497;

has no force in this country, since owing to the fact that the receiver is the instrument or arm of the court, he is privileged, and it is, in fact, his duty, to apply to the court at any and all times for instructions and directions as to his powers and duties, and he should do so especially where there are conflicting interests, rights, liens, and matters which may give rise to future litigation.[3]

Re Doolan, 2 Connor & L. 232; Clark v. Fisher, Sausse & Sc. 684; O'Connor v. Malone, 1 Ir. Eq. 20; Wrixson v. Vize, 5 Ir. Eq. 276; Richards v. Goold, 7 Ir. Eq. 209.

A mere order of the court directing receivers to take charge of the property of an insolvent railroad company, including its leased lines, and taking possession thereof by the receivers, does not have the effect to change either the title to the property or the right of possession in the property. The receivers thereby become the mere custodians of the property for the court. Central Trust Co. v. Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235, 58 U. S. App. 605; Tradesman Publishing Co. v. Knoxville Carwheel Co., 95 Tenn. 634, 49 Am. St. Rep. 943, 31 L. R. A. 593, 32 S. W. 1097, and he may obtain an order that tenants shall attorn to and pay their rent to him. But a receiver of a property of a judgment debtor, appointed in pursuance of proceedings supplementary to an execution, becomes vested with the title of the debtor by virtue of his appointment, and may maintain all actions incidental to a reversionary estate in the land. Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519.

[3] The original order may be enlarged from time to time as the exigencies of the case may require. "Since the receiver is an officer, or, as he is sometimes called, 'the hand' of the court, it would be singular if he could not, at any time, go to it with his complaint, or for instructions in regard to any matter touching the fund placed in his custody." People v. Security L. Ins. & Annuity Co., 79 N. Y. 267, 270; Curtis v. Leavitt, 1 Abb. Pr. (N. Y.) 274.

In Smith v. New York Consolidated Stage Co., 28 How. Pr. (N. Y.) 377, the court say: "The court has sanctioned the practice of the receiver to ask for instructions regarding the receivership business."

In People v. Security L. Ins. & A. Co., 79 N. Y. 267, the court say: "Since the receiver is an officer, or, as he is sometimes called, the hand of the court, it would be singular if he could not at such stage go to it with his complaint or for instructions in regard to any matter touching the fund placed in his custody, and more especially when, as in the case before us, it is in danger through his own error of being unfairly distributed."

Receiver of an insolvent corporation has the right to question a transaction whereby insolvent borrowed money, paying an alleged usurious rate of interest. James Bradford Co. v. United Leather Co., (Del. Ch.) 95 Atl. 308.

A second source of power of ordinary receivers is to be found in the course and practice of the courts relative to receiverships. The courts exercising chancery jurisdiction have established by long usage and experience certain well defined rules relating to the powers of receivers, and it is to these rules so established that we must usually go to determine the scope of authority of the ordinary receiver.[4]

Statutory receivers, or those appointed pursuant to the requirements of statute, as will be seen elsewhere, derive their general powers wholly from the statute under which they are appointed, and have no powers except those conferred by it, either by express terms or such as can be fairly implied from the general scope of the statute, or as an incident to an express power given.[5] The power thus conferred is deemed delegated and requires careful consideration by the court in its exercise.[6]

A receiver by virtue of his office is possessed of limited powers and all persons dealing with him must take notice of such limitations, and contract with him with such

4 Hooper v. Winston, 24 Ill. 353; Republic L. Ins. Co. v. Swigert, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680; Chautauque County Bank v. White, 6 Barb. (N. Y.) 589; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438; Booth v. Clark, 58 U. S. (17 How.) 322, 15 L. Ed. 164.

5 Attorney-General v. Life & F. Ins. Co., 4 Paige (N. Y.) 224. See Knott v. Morris Canal & Bkg. Co., 4 N. J. Eq. 423; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438, 452; Attorney-General v. Atlantic Mut. L. Ins. Co., 77 N. Y. 336.

A receiver appointed by a federal court must manage and operate the property in accordance with the state where the property is situated. Act of Congress, March 3, 1887, § 2. The power conferred on statutory receivers may not always be express but may be inferred from the general scope of the statute, as where authority is given to hear and determine the validity of claims, this embraces implied power to administer oaths to witnesses. Runyon v. Farmers & M. Bank, 4 N. J. Eq. 480.

6 Davis v. United States Elec. P. & L. Co., 77 Md. 35, 25 Atl. 982; Oakley v. Paterson Bank, 2 N. J. Eq. 173; Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

knowledge.[7] This principle is not peculiar to the law of receivership but applies to judicial sales made by ministerial officers generally. As in dealing with a special agent every one must know that the scope of the receiver's powers is limited and special, and his acts at all times subject to modification or annulment.

Unless sooner discharged, his powers remain during the continuance of the litigation, and, as a rule, are not suspended during appeal,[8] though there are exceptions as will be seen in the sections in which the appellate procedure will be discussed.

The appointment of a receiver regularly and legally made at final judgment or decree vests in him all the powers and duties usually pertaining to his office, though a previous irregular and illegal appointment has been made, during the pendency of the action.[9] The final action of the court becomes retrospective so far as his acts as receiver are concerned.

§ 43. General Duties and Care Required of a Receiver.

The broad general duties of a receiver are to take charge of and safely keep and account for all of the assets of the estate and to obey all orders of the court having

7 Tripp v. Boardman, 49 Iowa 410; Barron v. Mullin, 21 Minn. 374; Lehigh Coal & Nav. Co. v. Central R. Co., 35 N. J. Eq. 426.

8 Re Real Estate Associates, 58 Cal. 356; Swing v. Townsend, 24 Ohio St. 1. Although the appeal may suspend or vacate the final decree. Merrill v. Elam, 2 Tenn. Ch. 513; Brien v. Paul, 3 Tenn. Ch. 357; Stafford v. Union Bank, 57 U. S. (16 How.) 135, 140, 14 L. Ed. 876, 878; Schenck v. Peay, 1 Dill. 267, 270, Fed. Cas. No. 12451.

9 Lutt v. Grimont, 17 Ill. App. 308; Richards v. People, 81 Ill. 551; Cook v. Citizens' Nat. Bank, 73 Ind. 256; American Bank v. Cooper, 54 Me. 438; Albany City Bank v. Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551; People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Re Stonebridge, 59 Hun 626, 13 N. Y. Supp. 770, 37 N. Y. St. Rep. 617 (affirmed without opinion in Stonebridge v. Alden, 128 N. Y. 618, 28 N. E. 253); Russell v. East Anglian R. Co., 3 MacN. & G. 104 Ames v. Birkenhead Docks Trustees, 20 Beav. 332.

control of the receivership.[1] Persons dealing with a receiver are chargeable with notice of the fact that his powers are limited and subject to the control of the court appointing him.[2] In other words, a receiver has no principal behind him, in the sense of an ordinary agent, for whom he can promise, and hence, unless authorized so to do by the court which appointed him, his promises and contracts will bind him individually.[3]

It is the duty of a receiver to make and file with the court, when he is appointed, a list of the property which passes into his hands so that creditors and all persons

1 Demain v. Cassidy, 55 Miss. 320; Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co., 92 Wash. 654, 159 Pac. 788.

2 Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699; Brunner, Mond & Co. v. Central Glass Co., 18 Ind. App. 174, 63 Am. St. Rep. 339, 47 N. E. 686; Stone v. St. Louis Union Trust Co., 183 Mo. App. 261, 166 S. W. 1091.

One who was appointed receiver of a fund in litigation, to hold it until further order, though agreed upon by the parties, was bound to take notice that the whole fund was involved, and an assignment to him of an interest in the fund pending his receivership was void as against plaintiff, who recovered an interest therein. Cascaden v. Dunbar, 3 Alaska 671.

The purchaser of notes of the receiver of a corporation, signed "Z., Receiver," and indorsed by him personally, took them with constructive notice of the receiver's want of authority to issue them, so that the corporation was not liable thereon. Zielian v. Baltimore Plant Ice Co., 115 Md. 658, 81 Atl. 22.

3 Acts of a receiver outside of the scope of the authority given him by the court do not bind the court. Farmers' Loan etc. Co. v. Chicago etc. Ry. Co., 42 Fed. 6.

A receiver has no principal behind him for whom he can promise, and he alone is individually liable on notes executed by him as receiver without express authority, nor can such notes be reformed so as to speak the true intent of the parties to the effect that he was to be bound in his capacity as receiver, and not individually. Peoria Steam Marble Works v. Hickey, 110 Iowa 276, 80 Am. St. Rep. 296, 81 N. W 473.

Where letters which would make receivers liable, individually, if signed as individuals, were signed "receivers" and not "as receivers," it was held that the receivers were individually liable, since the word "receivers" was merely descriptive of the persons. Guimarin v. Southern Life & Trust Co., (S. C.) 90 S. E. 319.

interested may know what property belongs to the parties in the case wherein the receiver has been appointed.[4]

All books, documents, and papers in the hands of a receiver are quasi-public in character, and are open to examination, not only by the court, but by persons interested in the estate.[5]

A receiver occupies a fiduciary relation and is naturally governed by the general rules applicable to trustees. He is bound to exercise the same character of prudence and skill in handling the receivership property as he would exercise in dealing with his own property.[6] He should exercise the same degree of care and diligence in the administration of the receivership which is exercised by a man of ordinary prudence with reference to his own business affairs. When he uses ordinary care and prudence, that is, the care and diligence which an ordinarily prudent man uses in handling his own estate, he has fulfilled the measure of his official duty and is not answerable for losses which occur to the property and assets in his charge; but when he fails to exercise this degree of care and diligence he becomes answerable for the consequences of his neglect or dereliction. He is not an insurer of the safety of the property, since ordinary care is the test of his responsibility. The measure of his responsibility, therefore, is analogous to that of an administrator or guardian.[7]

4 Heffron v. Rice, 149 Ill. 216, 41 Am. St. Rep. 271, 36 N. E. 562; In re New Iberia Cotton Mill Co., 109 La. 875, 33 So. 903.

A court may refuse to have issues framed and submitted to a jury to ascertain the value of property put into the hands of a receiver, and the ownership thereof, since it will be presumed that the judge informed himself as to what he placed in the hands of the receiver, and it will not be presumed that the referee transcended his authority. Whitney v. Buckman, 26 Cal. 447, 448.

5 Decker Bros. v. Berners Bay Min. & Mill. Co., 2 Alaska 504.

6 Schwartz v. Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018.

7 Johnston v. Keener, 23 Ill. App. 220, Eskridge v. Rushworth, 3 Colo. App. 562, 34 Pac. 482; State v Germania Bank of St. Paul (Lagerman v. Willius), 106 Minn. 164, 130 Am. St. Rep. 599; 118 N. W.

The duties of a receiver being fiduciary in character, he can not delegate the performance of his trust to others. He is an officer of the court for the purpose of executing its orders and directions. If he employs agents to perform his own duties, he will be held liable for their acts.[8] If a receiver places funds belonging to the receivership out of his control and in the hands of others for handling, he will be held to guarantee their solvency and become answerable for any losses through them.[9]

683; State v. Germania Bank of St. Paul (Lagerman v. Willius), 106 Minn. 539, 118 N. W. 686; Pangburn v. American Vault etc. Co., 205 Pa. 93, 54 Atl. 508; Groesbeck Cotton Oil etc. Co. v. Oliver, 44 Tex. Civ. 303, 97 S. W. 1092; Chandler v. Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548; United States Blowpipe Co. v. Spencer, 61 W. Va. 191, 56 S. E. 345; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909; Gutterson etc. v. Lebanon Iron etc. Co., 151 Fed. 72.

It is the duty of a receiver of an insolvent institution to faithfully collect, and enhance the assets of the institution, and administer its affairs to the end that its creditors may receive what is justly due them, and that its stockholders, if any there be, may receive the residue. State v. State Bank & Trust Co., 36 Nev. 526, 137 Pac. 400.

A receiver in renting and collecting rents must exercise such care as may reasonably be expected of an ordinarily prudent person under the circumstances, and if through negligence he fails to collect rents, he is liable therefor. Higgins v Shields, 151 Ky. 227, 151 S. W. 391.

Where the receiver acts for the best interests of the receivership according to his judgment, he will not ordinarily be held liable for a loss. Filkins v. Adams, 60 Ill. App. 410.

A receiver is not responsible for loss of cattle simply because he permitted them to remain on the range, nor for property destroyed by fire merely because he did not insure it. Hamm v. J. Stone & Sons Livestock Co., 13 Tex. Civ. 414, 35 S. W. 427.

8 A receiver is a trustee for all persons in interest, and can not delegate his trust to another. Broussard v. Mason, 187 Mo. App. 281, 173 S. W. 698.

A receiver of a corporation can not make an agreement with its former manager by which the latter shall control certain of the corporate business and collect its credits, so as to render payments made to the manager valid, and prevent a second collection of the claims by the receiver. Buchanan v. Hicks, 98 Ark. 370, 34 L. R. A. (N. S.) 1200, 136 S. W. 177.

9 Salway v. Salway, 2 Russ. & M. 215 (affirmed by House of Lords under the name of White v. Baugh, 9 Bligh (N. S.) 181, 3 Clark & F. 44).

§ 44. Liability of Receiver for Funds on Deposit in Bank.

A receiver may deposit the funds of an estate coming into his hands in a bank of good standing and repute; and in determining the character of the bank that degree of care and prudence is exacted which ordinarily is exercised by reasonably cautious men in transacting their business of like character and importance. If he uses this degree of care and prudence he is not responsible for any loss, due to a failure of the bank. The same is true in respect to continuing the deposit.[1]

1 State v. Corning State Sav. Bank, 128 Iowa 597, 105 N. W. 159; Ficener v. Bott, 20 Ky. Law Rep. 632, 47 S. W. 251; Groesbeck Cotton Oil etc. Co. v. Oliver, 44 Tex. Civ. 303, 97 S. W. 1092; Hamm v. J. Stone & Sons Livestock Co., 13 Tex. Civ. 414, 35 S. W. 427.

Where a receiver who was ordered to collect certain money and pay it in court at the next term of court, but the Civil War intervened before the next term of court and he deposited it in a bank which became defunct because of the war, it was held that he was liable for the loss of the funds. Barton's Exr. v. Ridgeway's Admr., 92 Va. 162, 23 S. E. 226.

Under Rev. St. 1895, art. 1462, which provides that whenever, during the progress of any cause, any money shall be deposited with the court to await the result of any legal proceeding, the officer having custody thereof shall seal up the identical money and deposit it in a safe or bank vault, accessible to the court, and a statute, in relation to receivers, which provides that a receiver shall have power to take charge and keep possession of the property, and the condition of his bond, as prescribed by statute, is that he will faithfully discharge all the duties of receiver and obey the orders of the court, it was held, that the statute has no application to funds coming into the hands of a receiver, and, in the absence of any order of court, a receiver fulfilled the measure of his duty when he deposited funds coming into his hands in banks of such standing and under such circumstances as to characterize his conduct as that of an ordinarily prudent person in the discharge of his own affairs. Groesbeck Cotton Oil & Compress Co. v. Oliver, 44 Tex. Civ. 303, 97 S. W. 1092.

But it has been held that when money is in the hands of a receiver at the place of final custody, and he has no further duty in respect to it except to preserve it, it is already in court, and he can not part with his custody of it by depositing it in bank, save at his own risk, without some order, leave, or direction authorizing him so to do. Ricks v. Broyles, 78 Ga. 610, 6 Am. St. Rep. 280, 3 S. E. 772. And see State v. Gooch, 97 N. C. 186, 2 Am. St. Rep. 284, 1 S. E. 653, to the same effect where the funds

Receivership funds should be kept by the receiver separate and distinct from his own funds. And if deposited in a bank should be deposited in a separate account in his name as receiver so that the different items can be traced and shown not to have become mingled with his separate funds. If by mingling such funds with his own he derives a benefit, he is chargeable with interest.[2] If the court by an order designates a particular party as the depositary of the court's funds and such party accepts funds with such knowledge, he thereby becomes an officer of the court and may be proceeded against by contempt proceedings in order to enforce repayment of the funds.[3]

§ 45. Right of Receiver to Borrow Money.

A receiver should not make any disposition of the funds in his possession which will tend to impair them without an order of court.[1]

Where the order of the court gives to the receiver authority to continue in the possession and management of the property, he may in good faith borrow the necessary money for the successful and proper management of such property, and the claim of the lender will be superior to that of bondholders.[2] An order authorizing

were deposited in a bank in another state without authority of the court.

2 Hooper v. Winston, 24 Ill. 353; Cool v. Jackman, 13 Ill. App. 560; Hodge v. Quiry, 9 Ky. Law Rep. 650; Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520; Matter of Commonwealth Fire Ins. Co., 32 Hun (N. Y.) 78; Schwartz v. Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Hinckley v. Gilman etc. R. Co., 100 U. S. 153, 157, 25 L. Ed. 591, 593; Wren v. Kirton, 11 Ves. Jr. 377.

Where the bank pays him interest upon the balances to his credit and a loss occurs, he will be held liable. Drever v. Mandesley, 13 L. J. (N. S.) 433, 8 Jur. 547.

3 In re Western Marine etc. Ins. Co., 38 Ill. 289.

1 Hooper v. Winston, 24 Ill. 353.

2 Ex parte Carolina Nat. Bank, 18 S. C. 289; Re Fifty-four First Mortgage Bonds, 15 S. C. 304. Ex parte Benson, 18 S. C. 38, 44 Am. Rep. 564; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Cowdrey v. Galveston, H. & H. R. Co., 1 Woods 331, Fed. Cas. No. 3293. In this case the court says: "All out-

lays made by the receivers in good faith in the ordinary course with a view to advance and promote the business of the road and to render it profitable and successful are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management of a railroad in his hands."

Greenwood v. Algesiras R. Co. [1894], 2 Ch. 205, 63 L. J. Ch 670. This case is based upon the fact that there must be an emergency, and that the borrowing of the money is essential to the preservation of the property. In Bank of Montreal v. Chicago, C. & W. R. Co., 48 Iowa 518, a receiver was authorized to issue certificates "for money borrowed, materials furnished, labor performed, or on account of contracts made by him for the construction or completion of said road or any part thereof," and such certificates so issued were made a first lien on the road. It was held that certificates issued prior to the furnishing of the material or performance of the labor were void. The furnishing of the material and the performance of the work were prerequisites to the issuing of certificates.

This power should be exercised with the acquiescence of all parties concerned, if possible, Wallace v. Loomis, 97 U. S. 146, 162, 24 **L. Ed.** 895, 901, and with caution. For a full discussion of the power in its many phases, see, Credit Co. v. Arkansas C. R. Co., 15 Fed. 46, 5 McCrary 23; Taylor v. Philadelphia & R. R. Co., 7 Fed. 377; Kennedy v. St. Paul & P. R. Co., 2 Dill. 448, Fed. Cas. No. 7706; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 29 **L. Ed.** 963, 6 Sup. Ct. 809; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 27 **L. Ed.** 117, 1 Sup. Ct. 140; Jerome v. McCarter, 94 U. S. 734, 24 **L. Ed.** 136; Cowdrey v. Galveston, H. & H. R. Co., 1 Woods 331, Fed. Cas. No. 3293; Stanton v. Alabama & C. R. Co., 2 Woods 506, Fed. Cas. No. 13296; Meyer v. Johnston, 53 Ala. 237; Vermont & C. R. Co. v. Vermont C. R. Co., 46 Vt. 792, 50 Vt. 500; Hoover v. Montclair & G. L. R. Co., 29 N. J. Eq. 4; Bank of Montreal v. Chicago, C. & W. R. Co., 48 Iowa 518.

As to power to mortgage, see Burroughs v. Gaither, 66 Md. 171, 7 Atl. 243.

And power to invest, see Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520; but see Attorney General v. North American L. Ins. Co., 89 N. Y. 94.

In the case of Meyer v. Johnston, 53 Ala. 237, the power of the receiver to borrow money is elaborately discussed after an exhaustive argument by counsel, and the reasons both for and against the exercise of this power are clearly stated (p. 346).

Where a receiver borrowed money and used the same to discharge a valid lien on the property in his care and custody and acted in good faith, it was held proper to allow him credit therefor. Heffron v. Rice, 149 Ill. 216, 41 **Am. St. Rep.** 271, 36 N. E. 562.

The power to incur expense does not extend beyond what is absolutely essential to the preservation and use of the property. Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352, 23 **L. Ed.** 950.

Where a receiver authorized to complete certain contracts was

a receiver to borrow money for certain purposes does not authorize him to purchase goods on credit.[3]

Although a receiver may have no right to borrow money, yet if he uses money borrowed by him to discharge a valid lien on the property committed to his charge, and acts in good faith in making the payment, he is entitled to credit therefor as against the insolvent debtors who have received the benefit of the payment.[4]

Where the receiver is properly authorized to borrow money to carry on the business of the receivership, he will not be held personally liable for the sums borrowed where he has not exceeded his authority.[5] And where a receiver, authorized to borrow money, did not have sufficient funds to take up the original notes when due, their renewal according to the custom of banks does not work a change in the original loan.[6]

The source of this power is to be found in the inherent right of the court to preserve the receivership property from waste, damage, or loss. And in case of public corporations the public have interests that are to be protected. The power to borrow money in all cases presup-

authorized to borrow from time to time $5000, and to execute notes in his official capacity which would constitute a first lien on the estate, and thereafter was authorized to borrow $1000 to purchase certain appliances, and again to borrow $5000 more, and to issue receiver's certificates therefor, such orders should be construed together, and created a preference for such loans to the amount of $11,000, but did not establish for the receiver a continuing credit, the authority being exhausted on a loan to the amount specified being negotiated. People's Sav. Bank & Trust Co. v. Rogers, 177 Fed. 386, 100 C. C. A. 618.

The implied authority of a receiver in bankruptcy who is conducting the business to purchase on credit and borrow money exists only in the absence of an express power to borrow conferred by the court. Re C. M. Burkhalter & Co., 182 Fed. 353.

3 Haines v. Buckeye Wheel Co., 224 Fed. 289, 139 C. C. A. 525.

4 Heffron v. Rice, 149 Ill. 216, 41 Am. St. Rep. 271, 36 N. E. 562.

5 Haines v. Buckeye Wheel Co., 224 Fed. 289, 139 C. C. A. 525.

6 People's Sav. Bank & Trust Co. v. Rogers, 177 Fed. 386, 100 C. C. A. 618.

poses authority from the court given for that purpose, based on specific application either by the receiver or plaintiff; and the exercise of the power is with great caution.

The power to mortgage is, in principle, the same as the power to issue receiver's certificates and make them a first lien upon the property. There must be the gravest necessity to justify an order of this kind, and more especially so where the property is not charged with a public trust.[7]

The subject will necessarily be further considered in the discussion of receiver's certificates issued on the procurance of loans for the maintenance of the receivership property.

§ 46. Right of Receiver to Loan Receivership Funds.

Where the loaning of money is not the business of a receivership which is being conducted as a going business by a receiver, he naturally has no authority to loan funds belonging to the receivership without specific authority of the court, since to do so would not be in accord with the purposes of his appointment, which is to preserve the estate and distribute it in accordance with the directions of the court.[1] Of course, he may make such loans where authorized so to do by the court.[2] Where the receiver is

7 Burroughs v. Gaither, 66 Md. 171, 7 Atl. 243.

1 Ryan v. Morrill, 83 Ky. 352; Darby v. Gilligan, 37 W. Va. 59, 16 S. E. 507.

Receivers have no right to loan funds coming to their hands as receivers. If they loan such money and lose it they must stand the loss, except under special circumstances. Heffron v. Rice, 149 Ill. 216, 41 Am. St. Rep. 271, 36 N. E. 562.

Where three officers of a corporation formed a partnership to perform certain work for the corporation from which they derived a profit, and one of the partners was appointed receiver for the corporation and paid the firm a certain sum and made no effort to recover profits realized by it, the court properly surcharged the receiver for his actions. Tenth Nat. Bank of Philadelphia v. Smith Const. Co., 242 Pa. 269, 89 Atl. 76.

2 Where money has been paid into the hands of a general re-

authorized to loan receivership funds, he must use the utmost good faith in doing so. He should not loan the funds to himself or to a firm of which he is a member or be indirectly concerned in the loan.[3] But when the receiver's funds have been loaned without authority, and a note taken therefor, such want of authority in the receiver is no defense to an action on the note.[4] And where a receiver loans receivership funds without an order of court but in good faith and the receivership was in fact benefited by the loan he will not be chargeable with interest.[5]

§ 47. Liability of Receiver for Interest on Funds.

A fund which is in the custody of the court and can not be paid out without an order of court does not ordinarily bear interest,[1] but where a receiver obtains interest on

ceiver to the credit of a particular suit, and by him, under an order of court, loaned out, no order should be entered requiring him to pay out and disburse the fund until he has first been ordered to collect it, and it is in his hands, or unless his failure to collect it is attributable to his fault, negligence, misappropriation, or mismanagement of the fund. United States Blowpipe Co. v. Spencer, 61 W. Va. 191, 56 S. E. 345.

3 If one holding money as receiver lends it to the firm of which he is a member, he is guilty of a breach of trust, but this does not create any lien against the property of the firm in favor of the persons entitled to the moneys so misappropriated by the receiver. Goldthwaite v. Janney, 102 Ala. 431, 48 Am. St. Rep. 56, 28 L. R. A. 161, 15 So. 560.

Where a receiver loans money to a firm of which he is a partner instead of depositing it in a certain bank as directed by the court, the firm will be liable for its loss, even if they have repaid it to the receiver who had misappropriated it. Ryan v. Morrill, 83 Ky. 352.

4 Corbin v. De La Vergne, 44 N. J. L. 70.

5 Attorney General v. North American etc. Ins. Co., 89 N. Y. 94; Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520.

1 Bowman v. Wilson, 12 Fed. 864, 2 McCrary 394; How v. Jones, 60 Iowa 70, 14 N. W. 193; Crawford v. Fickey, 41 W. Va. 544, 23 S. E. 662.

A receiver having on hand a fund which is subject to distribution at any time is not chargeable with interest on it. First Nat. Bank v. Wood, 30 Misc. Rep. 278, 63 N. Y. Supp. 324.

A trust company acting as receiver held not chargeable with interest on receivership funds de-

the funds in his charge he must account for the sums so received by him.[2] He will be chargeable with interest on funds of the receivership withheld beyond the time directed by the court to be distributed or placed at the disposal of the court.[3] And where a receiver mingled the receivership funds with those of his own and from time to time drew out such sums that made it apparent that he had drawn out the receivership funds for his personal use, he will be charged with interest on the funds.[4]

A receiver is not liable for interest on money withheld

posited in its own bank subject to check. Haddock v. Plymouth Coal Co., 237 Pa. 37, 85 Atl. 23.

2 Hooper v. Winston, 24 Ill. 353; Lonsdale v. Church, 3 Bro. C. C. 41.

3 Johnson v. Moon, 82 Ga. 247, 252, 10 S. E. 193; Commonwealth v. Eagle F. Ins. Co., 14 Allen (96 Mass.) 344; In re Carter, 3 Paige (N. Y.) 146; In re Seaman, 2 Paige (N. Y.) 409; Fetnam v. Kriby, 4 Ir. Eq. 320; Hicks v. Hicks, 3 Atk. 274; Blank v. Jolland, 8 Ves. 72.

Failure of a receiver to obey an order directing him to loan funds in his hands, in the absence of excuse, justifies a charge against him in his settlement of an account equal to the interest he would have received. Cecil v. Clark, 69 W. Va. 641, 72 S. E. 737.

Under Code, 1887, 3409 (Va. Code 1904, p. 1811), which makes a receiver liable for moneys coming into his hands, and for interest thereon on his failing to invest the same, a receiver of funds arising out of the sale of real estate of a debtor who was required, by the court appointing him, to invest the funds, but did not do so and on the contrary kept them in his hands to the time of the application for the settlement of his accounts, is chargeable only with simple interest on the funds, notwithstanding section 3413 (Va. Code 1904, p. 1812) declaring that the interest on all loans to individuals under an order of the court shall become payable on the 1st day of January next after the making of the loan, and annually on the 1st day of January of each succeeding year, until the principal is paid, and unless the principal be paid when due, compound interest shall be charged thereon. Roller v. Paul, 106 Va. 214, 55 S. E. 558.

4 Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520; Hinckley v. Gilman etc. R. Co., 100 U. S. 153, 25 L. Ed. 591.

But the mere fact that a receiver deposited receivership funds in his private account, it not appearing that he used them, will not subject him to be charged with interest. Radford v. Folsom, 55 Iowa 276, 7 N. W. 604; How v. Jones, 60 Iowa 70, 14 N. W. 193.

by him until he could be advised as to his duty in the premises.[5]

§ 48. Liability of Receiver for Violations of His Trust.

While receivers are necessarily clothed with a considerable discretion in the management of the trust property, that fact does not excuse them for dealing with it carelessly or extravagantly.[1]

The liability of receivers for their acts in the management of property placed in their custody is official, and not personal, except in instances of their personal misconduct, so that a judgment against them is in effect a judgment against the property in their custody.[2]

A receiver owes duties of a fiduciary nature toward all of the parties to the litigation, although not their agent.[3] He is responsible to the court for his personal misconduct in respect to the receivership.[4] As a general rule,

5 Guignon v. First Nat. Bank, 22 Mont. 140, 55 Pac. 1051, 1097; Malcomson v. Wappoo Mills, 99 Fed. 633.

1 Hitner v. Diamond State Steel Co., 207 Fed. 616.

A receiver acting as the manager of a hotel business must necessarily exercise his discretion in many cases. If he acts in good faith, and conducts the business as a prudent person would manage his own business, he is not liable for the loss of a small amount by reason of cashing a draft for a guest. Heffron v. Rice, 149 Ill. 216, 41 Am. St. Rep. 271, 36 N. E. 562.

Where an order has been entered directing the receiver to collect certain funds, and he fails to do so, and it appears that such failure is attributable to his misconduct or mismanagement in relation to the trust, a decree may be entered after giving him an opportunity to be heard charging him personally, or permission may be given to sue him and his sureties on his official bond. United States Blowpipe Co. v. Spencer, 61 W. Va. 191, 56 S. E. 345.

2 Hanlon v. Smith, 175 Fed. 192.

3 A receiver appointed by the court in the progress of litigation acts as receiver for all the parties interested; but he is not the agent for the parties in the sense that each one of the parties interested in the litigation is personally severally responsible for his wrongful or negligent acts. City Savings Bank v. Carlon, 87 Neb. 266, 127 N. W. 161.

4 General Share Co. v. Wetley Brick Co., 20 Ch. D. 260, 267; 30 W. R. 445, per Jessel, M. R.

he is protected when he acts in good faith in the management of the estate, but where he acts in the capacity of a guardian of the estate, he will be held to the same accountability as an ordinary guardian.[5] He can not use knowledge acquired by him in his capacity as a receiver for the purpose of acquiring a paramount title to property involved in a litigation which he is conducting for the receivership.[6] He must use his best efforts to collect the assets of the receivership,[7] but it has been held that a receiver is not guilty of such negligence as to make him responsible for losses resulting from the failure of his attorney, acting upon a mistake of law, to bring suits against certain stockholders before the expiration of the statute of limitations,[8] although he has been held liable for the acts of a clerk employed by him.[9]

But a receiver who has managed a business can not be prevented after the close of the receivership from doing business with former customers of the business[10] conducted by the receivership.

5 State v. Gooch, 97 N. C. 186, 2 Am. St. Rep. 284, 1 S. E. 653.

6 Halman v. Burlen, 198 Mass. 494, 85 N. E. 167.

7 Where two receivers are appointed to wind up the affairs of a corporation and one of them illegally appropriates the receivership funds and the other negligently allows him to do so, they will both be liable. Commonwealth v. Eagle etc. Ins. Co., 14 Allen (96 Mass.) 344.

A receiver is chargeable with money which, though collectible, he has made no attempt to collect. Tenth Nat. Bank of Philadelphia v. Smith Const. Co., 242 Pa. 269, 89 Atl. 76.

A receiver who fails to sell the good will of partnership over which he has been receiver will be held liable for its value. Mechanics Nat. Bank v. Landauer, 68 Wis. 44, 31 N. W. 160.

8 State v. Germania Bank (Lagerman v. Willius), 106 Minn. 164, 130 Am. St. Rep. 599, 118 N. W. 683.

Where the failure to enforce the liability of stockholders of an insolvent bank was occasioned by the neglect of an attorney forced on the receiver, who unsuccessfully sought the appointment of another attorney, the receiver was held not liable for the loss sustained. People v. Bank of Staten Island, 146 App. Div. 378, 131 N. Y. Supp. 53, modifying order 127 N. Y. Supp. 906.

9 Gunn v. Ewan, 93 Fed. 80, 35 C. C. A. 213.

10 In re Irish, 40 Ch. D. 49.

§ 49. Duty of Receiver Not to Profit from Receivership Transactions.

From what has been said in the preceding sections it is apparent that, in accordance with the well-established principles of equity jurisprudence, a receiver is prohibited from taking advantage of his position of receiver and thereby deal with receivership property or funds to his own profit. The cases illustrating this rule naturally occur quite frequently in connection with a receiver purchasing receivership property and thereby placing himself in a position whereby his individual interests are brought into conflict with his duty.[1] The general rule in this respect is that a receiver will not be permitted to buy[2] or be interested directly or indirectly in the purchase of receivership property.[3] "The rule has its foundation

1 Hooper v. Winston, 24 Ill. 353; In re Dugdamonia Shingle etc. Co., 118 La. 242, 42 So. 789; Shadewald v. White, 74 Minn. 208, 77 N. W. 42; Adair County v. Ownby, 75 Mo. 282; Whitesides v. Lafferty, 3 Humph. (Tenn.) 150; Jones v. Gardner, (Tex. Civ.) 112 S. W. 826; Reynolds Ex'r v. Pettyjohn, 79 Va. 327; Roller v. Paul, 106 Va. 214, 55 S. E. 558; Bowman v. Liskey, 108 Va. 678, 62 S. E. 942.

2 McDonald v. Trojan etc. Co., 56 Hun 648, 10 N. Y. Supp. 91; New Britain Mach. Co. v. Watt, (Tex. Civ.) 180 S. W. 624; Anderson v. Anderson, 9 Ir. Eq. 23.

A receiver appointed by the court can not purchase the property of which he is receiver without leave of the court, even where the sale is made not in the action in which he was appointed, but by a mortgagee selling with leave outside the action. Nugent v. Nugent, 1 B. R. Co. 405, (1908) 1 Ch. 546. Also, reported in 77 L. J. Ch. N. S. 271, 98 L. T. N. S. 354, 24 Times L. R. 296, 52 Sol. Jo. 262.

3 A receiver is not allowed to purchase receivership property through an agent or trustee. Alven v. Bond, Flan. & Kel. 196, 3 Ir. Eq. 365.

Where receivership property was sold at more than its appraised value, the fact that it was sold to sons of the receiver is no ground for avoiding it. Yetzer v. Applegate, 85 Iowa 121, 52 N. W. 118.

A sale of property by a receiver to himself, to his wife, or to a corporation in which he is a stockholder and director, is contrary to public policy, and voidable at the election of any one having a beneficial interest in the property. South Georgia Bldg. & Inv. Co. v. Mathews, 7 Ga. App. 452, 67 S. E. 127.

A contract made by a receiver with the purchaser at a sale by him, under which a purchaser was to be liable for the receiver's com-

in grounds of public policy, and in the peculiar relations sustained by the receiver to the fund, or estate, in his hands. It denies to the receiver the privilege of becoming a purchaser of property pertaining to his trust, entirely independent of the question of whether any fraud intervened."[4]

Such a purchase by the receiver is not void and can not be attacked collaterally, although voidable.[5] It may be avoided at the instance of any one interested in the estate,[6] or on the other hand it may be ratified.[7]

pensation at a stated amount or at an amount thereafter to be determined, is contrary to public policy and void in a case where the agreement was not authorized or approved by the court in charge of the receivership. Hall v. Stulb, 126 Ga. 521, 55 S. E. 172.

In re Dugdamonia Shingle etc. Co., 118 La. 242, 42 So. 789, the receiver of a lumber company sold nearly the entire output of the company to a partnership of which he was a member. Upon the hearing of objections to the receiver's account, the court held that the relation between the buyer and the seller demanded the production of clear and positive proof that the full market price for the lumber had been paid by the company, and that the receiver should be required to support his bare assertion that his firm made no profit out of the transactions, by convincing corroborative evidence of the sales made by or through the firm.

4 Herrick v. Miller, 123 Ind. 304, 308, 24 N. E. 111.

5 Groeltz v. Cole, 128 Iowa 340, 103 N. W. 977.

6 People v. Merchants Bank, 35 Hun (N. Y.) 97; Herrick v. Miller, 123 Ind. 304, 24 N. E. 111; Carr v. Houser, 46 Ga. 477, 479; Jewett v. Miller, 10 N. Y. 402, 65 Am. Dec. 751; Eyre v. McDonnell, 15 Ir. Ch. N. S. 534.

7 Chandler v. Cushing-Young etc. Co., 13 Wash. 89, 42 Pac. 548.

Although a receiver, by reason of public policy, is ordinarily prohibited from purchasing any portion of the receivership property, it does not necessarily follow that all sales in which a receiver is interested as a purchaser should be vacated, that even though such a sale is presumptively irregular, the presumption is not conclusive and the sale is not in itself void, but is simply voidable at the election of the beneficiaries, and that the conduct of the beneficiaries may preclude them from asserting its invalidity. Hence, where the purchase of the assets of an insolvent bank by a bank in which the receiver is interested has been permitted by the stockholders of the insolvent bank, or if they have not been injured thereby, the sale will not be vacated. Jackson v. Clark First State Bank, 21 S. D. 484, 113 N. W. 873.

Where a receiver purchases receivership property he may be held to hold it in trust for the receivership[8] and be made to account for the profits derived by him from the transaction,[9] although this duty to account has been denied in the absence of bad faith on his part.[10]

The same general rules naturally prohibit the buying up of claims against the receivership by the receiver or persons with whom he has some arrangements to participate in the profits derived from such transactions. Hence where the receiver buys claims against the receivership at a discount, he will be held to hold them in trust for the receivership and he will not be allowed to profit from such transactions.[11]

So, also, where a receiver purchases an outstanding title to property for his wife, she will be held to hold it in trust for the receivership subject to being reimbursed for the amount expended by her with interest. Such a

8 Gilbert v. Hewetson, 79 Minn. 326, 333, 79 Am. St. Rep. 486, 82 N. W. 655; Hammond v. Atlee, 15 Tex. Civ. 267, 272, 39 S. W. 600.

9 He may be required to account for the difference between the price at which he purchased it and its real value. Penzel Grocer Co. v. Williams, 53 Ark. 81, 13 S. W. 736; Donahue v. Quackenbush, 75 Minn. 43, 77 N. W. 430; French v. Pittsburg Vehicle etc. Co. 184 Pa. St. 101, 39 Atl. 63; Pangburn v. American Vault etc. Co., 205 Pa. St. 93, 54 Atl. 508.

If a receiver purchases at a sale ordered by the court, he may be held liable for the appraised value of the property. In re Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809.

10 Wagner v. Swift's Iron etc. Works, 16 Ky. Law Rep. 273, 26 S. W. 720.

11 Titherington's Admr. v. Hodge, 81 Ky. 286.

Where a receiver of funds arising out of the sale of real estate of a debtor against whom a general creditor's suit has been brought buys up the claims against the debtor, he can not require payment for the face value of the claims, but can only recover such sum as he paid for them. Roller v. Paul, 106 Va. 214, 55 S. E. 558.

Receiver can not be held liable because his brother has bought up claims against the estate where it is not shown that the receiver was interested in such purchases. Luderbach Plumbing Co. v. Its Creditors 121 La. 371, 46 So. 359.

purchase is, however, merely voidable and the right to enforce the trust may be waived.[12]

A receiver can not use the receivership property for himself or use his position as receiver as a basis for exacting some benefits for himself which he otherwise could not obtain.[13]

But it is not improper for a receiver, as an individual, to sell property to the receivership where he does so at a price less than the ordinary price at which the property could be purchased.[14]

Of course, if a receiver wrongfully converts property of the receivership to his own use, he will be held liable personally, since he is liable personally for trespass or torts committed by him.[15]

12 Cook v. Martin, 75 Ark. 40, 5 Ann. Cas. 204, 87 S. W. 625, 1024.

13 In Halman v. Burlen, 198 Mass. 494, 85 N. E. 167, it was held that a receiver can not use the knowledge which he has obtained as receiver to buy a paramount title which at the termination of the litigation he might set up against the person who proves to be the true owner.

A contract between a receiver and his surety, whereby he agreed to deposit the receivership funds with the surety and to waive payment of interest, is void. Stone v. St. Louis Union Trust Co., 183 Mo. App. 261, 166 S. W. 1091.

Likewise, where the receiver makes an agreement by which he is to receive one-half of the fees to be awarded to his attorney, it will be held to inure to the benefit of the receivership. Hammond v. Atlee, 15 Tex. Civ. 267, 39 S. W. 600.

Thus, where a receiver who was in possession of slaves instead of hiring them out used their labor on his own account, he was held accountable to the estate. Battaile v. Fisher, 36 Miss. 321.

A receiver of a brewing company, who was also in the wholesale liquor business and distributed the company's product, is not entitled to pay his own license from the funds of the company, notwithstanding that was the practice in the vicinity. Appeal of Pramuk, 250 Pa. 45, 95 Atl. 326.

Where one who is a committee of property is also mortgagee, he can not foreclose his mortgage except under the authority of the court. Matter of Carter, 3 Paige (N. Y.) 146.

A receiver should not become a mortgagee of the receivership property. Thompson v. Holladay, 15 Ore. 34, 55, 14 Pac. 725.

14 Patterson v. Ward, 6 N. D. 609, 72 N. W. 1013.

15 Kirk v. Kane, 87 Mo. App. 274. The court, in the case just cited, said: "He obtains no immu-

§ 50. Duty of Employees and Others in Intimate Control.

This same rule of duty not to profit from the receivership also applies to confidential employees of the receiver. Thus where a trusted clerk of the receiver, through his intimate knowledge of its affairs, buys claims against the receivership and makes a profit out of the transactions and invests such profits in real estate the receiver may establish a constructive trust in such property to the extent of such profits.[1]

Likewise where an officer of a corporation which is in receivership purchases receivership property at a depreciated price at a sale in the proceedings which he controlled, he will be held to hold such property in trust for the benefit of all persons interested in it.[2]

§ 51. Liability of Person Improperly Assuming to Act as Receiver.

Where after the death of a receiver, a solicitor took upon himself to act as receiver without being appointed as such and his conduct of the former receivership was such as to make parties dealing with him believe that he was the successor of the former receiver, he will be held liable for losses for rents and the like caused by his neglect of the duties of a properly appointed receiver.[1]

§ 52. Order of Appointment as Protection to Receiver.

Acts of a receiver in the course of the receivership done according to the directions of the court and under the court's orders will not subject him to a personal liability.[1]

nity from liability in such cases by reason of his office. He may frequently, under color of office, get possession of property which does not belong to or is not a part of the receivership property and his official character ought not to be a defense to his tortious acts or deprive parties of their rights. As a wrongdoer he is liable personally, whether liable officially or not."

1 Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655.

2 Broussard v. Mason, 187 Mo. App. 281, 173 S. W. 698.

1 Wood v. Wood, 4 Russ. 558.

1 Eskridge v. Rushworth, 3 Colo. App. 562, 34 Pac. 482; Walsh v.

Raymond, 58 Conn. 251, 18 **Am. St. Rep.** 264, 20 Atl. 464; Johnston v. Keener, 23 Ill. App. 220; Heise v. Starr, 44 Ill. App. 406; How v. Jones, 60 Iowa 70, 14 N. W. 193; Remington Paper Co. v. Watson, 49 La. Ann. 1296, 22 So. 355; Schmidt v. Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; Willis v. Sharp, 124 N. Y. 406, 26 N. E. 974; Platt v. New York etc. Ry. Co., 170 N. Y. 451, 63 N. E. 532; State v. Port Royal etc. Ry. Co., 45 S. C. 464, 23 S. E. 380; Reardon v. White, 38 Tex. Civ. 636, 87 S. W. 365; Chandler v. Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548; Davis v. Duncan, 19 Fed. 477; American Bonding etc. Co. v. Baltimore etc. R. Co., 124 Fed. 866, 60 C. C. A. 52; Pusey etc. v. Pennsylvania Paper Mills, 173 Fed. 629.

The fact that a receiver did not follow the exact terms of the orders of court under the advice of counsel may relieve him from being charged with bad faith, but will not relieve him from liability. McCay v. Black, 14 Phila. 635.

In Ft. Wayne, M. & C. R. Co. v. Mellett, 92 Ind. 535, it was held that where a receiver was in possession of land under decree of the Circuit Court of the United States no action could be maintained in the state courts to recover possession thereof. In such case the court which holds by its receiver is the only court to try the question of title.

An order of appointment even though irregular, where nothing has been done to set it aside, will protect the receiver acting under it in good faith. Corey v. Long, 12 Abb. Pr. (N. S.) (N. Y.) 427.

A receiver is liable personally as for a trespass or conversion where he takes possession of property not included in the trust, notwithstanding he takes possession under an order of court. His official character is no defense. Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303; Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982; Kirk v. Kane, 87 Mo. App. 274; Curran v. Craig, 22 Fed. 101; Hartell v. Tilghman, 99 U. S. 547, 25 **L. Ed.** 357; Barton v. Barbour, 104 U. S. 126, 26 **L. Ed.** 672; note to Malott v. Shriner, 74 **Am. St. Rep.** 289.

Where a receiver who was operating a business under the order of the court purchased supplies for that purpose with the knowledge of the seller, and the goods were billed to him in his official capacity, he will not be personally liable for them, but merely in his official capacity. Olpherts v. Smith, 54 App. Div. 514, 66 N. Y. Supp. 976.

Where a receiver appointed in Virginia was ordered to sell cattle belonging to the receivership and pursuant to such order sells them to a resident of the District of Columbia and delivers them to such purchaser, the courts of the latter place will, as a matter of comity, protect the possession of the receiver, since the possessory title of the receiver will follow him into another jurisdiction. Jenkins v. Purcell, 29 App. Cas. (D. C.) 209, 9 **L. R. A.** (N. S.) 1074.

Where the proper administration of an estate makes it necessary for the receiver to take legal advice, and competent counsel is employed whose advice is followed, the receiver is not liable for consequent losses. State v. Germania Bank of St. Paul (La

If, however, the receiver goes beyond the order of the court, he will not be protected in respect to such acts.[2]

german v. Willius), 106 Minn. 164, 118 N. W. 683; State v. Germania Bank of St. Paul (Lagerman v. Willius), 106 Minn. 539, 118 N. W. 686.

In re Home Provident etc. Assn., 129 N. Y. 288, 29 N. E. 323, the court protected the receiver as to certain funds paid out by him in good faith under the order of court but required attorneys to whom a portion of the moneys had been paid to return the same.

Though money or property in the custody of a receiver may be applicable to the payment of a judgment against him as receiver, he is protected by the court's order for expenditures made in reliance of such order while it was in force, though it may be afterward reversed. Coe v. Patterson, 106 N. Y. Supp. 659, 122 App. Div. 76, rehearing denied, (1908) 108 N. Y. Supp. 1127, 123 App. Div. 914.

Receiver can not be treated as trespasser for selling property in his possession pursuant to the order of the court by which he was appointed. Neither can the plaintiff who procured the appointment of such receiver become a trespasser by advising and aiding him to execute such order. Walling v. Miller, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65.

An application by receiver for general creditors to require the receiver of mortgaged property to turn over rents was properly denied, where the money had been spent and accounted for under the court's directions. Ball v. Improved Property Holding Co. of New York, 220 Fed. 637.

2 Chicago Fire etc. Co. v. United States Book Co., 58 Ill. App. 293; Platt v. New York etc. Ry. Co., 170 N. Y. 451, 63 N. E. 532.

In Staples v. May, 87 Cal. 178, 25 Pac. 346, it was held that if the receiver appointed in a mortgage foreclosure works ores in lands of the mortgagor, which are not included in the mortgage foreclosed, he becomes liable as a trespasser for the net proceeds of the ore extracted and the general creditors of the mortgagor may avail themselves of such liability by proceedings supplemental to execution.

In Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982, it is held that a receiver should see to it that he sells none but the property covered by the mortgage under the order of court, for its sale, and an action of trover will lie against him for the value of other property held by the mortgagor as bailee and delivered by him to the receiver without demand and without order of court. Cf. Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855; Pingree v. Detroit, L. & N. R. Co., 66 Mich. 148, 11 Am. St. Rep. 479, 33 N. W. 298; Allen v. Kinyon, 41 Mich. 281, 1 N. W. 863; Scudder v. Anderson, 54 Mich. 122, 19 N. W. 775; Hake v. Buell, 50 Mich. 89, 14 N. W. 710; Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548; Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303.

Where a receiver takes possession of property not belonging to the defendant, he is in much the same position as a sheriff taking property not belonging to the judg-

If, however, a receiver in asking for an order of court to pay certain claims or make certain expenditures makes false representations to the court as to the condition of the receivership and the order is made because of such misleading reports, the receiver will be held personally liable for his disbursements or acts under the order.[3]

§ 53. Rights of Claimants to Property in the Possession of Receiver.

Where the receiver holds property, his possession is the possession of the court, and any equitable rights therein claimed by third parties must be asserted by petition and determined by the court appointing the receiver. It is also an equally well recognized rule that where it is alleged and good cause is shown that property should not pass to a receiver, the court may, on petition, release the same.[1]

ment debtor under color of an execution. Kirk v. Kane, 87 Mo. App. 274.

A receiver ordinarily can not pay out money in his hands by virtue of his office without an order of court, general or special. Sullivan Timber Co. v. Black, 159 Ala. 570, 48 So. 870; Buffalo Forge Co. v. Columbus & Hocking Clay Const. Co., 112 N. Y. Supp. 460.

If, with or without order of court, a receiver takes property to which he is not entitled, he becomes a trespasser; and neither the order of appointment nor any order under which he acts will protect him, and he may not only be sued without leave of court, but the court which appointed him can not lawfully enjoin such suit. Hetzel v. Fadner, 162 Ill. App. 639.

Where a receiver under color of his position as receiver obtains possession of property not belonging to the receivership, his official position is not a defense to his tortious actions. As a wrongdoer he is liable personally whether liable officially or not. Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303; Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982.

But a receiver is not liable to a claimant where the possession of property was voluntarily delivered to the receiver. Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225.

3 Gutterson v. Lebanon Iron etc. Co., 151 Fed. 72.

1 If one claims property in the possession of a receiver he should apply to the court for relief. Woodburn v. Smith, 96 Ga. 241, 22 S. E. 964; Riggs v. Whitney, 15 Abb. Pr. (N. Y.) 388.

In Thompson v. McCleary, 159 Pa. 189, 28 Atl. 254, it is held that a creditor having execution under a judgment should apply to the

court which appointed the receiver and ask for a discharge of the property out of its custody so that he may proceed against it. The same doctrine is recognized in Smith v. Earl of Effingham, 2 Beav. 232.

In re Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665, it was held that when property had passed to the actual possession of the receiver it could not, without leave of the court first obtained, have been replevied from him in an action against him. The only remedy would have been by an action commenced with the leave of court, or by petition to the court appointing the receiver. Citing Noe v. Gibson, 7 Paige (N. Y.) 513; Riggs v. Whitney, 15 Abb. Pr. (N. Y.) 388; Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Evelyn v. Lewis, 3 Hare 472; Ex parte Cochrane, L. R. 20 Eq. Cas. 282.

In Robinson v. Atlantic & G. W. R. Co., 66 Pa. 160, it was held that whether certain land belonging to a mortgagor should pass into the hands of a receiver could be determined only by the court appointing the receiver. The court saying: "If a creditor believes that the property was not legally mortgaged, or for any good reason should not pass into the hands of the receiver, his duty is to apply to the court having appointed the receiver to ask its discharge out of custody, in order that he may proceed against it." See, also, Re Day, 34 Wis. 638. In this case shingles were lawfully in the possession of the receiver, and the court held if there had been a mistake in the delivery and they belonged in fact to another party than the debtor, the remedy of the claimant was by application to the court for redress or for leave to sue.

In Wiswall v. Sampson, 55 U. S. (14 How.) 52, 14 L. Ed. 322, it was held that where real estate was in custody of the receiver appointed by a court of chancery, the sale thereof was improper under an execution issued in a judgment at law. It is held that when a party is prejudiced by having a receiver put in his way, the practice has been either to give him leave to bring ejectment or permit him to be examined pro interesse suo. If persons claim to have prior legal or equitable interests to the property in the hands of the receiver, and they desire to avail themselves of such rights, they must apply to the court for protection, even though their right to the possession is clear; and the same practice applies where the property claimed consists of goods and chattels, or other personality, as to real estate. The court say: "The settled rule, also, appears to be that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court, pending the litigation, by the appointment of a receiver, or by sequestration, the title is bound from the filing of the bill; and any purchaser, pendente lite, even for a valuable consideration, comes in at his peril."

In this case the court examined extensively the English and American doctrine in regard to the possession of the receiver and the interference therewith and the remedies of claimants thereto.

In Russell v. East Anglian R.

Co., 3 Macn. & G. 104, property in the possession of the receiver was seized under execution on judgments against the debtor. It was held that the established rule was that no party could question any order or process of court by disobedience; that it was not competent for any one to interfere with the possession of the receiver or disobey any order of court, on the ground that the orders were improperly made. The proper course to question their validity was open to all, and this course must be pursued. "It was perfectly open to the plaintiffs to have applied to the court to be heard pro interesse suo, or to have been heard on a summary application for leave to levy their execution, notwithstanding the possession of the receiver."

In Porter v. Kingman, 126 Mass. 141, it is held that a person who has purchased property subject to a mortgage given by the owner to a bank, can not maintain a bill in equity against the receivers of the bank for a cancellation of the mortgage, alleging as a ground false and fraudulent representations of the bank, but if he has any remedy at all he must proceed by petition in the court in which the receiver was appointed. Equitable rights which are contended as superior to the title made by order of court cannot be passed upon except in the cause in which that title is created, and cannot be set up in an independent suit.

Cf. Atlas Bank v. Nahant Bank, 23 Pick. (40 Mass.) 480; Columbian Book Co. v. De Golyer, 115 Mass. 67; Wiswall v. Sampson, 55 U. S. (14 How.) 52, 14 L. Ed. 322; Noe v. Gibson, 7 Paige (N. Y.) 513; Robinson v. Atlantic & G. W. R. Co., 66 Pa. 160; Russell v. East Anglian R. Co., 3 Macn. & G. 104; Hills v. Parker, 111 Mass. 508, 15 Am. Rep. 63.

In Columbian Book Co. v. De Golyer, 115 Mass. 67, it was held that before property of a corporation in the hands of a receiver could be taken from such receiver and applied to the payment of creditors, a petition in equity in the cause in which the receivers were appointed was necessary.

In Hills v. Parker, 111 Mass. 508, 15 Am. Rep. 63, an action of replevin was maintained against an agent of the railroad company, whose property was in the hands of receivers, without obtaining leave of court, where it appeared that the corporation had no interest in the property replevied, although it was in use by the receiver. It was held that leave to bring an action would be granted by a court of chancery as of course, unless it was clear that there was no foundation for the claim. The appointment of receivers entitles them to the protection of the court as to the property they were directed to take possession of, but does not extend to property not embraced in the decree and of which the debtor never had any title. Parker v. Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; Paige v. Smith, 99 Mass. 395; Leighton v. Harwood, 111 Mass. 67, 15 Am. Rep. 4.

In Atlas Bank v. Nahant Bank, 23 Pick. (40 Mass.) 480, it appeared that attachment suits were brought against an insolvent bank, and the receivers filed a petition praying that the attachment might be dissolved and the respondents

The broad rules which prevail in such circumstances were shown by the Colorado Court of Appeals in a case[2] wherein the court said:

"While it is true that the appointment of a receiver frequently leads to a conflict of rights as to the possession of property, and while it is true that the court having jurisdiction of the estate will not permit third parties to interfere with the receivers' possession without its consent, still the courts never unnecessarily interfere with the rights of third persons to repossess themselves

be restrained from other attachments; that the petition was a distinct proceeding, unconnected with the original suit against the bank, and was held to be irregular, but that the receivers were entitled to proceed in a summary mode, by a petition filed in the original suit, to obtain a decision of the court upon the rights of attaching creditors, and that a supplemental bill was not necessary.

If a receiver has property in his possession which is claimed by a person not a party to the suit, and the receiver refuses to turn it over to him, the proper procedure is to intervene by petition setting up his claim, and if the claim is proved, the court will restore it to the owner. Kirkpatrick v. Eastern Milling etc. Co., 135 Fed. 146, 137 Fed. 387, 69 C. C. A. 579.

The remedy of a stranger to a suit who claims property in the possession of the receiver or some interest or lien in it is to petition to intervene in the receivership proceeding. Wheeler v. Walton etc. Co., 64 Fed. 664; Winchester v. Davis Pyrites Co., 67 Fed. 45, 14 C. C. A. 300.

Where a note payable to a corporation is in fact owned by another person and such corporation becomes insolvent, its effects passing to a receiver, such receiver may indorse such note to the real owner, and thereby invest him with the legal title. Gibson v. Gutru, 83 Neb. 718, 120 N. W. 201.

Where a person claims title to the property in the possession of the receiver under an attachment sale, but is not interfering with the possession, the receiver ought to seek the setting aside of the sale in an independent proceeding. Cherry v. Western Wash. etc. Co., 11 Wash. 586, 40 Pac. 136.

Where a receiver wrongfully obtained a warrant for a claim against a city assigned to a third person prior to the receivership, it was proper for the assignee after the appointment to appear in the action in which the receiver was appointed, and ask an order requiring the payment of the proceeds of such warrant to it. McGill v. Brown, 72 Wash. 514, 130 Pac. 1142.

2 Central Locomotive etc. Works v. Smith, 27 Colo. App. 449, 150 Pac. 241.

of their own property. Indeed, unless it is made affirmatively and clearly to appear that for some reason recognized by the rules of equity, the rights of third persons ought to be postponed, it is the duty of the court having jurisdiction of the estate to facilitate their efforts to enforce such rights. (This is the plain duty of the court even where the rule is not changed or affected by statute.)"

Where two parties claim the same property or fund in the hands of a receiver, it is proper for the receiver to file a bill of interpleader and compel them to determine as to each other which has a superior right.[3]

In accordance with the general rule that the court which first obtains jurisdiction of the subject-matter will retain control to the end of the controversy, it is proper that the receivership court take charge of controversies over the title to property which arise subsequent to the appointment of the receiver, or at least be petitioned for leave to commence the appropriate proceeding to determine the rights of the claimants.[4]

3 In Winfield v. Bacon, 24 Barb. (N. Y.) 154, the receiver had a fund in his hands realized from the sale of land to which there were two claimants, each of whom had commenced a separate action against him regarding the fund, and had obtained an injunction to prevent him from paying it over. In such case it was held that a bill of interpleader by the receiver might be maintained against the rival claimants to compel them to interplead and settle the rights between themselves.

Where there is a dispute between a husband and wife as to a portion of property in the hands of a receiver and such controversy is about to be settled in a divorce proceeding between them, the court should require the rents and profits which will go to the successful party to be placed in court to await the final outcome of the divorce suit. Vincent v. Parker, 7 Paige (N. Y.) 65.

4 In Lanyon v. Braden, (Okla.) 150 Pac. 677, the court in its official syllabus said:

"It is now the established doctrine of both the state and federal courts, that that court, whether state or federal, which first acquires jurisdiction of the subject-matter, or of the res, and which is first put in motion, will retain its control to the end of the controversy, and the possession of its receiver will not be disturbed

A claimant of real estate in the possession of a receiver will not be permitted to bring an action of ejectment against the receiver without leave of court,[5] and the

by the subsequent appointment of a receiver by the other court. Nor is it necessary, in the application of the general doctrine here stated, that the court asserting its exclusive control by reason of having been first to take cognizance of the subject-matter should be the first to take actual possession of the property by its receiver."

It followed the case of Farmers' Loan & T. Co. v. Lake St. E. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667.

The appointment, if made in a court of competent jurisdiction, and in an action where the power to appoint exists, can not be collaterally attacked. Comer v. Bray, 83 Ala. 217, 3 So. 554; Andrews v. Steele City Bank, 57 Neb. 173, 77 N. W. 342, 9 Am. Eng. Corp. Cas. (N. S.) 452; Roby v. Title Guarantee & T. Co., 166 Ill. 336, 46 N. E. 1110; Carroll v. Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32.

In this connection, see, also, § 40.

But the court will not draw to itself by means of the receivership jurisdiction to try disputed titles to property unless the circumstances are such as to render the common law remedies inadequate or for some reason are unfit for the purposes of the particular case. Merchants & M. Nat. Bank v. Kent, Cir. Judge, 43 Mich. 292, 5 N. W. 627.

A receiver should ordinarily be directed to hold, care for, and preserve the property until the issues are finally determined. Boothe v. Summit Coal Mining Co., 63 Wash. 620, 116 Pac. 269.

Property in the possession of a receiver, appointed by a federal court, is in possession of such court, and can not be taken therefrom by subsequent process from a state court. Ohio & M. R. Co. v. Fitch, 20 Ind. 498.

The appointment of receiver pendente lite does not determine the rights of litigants to property in controversy; such rights being preserved as they existed when the receiver was appointed. Strebel v. Bligh, 183 Ind. 537, 109 N. E. 45.

The receiver may intervene in an attachment suit instituted prior to his appointment. Andrews v. Steele City Bank, 57 Neb. 173, 77 N. W. 342.

The prosecution of an action in replevin is not abated by the appointment of a receiver for the defendant in such action. Stearns v. Early, 49 Misc. 614, 96 N. Y. Supp. 837.

The proper practice is for the court to grant leave to bring an action or permit the claimant to be examined pro interesse suo. Brien v. Paul, 3 Tenn. Ch. 357; Strain v. Palmer, 159 Fed. 628, 86 C. C. A. 618.

A person claiming title to property in the possession of a receiver should not attempt to obtain possession of it by an act of trespass but seek leave of court to sue the receiver. In re Day, 34 Wis. 638; Ex parte Cochrane, L. R. 20 Eq. 282.

[5] St. Louis etc. R. Co. v. Hamilton, 158 Ill. 366, 41 N. E. 777; Fort Wayne M. & C. R. Co. v. Mellett, 92 Ind. 535; Potter v. Spa Spring

court will not as a rule allow such an action to be brought in a court other than that of the receivership.[6]

§ 54. Rights of Receiver Respecting Property in Possession of Claimants.

The general powers and functions of a receiver are measured by the order of his appointment or subsequent orders of the court, and the powers conferred in such orders are in some cases limited by statutory provisions.[1]

A receiver, even though the order of his appointment specifically describes the property over which he is appointed receiver, has no right to take the property from the possession of a stranger to the action without giving such party his day in court, where such stranger claims title to it.[2] The receiver is not required to take property forcibly out of the possession of a stranger, or even of

Brick Co., 47 N. J. Eq. 442, 20 Atl. 852.

6 Fort Wayne etc. R. Co. v. Mellett, 92 Ind. 535.

1 Dennery v. Superior Court, 84 Cal. 7, 24 Pac. 147; Moore's Estate, 88 Cal. 1, 25 Pac. 915; Wheat v. Bank of California, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47.

Receivers pendente lite are mere temporary officers of the court and do not possess the powers of a permanent receiver unless specially conferred on them by the court. Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814.

2 Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

The receiver must, however, be indifferent as between these different claimants to the funds in his hands, and not pay the claims of one claimant without giving others an opportunity to be heard in respect to their claims. People v. Family Fund Soc., 31 App. Div. 166, 52 N. Y. Supp. 867.

Money need not be paid a receiver whose right thereto is not established, notwithstanding the party ordered to pay the same may not himself have any right thereto. Burnham v. Barrett, 137 Ill. App. 119.

It has, however, been said that a person is not deprived of his property without due process of law by being compelled to deliver it to a receiver, since a receiver merely holds it subject to the ultimate determination of the receivership court as to its ownership. In re Cohen, 5 Cal. 494; Miles v. New South Bldg. etc. Assn., 95 Fed. 919.

The above decisions must be considered, however, with a view to the purposes of the receivership.

the defendant, without the express directions of the court,[3] but the court may order property which belongs to a third party to be delivered to him by the receiver.[4] The court should direct its receiver to demand the delivery of property claimed as part of the receivership property, and on refusal of such demand initiate proceedings

3 Re Day, 34 Wis. 638; Attorney-General v. St. Cross Hospital, 18 Beav. 601; Ex parte Cochrane, L. R. 20 Eq. 282.

In Parker v. Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717, the court, speaking through Chancellor Walworth, said: "And if the property is in the possession of a third person who claims the right to retain it, the receiver must either proceed by suit, in the ordinary way, to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands, so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt, if it is not obeyed. Where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect that possession, not only against acts of violence but also against suits at law; so that a third person claiming the same may be compelled to come in and ask to be examined pro interesse suo, if he wishes to test the justice of such claim. But where the property is in the possession of a third person, under a claim of title, the court will not protect the officer who attempts by violence to obtain possession, any further than the law will protect him; his right to take possession of property of which he has been appointed receiver being unquestioned."

A receiver can not ordinarily take possession of property found in the possession of a stranger to the record, who claims title. State v. McClure, 17 N. M. 694, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744, 133 Pac. 1063.

And where property belonging to the receivership is in the possession of officers of the corporation which is defendant, its delivery to the receiver may be sought in the receivership proceeding. Brandt v. Allen, 76 Iowa 50, 1 L. R. A. 653, 40 N. W. 82.

An order for the delivery of the possession of property belonging to the receivership may be also directed against the employees and agents of the defendant, although they are not parties to the record. In re Cohen, 5 Cal. 494.

The same has been applied to the attorney for the defendant. Geisse v. Beall, 5 Wis. 224.

4 A receiver is in the lawful possession of property where it was voluntarily delivered to him by the owner, but he has no authority to forcibly take possession of property in the hands of a person not a party to the suit, and if he does so, he acts on his personal responsibility. Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225.

for its recovery.[5] Courts, however, are always reluctant in respect to interfering with the possession of third persons claiming the legal title to property in their possession which is claimed by the receiver,[6] and this is especially true where such parties make a showing of good faith in their claims.[7] This reluctance does not,

5 If a receiver representing creditors brings suit to set aside a transfer of the debtor's property as in fraud of his creditors, and such suit is terminated by a decree against the receiver, the creditors are bound thereby, and one of them can not subsequently maintain proceedings against the debtor on the ground that the sum transferred was in fraud of his rights. Dohs v. Holbert, 103 Minn. 283, 123 Am. St. Rep. 329, 114 N. W. 961.

Where a receiver was appointed for a corporation in one county, and four days later an ancillary receiver was appointed by the court of another county in an unauthorized proceeding, and a bank in the county where the ancillary receiver was appointed refuses to pay over to the original receiver assets in his hands, the court should order its receiver to demand payment, and, on refusal, should order the receiver to sue to recover the amount held by such bank. Tenth Nat. Bank v. Smith Const. Co., 227 Pa. 354, 136 Am. St. Rep. 884, 76 Atl. 67.

Order requiring delivery of secret formulæ to a corporation's receiver held improper, on the ground, however, that there was no issue involved in respect to the ownership of them. Brewster v. F. G. Brewster Co., 145 App. Div. 812, 130 N. Y. Supp. 654.

6 McCombs v. Merryhew, 40 Mich. 721; Cassilear etc. v. Simons, 8 Paige (N. Y.) 273.

7 Levi v. Karrick, 13 Iowa 344; Andrews v. Paschen, 67 Wis. 413, 30 N. W. 712.

Where the party in possession of the property claims the legal title under a decree in a mortgage foreclosure, the receivership court upon such a showing ought not to decide the validity of his title upon a mere motion in the receivership proceeding supported by affidavits, but ought to require the parties to determine the question in a form of action which will allow all of the facts to be looked into in a more thorough manner. Gelpeke v. Milwaukee etc. R. Co., 11 Wis. 454.

Where the third person is claiming under a color of title, the proper practice is for the receiver to commence an independent action for the recovery of the property. Stuparich Mfg. Co. v. Superior Court, 123 Cal. 290, 55 Pac. 985.

The court will not on a summary motion determine the rights of a person claiming title to property under an assignment for the benefit of creditors. Coleman v. Salisbury, 52 Ga. 470.

Nor will the rights of a purchaser at an execution sale be determined by the receivership court in a summary proceeding,

however, obtain where it is quite apparent that the possession of such third party is under a merely colorable or fraudulent transfer, and in such circumstances the receivership court may compel the delivery of the property by proceedings had in the receivership rather than by an independent suit.[8]

Under the practice employed by the English Court of Chancery, an order was obtained from the court requiring the defendant to deliver possession and a writ of assistance or execution was then served upon the defendant,[9] but under our practice it has been customary to require in the order appointing the receiver that the defendant deliver the property described therein to the receiver and then permit the receiver to take such steps as are necessary for him to obtain the possession.[10]

but will require him to be made a party to the litigation in order to determine his rights. Robeson v. Ford, 3 Edw. Ch. (N. Y.) 441.

A writ of assistance will not be awarded to a receiver to compel third persons claiming property in good faith to deliver it to the receiver. Musgrove v. Gray, 123 Ala. 376, 82 Am. St. Rep. 124, 26 So. 343.

The court can not summarily order a delivery to the receiver of a railway company of the books of such company which have been sold to and are in the possession of a successor corporation, and this, notwithstanding the fact that the officers of the two companies are identical. Olmsted v. Rochester etc. R. Co., 46 Hun (N. Y.) 552.

A party is not obliged to turn over money to a receiver pending the determination of the question of his right to retain such fund as his own. Struckmeyer v. People, 133 Ill. App. 336.

But a court will not direct its receiver to dismiss an ejectment suit brought by him to recover property alleged to have been purchased with money of the estate, on petition of the defendant therein who holds the legal title, except on clear proof that the property was not so purchased. Pakradooni v. Storey Cotton Co., 151 Fed. 607.

8 United States v. Church of Jesus Christ etc., 5 Utah 361, 15 Pac. 473.

9 Green v. Green, 2 Sim. 430.

10 Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 417.

Where a receiver is in charge of the assets of a partnership, the court may make such orders and adopt such measures as are necessary to place its property in the hands of the receiver. Ex parte Dickens, 162 Ala. 272, 50 So. 218.

In the federal courts, and also some state courts, a distinction is made in the practice of procedure based upon the point whether the possession and claim of the third person arose prior or subsequent to the appointment of the receiver. In the former circumstances the receiver will be required to obtain possession by a plenary suit, while in the latter circumstances he will be allowed to proceed summarily by petition for a rule to show cause in the receivership proceeding.[11]

Where two receivers were appointed of the same bank, under distinct and independent proceedings, and by the terms of their respective appointments each had entire control of all the assets of the bank, they can not with

11 Horn v. Pere Marquette R. Co., 151 Fed. 626.

In Bien v. Robinson, 208 U. S. 423, 28 Sup. Ct. 379, 52 L. Ed. 556, after receivers had been appointed by the federal court and an order made enjoining all persons from paying over or transferring any money or assets of the company to any person other than the receivers, an officer of the company gave a person a check on a bank in which it had a deposit. The payee of the check, learning of the appointment, had the check certified, indorsed it and collected it through a third person. Thereupon the receivers obtained a rule to show cause why the payee of the check should not be required to pay to the receiver the money collected on the check. The court required it to be done. It was contended in the Supreme Court that the right of the receiver to the fund could not be determined in a summary proceeding, but could only be adjudged in an action at law to recover the proceeds of the check, but that court said: "We think the contention and the assignments of error based thereon are so manifestly frivolous as to be utterly insufficient to serve as the foundation for a writ of error."

In Receiver of State Bank v. First Nat. Bank, 34 N. J. Eq. 450, the court under its practice held that the proper procedure in such or similar circumstances was not a rule to show cause, but an action at law by the receiver to collect the debt.

In view of Act Gen. Assem. May 19, 1913 (27 Del. Laws, ch. 194), held, that receiver's rule, requiring assignee of company in receivership to show cause why it should not pay over money in its possession to him, was a proper proceeding. Price v. Horrigan Contracting Co., (Del. Ch.) 95 Atl. 345.

An order for the delivery of property to a receiver may be enforced by attachment process. Miller v. Jones, 39 Ill. 54.

propriety both act: the title of the one is necessarily exclusive of that of the other, and the question of priority in such circumstances must be determined as a legal right.[12]

It has been held that where a receiver has claimed title to property wrongfully but in good faith, the owner of the property can not recover damages caused by the property having been in storage pending the settlement of the title question.[13]

A person holding property belonging to a receivership, it has been held, is not bound to deliver it to any one except the receiver in person.[14]

Where the same receiver is appointed by several courts, the distribution of the fund belongs to the one who was first appointed.[15]

§ 55. Necessity for Order of Court to Pay Money.

In order for a receiver to be certain that his disbursement of the funds of the receivership will meet with the approval of the court, it is, of course, essential that he obtain an order of court authorizing the payment.[1] And where he has in good faith paid money under an order of court he will be protected in respect to such payment, even though the order authorizing it be subsequently reversed.[2] A receiver who is also a creditor of the receiv-

12 People v. Central City Bank, 53 Barb. (N. Y.) 412.

13 The receiver of a seller of certain automobiles in storage, having wrongfully claimed title thereto as against the buyer, but having acted in good faith, was not liable for damages sustained by the buyer, and due to depreciation, etc., during the time required to settle the receiver's claim. Huxley v. Hayes, 201 Fed. 899, 120 C. C. A. 413 (affirming judgment, (C. C.) 191 Fed. 943).

14 Panton v. Zebley, 19 How. Pr. (N. Y.) 394.

15 Burrell v. Leslie, 6 Paige (N. Y.) 445; People v. Central City Bank, 53 Barb. (N. Y.) 412.

1 State Central Sav. Bank v. Fanning Ball-Bearing etc. Co., 118 Iowa 698, 92 N. W. 712; Johnson v. Gunter, 6 Bush (69 Ky.) 534.

2 In re Home Provident etc. Fund Assn., 129 N. Y. 288, 29 N. E. 323.

ership should not pay his own claim without an express order of the court made under a full disclosure of the facts and conditions of the receivership property.[3]

§ 53. Power of Receiver to Make Settlements and Compromises.

The court in the interest of the estate may authorize and empower the receiver to compromise disputed and doubtful claims, by receiving less than the amount due if it shall appear expedient so to do and to the best interest of creditors, stockholders, or those interested.[1] And

3 In re Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809; Gridley v. Conner, 2 La. Ann. 87.

1 State v. Bank of Rushville, 57 Neb. 608, 78 N. W. 281.

But a receiver with no other authority than that of being "duly appointed," is not authorized to compromise a claim of the insolvent. Buffalo Forge Co. v. Columbus & Hocking Clay Const. Co., 112 N. Y. Supp. 460; Guardian Sav. Inst. v. Bowling Green Sav. Bank, 65 Barb. (N. Y.) 275; Insurance Commissioner v. Commercial Mutual Ins. Co., 20 R. I. 7, 36 Atl. 930.

An order authorizing the receivers of an insolvent company to compromise claims of the company is one entered in the exercise of the court's discretionary power, and can not be set aside unless it appears so unreasonable as to amount to a clear abuse of judicial discretion. MacDonald v. Ætna Indemnity Co., 88 Conn. 571, 92 Atl. 154.

In a buyer's action to recover the difference between the value of logs delivered and the payment made on the purchase price of logs measured, but not delivered, the court properly ordered a receiver to sell the logs delivered and which the buyer was not required to receive, and to apply the proceeds to the seller's indebtedness. Stamper v. Foreman-Earle Co., 158 Ky. 324, 164 S. W. 937.

In Monitor Furnace Co. v. Peters, 40 Ohio St. 575, a receiver of a corporation was appointed to administer the estate for the benefit of creditors and stockholders. Before the receiver's appointment the company made sale of its real estate and other property for the alleged purpose of defrauding creditors. Two years after the appointment a judgment creditor filed a bill for the purpose of declaring the sale void in the same court that appointed the receiver, in which the stockholders, receivers, and creditors were made defendants, and the bill was sustained on the ground that it was substantially an application to the court to direct the receiver to do his duty in the case stated. In this case the court can make the proper order as effectively and justly as if instituted by the receiver.

In re Croton Ins. Co., 3 Barb. Ch. 642, a receiver of an insolvent corporation, on application, was authorized to compromise dis-

it is proper for the court to give the receiver general power to compromise with debtors to the estate where it appears to him that debtors are unable to pay in full.[2]

But the power to compromise a statutory liability is extremely doubtful, and where it appears that the debtor has fraudulently transferred his property to avoid his legal obligations, or to shield himself from injury and exposure to litigation, the power to compromise should be withheld from the receiver.[3] And a receiver has no

puted and doubtful claims by the allowance of so much of said claims as to him should seem just and equitable and to compromise with debtors who are unable to pay in full upon receipts any part of their debts, if it should seem reasonable and for the best interest of creditors.

This power will not be granted if the debtor has fraudulently conveyed his property to avoid liability. In re Certain Stockholders of California Nat. Bank, 53 Fed. 38; Suydam v. Bank of New Brunswick, 3 N. J. Eq. 276. See, also, Re Platt, 1 Ben. 534, Fed. Cas. No. 11211; Kennedy v. Gibson, 75 U. S. (8 Wall.) 498, 19 L. Ed. 476; Henderson v. Meyers, 11 Phila. 616; Wilkinson v. Dodd, 40 N. J. Eq. 124, 3 Atl. 360. A receiver of a national bank may compromise. See U. S. Rev. Stat., § 5234.

Receivers appointed for an insolvent corporation in the first instance represent the company and all creditors, and a stipulation made by them with particular creditors binds all, in the absence of seasonable and proper objection. Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850.

An agreement executed in good faith by the receiver of a trust company and an individual claiming an interest in corporate stock in possession of the company, whereby the individual surrendered his interest in the stock in consideration of his receiving a dividend on a certain claim, is for the benefit of the receivership estate because it enables him to more readily dispose of securities forming the assets of the company, and is properly approved by the court. Alexander v. Maryland Trust Co., 106 Md. 170, 66 Atl. 836.

2 In re Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642. This power being subject to great abuse is exercised with caution. And see Kimball v. Lee, 40 N. J. Eq. 403, 2 Atl. 820; Wilkinson v. Dodd (1886), 40 N. J. Eq. 123, 3 Atl. 360; Dodd v. Wilkinson, 41 N. J. Eq. 566, 7 Atl. 337.

3 In re Certain Stockholders of California Nat. Bank, 53 Fed. 38.

In the above case, Judge Ross characterized the compromise with a stockholder of a bank who has fraudulently disposed of his property to avoid a legal liability as "a premium on fraud," and contrary to fair dealing and good faith.

authority to commute a debt.[4] So, also, the receiver will not be given greater powers than the defendant would have had in respect to the receivership property.[5]

In determining whether to authorize a receiver to make compromise, the court decides a question of prudence, and should consider the probable validity of the receiver's claim, the difficulties in enforcing it, the delay and expense likely to be thereby occasioned, and the relative amounts of both the assured recovery and the amount surrendered by the compromise.

In determining upon the advisability of making such a compromise the court does not determine as a matter of law whether the claims are valid, but merely the probability or possibility of the outcome of the litigation necessary to enforce them.[6] An unsuccessful attempt by a receiver to effectuate a compromise will not, of course, interfere with a subsequent action by the receiver on the claim.[7]

4 Paxton v. Steele, 86 Va. 311, 10 S. E. 1.

5 Where the statute provides that the receiver "upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful debts," and where it is shown by the evidence that the claims uncollected seem to be valid and enforceable to a far greater amount than those against the bank, the court will not authorize the receiver to compromise all claims for and against the bank by surrendering all its remaining assets in consideration of sufficient money to make a certain dividend, and particularly where the cash on hand is sufficient to make the same dividend. Such a compromise would be a surrender of the rights of the bank to a large and unjustifiable extent. In re First Nat. Bank of St. Albans, 49 Fed. 120.

And where a partner in the absence of special authority, or a special course of dealing, has no power to accept shares in a company even though fully paid up in satisfaction of a debt due the firm, the court has no jurisdiction in winding up the partnership to confer on a receiver greater power than a partner would have had in this respect. Niemann v. Niemann, L. R. 43 Ch. Div. 198.

6 MacDonald v. Ætna Indemnity Co., 88 Conn. 571, 92 Atl. 154.

7 Stewart v. Larabee, 185 Fed. 471, 109 C. C. A. 351.

The action of the court in authorizing a receiver to compromise a claim or suit will not be reviewed on appeal in the absence of an abuse of discretion.[8]

§ 57. Appointment of Receiver as Constituting an Act of Bankruptcy.

The National Act of Bankruptcy is intended to supply the remedy for creditors in cases of insolvency of their debtor and, of course, the Bankruptcy Court has exclusive jurisdiction of cases coming within the purview of the act. Although at first sight there would appear to be some confusion amongst the decisions in respect to the appointment of a receiver constituting at times an act of bankruptcy, none does in fact exist when the decisions are considered in connection with the condition of the act of bankruptcy as it existed at the time of the particular decision or when the particular facts of the case are carefully considered. There is naturally a difference between the decisions in respect to the act of 1898 and those in respect to that act as it stood after the amendment of 1903.

The amendment of 1903 to the Act of Bankruptcy of 1898 was as follows: "Being insolvent, applied for a receiver or trustee for his property, or, because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States." Under this amendment insolvency must be the ground for the appointment of the receiver, while under the original act the appointment of a receiver did not constitute an act of insolvency unless it operated as a preference of creditors by reason of the provisions of the state laws or was applied for fraudulently with the purpose of delaying or defeating creditors.[1]

[8] State v. Bank of Rushville, 57 Neb. 608, 78 N. W. 281.

[1] In re Bininger, 7 Blatchf. 262, Fed. Cas. No. 1420, 3 Fed. Cas. at page 417, it is said:

"The design and purpose of the

A reading of the amendment will show that it prohibits an insolvent applying for a receiver and prohibits others from seeking the appointment of a receiver where the bankruptcy law is that the property of an insolvent shall be secured to their creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all the protection against devices to establish false claims, fictitious debts, and illegal or inequitable preferences, which that act provides, and in the summary manner in which the proceedings may be conducted. It is not, therefore, for the debtors or for the debtors and some of the creditors to say, we can devise a better or safer or more economical mode for reaching the same final result. If it were true, it would be only saying, we will resort to an expedient to defeat the bankruptcy law, and our reason therefor is that we think our plan is wiser and better than that which Congress has seen fit to prescribe. But the administration of the property under a receiver in such a suit does not necessarily accomplish the same result."

The court further says:

"It seems hardly necessary to add that the taking of the property by a receiver for administration delays the operation of the act. . . . A proceeding which must pass through all the ordinary forms of litigation, and which is susceptible of almost indefinite protraction, through orders, appeals, rehearings, etc., is substituted for the summary proceedings which the act of Congress provides."

This case was decided under the federal act of 1867 (ch. 176, 14 Stat. 517).

If the appointment of a receiver secures a preference to some creditors by reason of state laws, it was held an act of bankruptcy under the act of 1898. In re Gilbert, 112 Fed. 951; In re Kersten, 110 Fed. 929; In re Empire etc. Co., 98 Fed. 981, 39 C. C. A. 372.

In Mather v. Coe, 92 Fed. 333, two members of a partnership applied to a state court for the appointment of a receiver for the partnership property, alleging inability to pay debts, the other members of the partnership did not oppose the proceedings. The application was held to be an act of bankruptcy under the act of 1898 in that the partnership had suffered its property to be transferred by an order of court to be administered under the insolvent laws of a state whereby certain preferences would be allowed to certain creditors for labor and services.

An application by the administrator of a deceased partner for a receiver of the partnership property is not a concealment or removal of property for the purpose of hindering and defrauding creditors or a general assignment. Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279.

In re Empire Metallic Bedstead Co., 95 Fed. 957 (affirmed in 98 Fed. 981, 39 C. C. A. 372), it was held that an application by a corporation under the state laws for dissolution was not a general as-

basis for such appointment is the insolvency of the debtor for whom a receiver is sought. Hence it is apparent that the appointment of a receiver based on grounds other than insolvency or by other petitioners than the debtor on grounds other than insolvency even if the debtor be in fact insolvent, will not constitute an act of bankruptcy under the Bankruptcy Act. Consequently, the question to be determined is whether a particular application for a receiver in the state courts was based on the ground of insolvency, and particularly so in cases where the pleadings do not use the term "insolvency" with a nice regard as to its technical meaning under either the Bankruptcy Act or state laws. The court will in such circumstances look to the record in the state court to determine whether the receiver was in fact appointed "because of insolvency" or whether the term was merely loosely used in the pleadings and in fact evidence outside of the record may be adduced in respect to the question.[2] In most cases in which the debtor is not insolvent

signment for the benefit of creditors.

The failure of a corporation to resist an application for a receiver does not constitute a conveyance or transfer of its property within the bankruptcy act. In re Baker-Ricketson Co., 97 Fed. 489. In this connection, see In re Henry Zeltner Brewing Co., 117 Fed. 799; In re Wilmington Hosiery Co., 120 Fed. 180; In re Doscher, 120 Fed. 408; In re Burrell, 123 Fed. 414, 59 C. C. A. 508; Seaboard Steel Casting Co. v. Wm. R. Trigg Co., 124 Fed. 75.

2 In re Valentine Bohl Co., 224 Fed. 685, 140 C. C. A. 225; In re Butte Duluth Mining Co., 227 Fed. 334.

The case of In re Butte Duluth Min. Co., 227 Fed. 334, is an instructive one on this question. In that case the court said:

"Whether or not respondent committed the act of bankruptcy alleged—that is, whether or not the receiver was appointed because of insolvency—is left by petitioners dependent upon the record of the receivership proceedings alone.

"The complaint therein charged that respondent was engaged in developing and operating copper mines and reduction works owned by it, that the whole was in an experimental stage and the actual market or cash value thereof unknown, that the operations were at a loss, that respondent owed debts and was in default, that suits were threatened because thereof, that dissipation and un-

but language is used in the pleadings susceptible of such a construction, it will be found that the condition of af-

equal distribution of assets and unfair advantage in payments were imminent, and that respondent was without money or credit, and 'is now and for a considerable time last past has been wholly insolvent and unable to pay its just debts and obligations as they mature and fall due in the regular course of business.' The prayer was for a receiver to take charge and operate the property of respondent, to sell when feasible, to pay debts, and to dissolve and wind up respondent and distribute any residue to its stockholders. Respondent's answer admitted all the allegations of the complaint and 'joins in the prayer' thereof. Thereupon the court made an order reciting that upon the pleadings and testimony heard it found all allegations of the complaint true, and appointing a receiver to take charge of and operate respondent's plant, subject to future orders.

"The bankruptcy act, by the amendment of 1903, provides that it is an 'act of bankruptcy' by any one when 'because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States.' It is to be noted that not every receivership, even though to finally administer a debtor's assets, or that results in finally administering an insolvent debtor's assets, is an act of bankruptcy, but those only are such acts as the bankruptcy act so declares. The act has its own definition of insolvency—the popular one—that:

" 'A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property . . . shall not, at a fair valuation, be sufficient in amount to pay his debts.' Comp. St. 1913, § 9585.

"This definition of insolvency in the original act, by familiar rules of construction, applies to the insolvency mentioned in the aforesaid 'act of bankruptcy' introduced into the original act by amendment.

"Nor do the words of the amendment, 'under the laws of a state, of a territory, or of the United States,' manifest a different intent or meaning for the term 'insolvency.' Rather are they words of limitation, so that a foreign receivership may not constitute an act of bankruptcy. The act contemplates that a man may be unable to pay his debts as they fall due, and yet not be insolvent. If he has property that at a fair valuation in amount equals his debts, so that, though not immediately convertible without sacrifice into money, by indulgence he may eventually so convert it and pay his debts, he is not insolvent, and can not be adjudicated a bankrupt against his will.

" 'The law has made its definition of insolvency, whatever the effect may be, and has determined by that definition consequences, not only to the debtor, but to his creditors.' Pirie v. Chicago Title etc. Co., 182 U. S. 438, 451, 21 Sup. Ct. 906, 911, 45 **L. Ed.** 1171.

"And so it is held, and by what seems the better authorities,

fairs was such that the debtor was in imminent danger of

that a receivership is not an act of bankruptcy, unless created 'because of insolvency,' as insolvency is defined in the bankruptcy act. See, In re Valentine Bohl Co., 224 Fed. 685, 140 C. C. A. 225, and cases therein cited. Therein is no inconsistency with the decision in the Exploration Mercantile Co. v. Pacific Hardware etc. Co., 177 Fed. 825, 101 C. C. A. 39, though there may be with detached dicta thereof.

"The record of the receivership involved in the instant proceedings neither directly nor by implication makes it to appear that respondent was insolvent within the meaning of the bankruptcy act—that is, that the aggregate of its property at a fair valuation was not sufficient in amount to pay its debts—and so fails to show that because of insolvency as so defined a receiver was put in charge of respondent's property, and so fails to prove that respondent committed the act of bankruptcy alleged.

"It is true that complaint in the receivership declares that respondent is 'wholly insolvent'; but the addition to this conclusion or general statement of the specific and controlling words, 'and unable to pay its debts and obligations as they mature and fall due,' and the other matter of said complaint, indicate the way to allege insolvency in this state's statutory sense of inability to meet current obligations and not all in the sense of the bankruptcy act.

"If the evidence before the court appointing the receiver was otherwise, if therefrom it appeared and the court found that respondent was insolvent in the sense of the bankruptcy act, and because thereof appointed the receiver, it nowhere appears in the record, and petitioners have not undertaken to prove it by extrinsic evidence consistent with the record. The power of the state court to appoint the receiver and whether exercised for a right or wrong reason, is not material here, further than to determine whether or not the appointment was made 'because of insolvency,' as defined in the bankruptcy act; such appointment alone giving jurisdiction to adjudicate bankruptcy because thereof."

In re Valentine Bohl Co., 224 Fed. 685, 140 C. C. A. 225, the petition for a receiver in the state court which was relied on as an act of bankruptcy was filed by the president of the corporation, who was also owner of the majority of its shares of stock. The allegations in the receivership petition were as follows:

"Said corporation has now no money available for its use, and can not borrow any money, and for a long time has been, and still is, embarrassed by the lack of money to carry on its business, and it is now impossible to carry on said business on account of the lack of money. Said corporation owes a large amount of debts, which it is unable to pay, and checks have been issued which it can not meet, and certain checks issued by it have been protested, and by reason of said unpaid debts and its inability to carry on its business its assets are in danger

insolvency if a receiver were not appointed to conserve

of waste through attachment and litigation. There is no prospect of its condition improving, and said corporation ought to be dissolved."

The court in holding that the receiver was not appointed because of insolvency, said:

"We think there is no evidence whatever of the first act of bankruptcy charged, viz., concealing or removing property with intent to hinder, delay, or defraud creditors. The petition in the state court was not filed by the Bohl Company, but by an individual stockholder acting on his own behalf, who happened to be the president and a director and owner of a majority of the capital stock. The company filed no answer. It was perhaps intended to justify this charge by the form in which the second act of bankruptcy was charged, viz., that the company suffered and permitted the receiver to be appointed. But the statute describes no such act of bankruptcy. Its language is the appointment of a receiver under the laws of a state 'because of insolvency.' In re Spalding, 139 Fed. 244, 71 C. C. A. 370. The language of the petition, though inartificial, may properly be held to cover such an act of bankruptcy.

"We think 'because of insolvency' must mean insolvency as defined by Bankruptcy Act, § 1a (15). In re Golden Malt Cream Co., 164 Fed. 326, 90 C. C. A. 258; In re Wm. S. Butler & Co., 207 Fed. 705, 125 C. C. A. 223. It is impossible to say that the state court appointed the receiver because of insolvency. The record of the court, so far as it is before us, indicates that, if appointed for insolvency at all, it was insolvency in the ordinary sense of inability to meet current obligations. This is sufficient to dispose of the case. However, we may add that the proofs seem to us to show that the company was not insolvent within the meaning of the bankruptcy act."

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property . . . shall not, at a fair valuation, be sufficient in amount to pay his debts." U. S. Comp. St. 1913, § 9585.

In re Muir, 212 Fed. 495, the court said:

"The decree of the court is silent as to the reason the receiver was appointed, and in such case the papers in the case may be consulted, or evidence aliunde may be produced. Davis v. Brown, 94 U. S. 423, 429, 24 **L. Ed.** 204; Russell v. Place, 94 U. S. 606, 608, 24 **L. Ed.** 214; Hooks v. Aldridge (C. C. A. 5th Cir.), 16 Am. Bankr. Rep. 662, 145 Fed. 865, 76 C. C. A. 409; In re Kennedy Tailoring Co. (D. C. Tenn.), 23 Am. Bankr. Rep. 656, 175 Fed. 871.

"It certainly can not be the law that because Muir, both plaintiff and defendant, drawing both the bill and answer, had so skilfully drawn the papers as that we can not point to the 'insolvency' as apparent from the fact of the proceedings, we are bound thereby and can not determine the question upon evidence aliunde. Under the second clause of section 3a(4) of the bankruptcy act, the charge

the assets.[3] Questions also arise where the debtor, who is insolvent, has been in fact the moving party in the

of 'insolvency' is an issue to be determined in the bankruptcy court."

3 In re Commonwealth Lumber Co., 223 Fed. 667, it was said:

"The petitioners contend that the state court having appointed a receiver 'for the reason that said corporation is utterly insolvent and unable to meet or pay its obligations' is a finding which is conclusive, and adjudication must now follow. There is no doubt that a receiver may be appointed in the state court for a corporation in financial depression, when bankruptcy proceedings could not be entertained. The statute of Washington authorizes the appointment of a receiver when a corporation is in imminent danger of insolvency (section 741, Rem. & Bal. Washington Code), and the state court holds that a corporation is insolvent when it is unable to meet its obligations as they mature in the ordinary course of business (State ex rel. v. Superior Court, 21 Wash. 575, 59 Pac. 483; Nixon v. Joshua Hendy Machine Works, 51 Wash. 419, 99 Pac. 11); while under the bankruptcy act, when the assets at a fair valuation do not equal the liabilities, a corporation is insolvent (section 1, subd. 15, Bankr. Act). Petitioners rely on In re Maplecroft Mills (D. C.), 218 Fed. 659, 661, in which the District Court of the Fourth District held the appointment of a receiver under the South Carolina code provision that a receiver may be appointed when a corporation is 'in imminent danger' of insolvency, and at page 673, the court says:

"'Under the evidence in the case now before the court it is found that the only ground upon which the state court, to wit, the Court of Common Pleas for Pickens County, could possibly have made the order of appointment of a receiver and taken possession of, to operate, and eventually liquidate and marshal and distribute, the assets of the Maplecroft Mills, under the allegations of the complaint, was because of insolvency. The Supreme Court of the State of South Carolina has approved, for the state courts of the State of South Carolina, the same definition of insolvency as that given in the bankruptcy act (citing case). Where the Court of Common Pleas for Pickens County appointed a receiver because of insolvency, it must be presumed that it found under the laws of South Carolina it was such an insolvency as is defined to be insolvency in the bankruptcy act, and that it adjudicated that question as against the Maplecroft Mills, so as to determine it as well for these proceedings as for those in the state court.'

"The Circuit Court of Appeals of the First Circuit (In re Wm. S. Butler & Co., 207 Fed. 705, 125 C. C. A. 223), Judge Putnam dissenting, held that the appointment of a receiver to assume control of the business and conduct the affairs of a corporation until further ordered, on a complaint, answer, and decree, for the reason

receivership proceeding although the application for the receiver has been prosecuted in the name of others.

In such circumstances it becomes a question of fact as

that the corporation was unable to meet its obligations as they matured in the ordinary course of business, in the absence of an allegation that the corporation's property, at a fair valuation, was insufficient to pay its debts, was not a finding of insolvency within the act of bankruptcy. The Supreme Court of Washington recognizes a distinction between insolvency under the bankruptcy act and state statute. State ex rel. v. Superior Court, supra. I do not think that the finding of the state court upon the allegations of the complaint, in the absence of testimony, is conclusive of the insolvency of the corporation in issue, under the bankruptcy act, in this proceeding."

The appointment of a receiver for a corporation by a state court, under a statute authorizing such appointment where the defendant "is in imminent danger of insolvency," on a petition which showed that, while the corporation, by reason of general business conditions, was unable to meet its obligations, its assets at a fair valuation were worth nearly double the amount of its indebtedness, does not constitute an act of bankruptcy, under Bankr. Act July 1, 1898, ch. 541, § 3a (4), as amended by act Feb. 5, 1903, ch. 487, § 2, 32 Stat. 797 (Comp. St. 1913, § 9587).

Maplecroft Mills v. Childs, 226 Fed. 415, 141 C. C. A. 245, the court saying: "The complaint in the state court, on its face, shows that the corporation was in imminent danger of insolvency; but it does not show actual insolvency. It appears from the record in the state court that there were no lien creditors; that there were on July 1, 1913, unsecured debts amounting in the aggregate to $176,184.23. It further appears from the petition that the alleged bankrupt had assets amounting in the aggregate to $313,068.20, consisting of property and plant, $253,489.80, and other assets as follows: $54,096.53, $3790.91, $504.94, $483.68, and $702.34, these amounting in the aggregate, as we have stated, to $313,068.20. Thus it will be seen that it appears on the face of the petition that the assets exceeded the liabilities $140,000. It is also alleged in the complaint filed in the receivership suit that if the property (by which we understand is meant the real estate and plant) were sold at a forced sale it might not bring 50 per cent of its actual value.

"However, assuming that this property should be sold at a forced sale and did not bring more than 50 per cent of its true value, nevertheless, by such sale there could be realized the sum of $126,744.90. If we add to this the actual value of the quick assets, consisting of cash, cotton, stock in process, goods, insurance, interest, etc., which amounts to $59,578.40, a sufficient sum would be realized to pay the indebtedness and leave a balance of $10,000."

to whether the debtor procured the appointment of the receiver. If he did so procure it, then the appointment constitutes a violation of the Bankruptcy Act.[4] Likewise

[4] The case of James Supply etc. Co. v. Dayton Coal etc. Co., 223 Fed. 991, 139 C. C. A. 367, was one which was held to come within this rule, the court saying:

"If the receivership was so procured by actual authority of the Dayton Company, and on its behalf, it was as effectively an act of bankruptcy as if the suit had been directly in the name of that company as complainant (Exploration Mercantile Co. v. Pacific Hardware etc. Co. [C. C. A. 9], 177 Fed. 825, 839, 101 C. C. A. 39), and the district court so held. Wheeler v. Denver, 229 U. S. 342, 33 Sup. Ct. 842, 57 L. Ed. 1219, contains nothing to the contrary. What is there said respecting collusion relates merely to jurisdiction. Similar holdings are found in Re Reisenberg (Metropolitan Ry. Receivership), 208 U. S. 90, 110, 28 Sup. Ct. 219, 52 L. Ed. 403, and American Brake etc. Co. v. Pere Marquette R. R. Co. (C. C. A. 6), 205 Fed. 14, 18, 123 C. C. A. 322. Here the question of intent to evade the provisions of the bankruptcy act is involved.

"It is immaterial that the receivership was not ordered because of insolvency. If the corporation was actually insolvent at the time receivership was applied for, it is enough. Hill v. Western Electric Co. (C. C. A. 6), 214 Fed. 243, 130 C. C. A. 613.

"We are not impressed by the proposition that the application for a receiver by this corporation would not be an act of bankruptcy unless shown to have been expressly authorized by formal action of its board of directors or stockholders; and the district judge did not so decide. Not only is there nothing in the record to indicate that the managing director of this British corporation lacked authority to direct such action, but the testimony is inferentially to the contrary, and is specifically that he had complete control of the company's affairs. If Donaldson individually lacked full control, there was testimony that Watson & Co. represented the stock control and, inferentially at least, had whatever control Donaldson lacked; and it is perhaps of some interest in this connection that the amended bill in the insolvency proceeding by implication treats the members of Watson & Co. as Whitaker's principals. We think the record did not impugn the existence of full authority on the part of Donaldson and Watson & Co. to direct the receivership, and thus the commission of an act of bankruptcy. Exploration Mercantile Co. v. Pacific Hardware etc. Co. (C. C. A. 9), 177 Fed. 825, 839, 101 C. C. A. 39; In re Maplecroft Mills (D. C.), 218 Fed. 659, 673; 1 Remington on Bankruptcy (2d ed.), § 152. Moreover, if those placed in full charge of the company's affairs were thus clothed in fact with sufficient power to actually accomplish a legally effective receivership, we can not think the application therefor was any the

if the appointment of the receiver is applied for by the debtor himself with intent to hinder, delay, and defraud his creditors, the appointment of the receiver will be deemed to be a "transfer" of the debtor's property within the meaning of the Bankruptcy Act.[5] And even

less an act of bankruptcy because those responsible therefor had no right, as against the stockholders, to so act. A somewhat contrary holding was had in Re Wm. S. Butler & Co. (C. C. A. 1), 207 Fed. 705, 713, 125 C. C. A. 223. How far that decision may have been affected by the law under which the corporation was organized does not appear."

The court in Re Muir, 212 Fed. 495, in this connection said: "If Muir was the real plaintiff in the equity case, lurking in the shadow of Burton, Price & Co., the nominal plaintiff, and it also appears from the record in the equity case that Muir is the actual defendant, there was no real cause before the court in the equity case for adjudication. A party can not be both plaintiff and defendant, yet such is the effect of the equity proceedings, under the facts. If there was no real cause depending before the court in the equity suit, there is surely nothing in the way of this court in determining 'insolvency.'

"It is not necessary, and the court does not undertake, to decide whether the receiver in equity was actually appointed on the basis of 'insolvency,' upon the face of the pleadings therein."

5 Thus, In re Muir, 212 Fed. 495, it was said:

"Did Muir, by procuring the appointment of the receiver in equity, within four months preceding the filing of the involuntary petition, while insolvent, make a transfer of his property with intent to hinder, delay, and defraud his creditors? This question the master has failed to answer. It has already been decided that Muir procured the appointment of the receiver and that he did so while insolvent.

"It remains, therefore, for us to consider and determine: (a) Whether there was a transfer of Muir's property accomplished by the receivership; and (b) whether there was the intent to hinder, delay, and defraud creditors thereby.

"It is not necessary since the amendment of February 5, 1903, that it be to hinder, delay, and defraud. It is sufficient if it be with either intent.

"Section 1 (25) of the bankruptcy act defines the word 'transfer' to 'include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally.' Said the Supreme Court of the United States in Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814:

"'"Transfer" is defined to be not only the sale of property, but "every other mode of disposing or parting with property." All technicality and narrowness of meaning is precluded. The word is used

though the purpose of a debtor was not to liquidate his assets and distribute them among his creditors, the appointment of the receiver will be regarded as an act of bankruptcy where he was in fact insolvent at the time of the application.[6] The element of estoppel, however,

in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished.'

"We have already decided that Muir procured the receivership. In general, the effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property, notwithstanding the right to the property is in no way affected, and he over whose property a receiver has been appointed has no authority thereafter to subject it to any legal liability in the hands of the receiver, or to deal with it in any manner which operates as an interference with the receiver's possession. 34 Cyc. 183, 184. The mere order appointing a receiver of property does not transfer the ownership of or legal title to the property over which he is appointed, without statutory provision to that effect, or where the appointment is pursuant to the general powers of the court and the usual practice in chancery as distinguished from an appointment under statutory provisions conferring special powers and rights. 34 Cyc. 184, 185, and cases cited. Without going into the question of where the title is, upon receivership, at law, the rule is laid down that:

" 'In equity, however, it is held that an order for a receiver, when his appointment is completed, vests in him all the property and effects subject to the order without an assignment, although as to the legal title to real estate a transfer has been held indispensable. 34 Cyc. 186.

" 'There was no real estate affected by this receivership, and we are of the opinion that title to the personalty vested in the receiver. At any rate, the receiver acquired thereby the possession thereof. The general proposition is well established that, the receiver being the officer or agent of the court from which he derives his appointment, his possession is exclusively the possession of the court; the property being regarded as in the custody of the law, in gremio legis for the benefit of whoever may be ultimately determined to be entitled thereto. High on Receivers (4th ed.), § 134, p. 153.

" 'There is no question but this comes within the very language of section 1 (25) of the bankruptcy act above quoted. We conclude, therefore, that the receivership was a transfer.' "

6 Hill v. Western Electric Co., 214 Fed. 243, 130 C. C. A. 613, the court saying: "Despite the stipulation that Rankin would testify that, when applying for a receiver, it was not his purpose to liquidate his assets and distribute 'them to creditors,' the appointment was

applies to proceedings in bankruptcy by petitioners who have participated in the receivership proceedings which are complained of as an act of bankruptcy. Hence where creditors have selected the state court as the forum in which to administer the estate of the debtor and have induced that court to act in such administration, they can not subsequently repudiate the proceedings and remove the matter to the bankruptcy court.[7]

§ 58. General Liability of the Receivership for Torts and Negligence.

Receivers *pendente lite* are mere temporary officers of the court and do not possess the powers of a permanent receiver unless specially conferred upon them by the court. They possess no legal powers, and their functions are limited to the care and preservation of the property or fund committed to their charge.[1] The power of

certain to remove the possession and control of his property to the receiver for administration according to orders of the court appointing him; and, in view of the conceded insolvency of the debtor, it can not for a moment be presumed that the court would have declined to enforce the rights of the college and the creditors. The case does not differ, then, from what it would have been if Rankin had admitted insolvency in his petition for a receiver; and hence every reason exists for testing his acts by the paramount rule of the bankruptcy law. Exploration Mercantile Co. v. Pacific H. & S. Co., 177 Fed. 825, 840, 101 C. C. A. 39 (C. C. A. 9th Cir.). See, also, Blackstone v. Everybody's Store, 207 Fed. 752, 755, 125 C. C. A. 290 (C. C. A. 1st Cir.), where the applicable rule is tersely stated, though the fact of insolvency failed of proof. And see reasoning of Judge Wallace in Re Spalding, 139 Fed. 244, 246, 71 C. C. A. 370 (C. C. A. 2d Cir.), although the case itself is not in point; 1 Loveland on Bankruptcy (4th ed.), § 155, p. 333; Collier on Bankruptcy (8th ed.), 1910, p. 84."

7 In re Commonwealth Lumber Co., 223 Fed. 667. See, also, Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337; Lowenstein v. Henry McShane Mfg. Co., 130 Fed. 1007, sustaining the principle that where creditors have elected a forum, they are bound by such election.

Cases in apparent conflict are distinguishable on the facts. Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210; In re Salmon & Salmon, 143 Fed. 395.

1 Herring v. New York, L. E. & W. R. Co., 105 N. Y. 340, 372, 12

appointment of a receiver of this character is an incident to the jurisdiction of a court of chancery, and is unaffected by the character of the parties before it, whether an individual or a corporation, or by the nature of the property,[2] and is usually brought into exercise in mortgage foreclosure cases. While this class of receivers have many duties and powers peculiar to themselves they are such only as flow from the nature and character of the property committed to their charge. Of course, in case of the foreclosure of railway mortgages, the powers and duties of the receiver are increased by reason of the public nature of the property and the franchises involved, but the title of the receiver is essentially the same in all cases.

Except in a few exceptional cases, he is selected not only because of his ability, honesty, and integrity, but because of his not being interested in any manner in the subject-matter of the litigation. Neither will he be permitted to become interested in the property in his charge as receiver during the progress of the litigation, nor use such property or funds for purposes of his own personal gain, and all interest and profits derived from the funds or property must be strictly accounted for.[3] He must, as we have shown before,[4] exercise such care in the handling of the affairs of the receivership as a man would prudently exercise in handling his own affairs. Hence a receiver, occupying the peculiarly responsible position that he does, both in his attitude to the court and the parties before the court, is required to exercise great care and circumspection over the funds or property entrusted to him, or whatever other interests that may come

N. E. 763; Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60.

A receiver is liable for waste. Turner v. Peoria etc. R. Co., 95 Ill. 134, 35 Am. Rep. 144.

2 United States Trust Co. v. New York, W. S. & B. R. Co., 101 N. Y. 478, 5 N. E. 316.

3 Battaile v. Fisher, 36 Miss. 321; see, § 49, supra.

4 See, § 43, supra.

to him as receiver.[5] And he will be liable for negligence in the management of the receivership property.[6] The liability of the receiver is generally merely in his official capacity unless the negligence or tort is the personal act

5 State v. Gibson, 21 Ark. 140; Walker v. Morris, 14 Ga. 323; Kaiser v. Kellar, 21 Iowa 95; Henry v. Kaufman, 24 Md. 1, 87 Am. Dec. 591; Devendorf v. Dickinson, 21 How. Pr. (N. Y.) 275; Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 417; Reynolds's Exr. v. Pettyjohn, 79 Va. 327; Salway v. Salway, 2 Russ. & M. 215.

Where a receiver was appointed in a case in which a large number of important interests were held by various parties—held, that as he became vested with the title of all the property involved in the suit, by virtue of the decree appointing him, he was entitled to the carriage of the decree into the master's office to compel the delivery of the property to him and that he was responsible for the exercise of his best judgment and good faith to all parties interested and was not to be controlled by any of the parties. Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 417; Moore v. Duffy, 74 Hun (N. Y.) 78, 26 N. Y. Supp. 340.

6 He is responsible for the value of property which by diligence would have come to his possession, but has become lost by his omission to act. Clapp v. Clapp, 49 Hun (N. Y.) 195, 1 N. Y. Supp. 919; Thurman v. Cherokee R. Co., 56 Ga. 376; Henderson v. Walker, 55 Ga. 481; Sloan v. Central Iowa Ry. Co., 62 Iowa 728, 16 N. W. 331; Ohio & M. R. Co. v. Davis, 23 Ind. 553, 85 Am. Dec. 477; Nichols v. Smith, 115 Mass. 332; Paige v. Smith, 99 Mass. 395; Fifield v. Northern R. R., 42 N. H. 225; Klein v. Jewett, 26 N. J. Eq. 474; In re Union Bank, 37 N. J. Eq. 420; Cardot v. Barney, 63 N. Y. 281, 20 Am. Rep. 533; Meara's Admr. v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Potter v. Bunnell, 20 Ohio St. 150, 159; Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 201; Ex parte Brown, 15 S. C. 518; Ex parte Johnson, 19 S. C. 492; Erwin v. Davenport, 9 Heisk. (Tenn.) 44; Newman v. Davenport, 9 Baxt. (Tenn.) 538; Lyman v. Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Hornsby v. Eddy, 56 Fed. 461, 5 C. C. A. 560; Winbourn's Case (Missouri Pac. R. Co. v. Texas P. R. Co.), 30 Fed. 167; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 26 Fed. 12. But see Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 30 Fed. 344; Brydon v. Stewart, 2 Macq. H. L. 30.

A receiver is liable for money paid as a dividend to a person not entitled to it when ordinary care would have prevented it. Todd v. Meding, 56 N. J. Eq. 83, 38 Atl. 349.

And where goods are committed to him for sale, and through negligence or bad faith he fails to realize the full value, he will be liable for the real value but not the speculative value. Demain v. Cassidy, 55 Miss. 320.

of the receiver himself. In such event it is a charge against the receivership property.[7]

[7] In those cases where a receiver may be sued without leave of the court which appoints him, it is doubtless competent for a person injured by his negligence or misconduct to pursue him at once in a court of law by an action for damages. Malott v. Shimer, 153 Ind. 35, 74 **Am. St. Rep.** 278, 54 N. E. 101.

Generally a receiver is responsible only for neglect, but if he by his appointment assumes the duties of a guardian his liability will be measured by that of a guardian. State v. Gooch, 97 N. C. 186, 2 **Am. St. Rep.** 284, 1 S. E. 653.

Receiver is not liable for personal injuries growing out of the negligence of a co-employee. Brown v. Comer, 97 Ga. 801, 25 S. E. 176.

The liability of a receiver for the torts of his employees and agents, when he himself is free from fault, is in his official capacity. In such capacity he is answerable for their torts. Fullerton v. Fordyce, 121 Mo. 1, 42 **Am. St. Rep.** 516, 25 S. W. 587; Murphy v. Holbrook, 20 Ohio St. 137, 5 **Am. Rep.** 633; International etc. Ry. Co. v. Bender, 87 Tex. 99, 26 S. W. 1047; Memphis & C. R. Co. v. Hoechner, 67 Fed. 456, 14 C. C. A. 469.

He will be liable personally for trespass and torts committed by him, his official position being no protection in such cases. Staples v. May, 87 Cal. 178, 25 Pac. 346; Hills v. Parker, 111 Mass. 508, 15 **Am. Rep.** 63. But see Walling v. Miller, 108 N. Y. 173, 2 **Am. St. Rep.** 400, 15 N. E. 65; Manning v. Monaghan, 1 Bosw. (N. Y.) 459, 23 N. Y. 539; Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982; Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303; Hartell v. Tilghman, 99 U. S. 547, 25 **L. Ed.** 357; Curran v. Craig, 22 Fed. 101.

A receiver who is himself free from fault is not personally liable for the negligence of his employees in operating the business in his charge. McGhee v. Willis, 134 Ala. 281, 32 So. 301; Bartlett v. Cicero Light etc. Co., 177 Ill. 68, 69 **Am. St. Rep.** 206, 42 **L. R. A.** 715, 52 N. E. 339; Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130; Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Keating v. Stevenson, 21 App. Div. 604, 47 N. Y. Supp. 847; Cardot v. Barney, 63 N. Y. 281, 20 **Am. Rep.** 533; McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 **L. Ed.** 796.

But if the receiver incurs expenses and charges without sufficient funds in his hands to meet them, he may become personally liable. Rogers v. Wendell, 54 Hun (N. Y.) 540, 7 N. Y. Supp. 781, 8 N. Y. Supp. 515.

And a judgment against a receiver must be against him officially and payable from the receivership funds. Woodruff v. Jewett, 37 Hun (N. Y.) 205, 115 N. Y. 267, 22 N. E. 156; Davis v. Duncan, 19 Fed. 477. The proceeding is in the nature of a proceeding in rem. It seems, however, that he may waive the right to be sued officially only. Camp v. Barney, 4 Hun (N. Y.) 373; Newell v. Smith, 49 Vt. 255.

In other words, the damages resulting from the negligence of the agents or servants of a receiver are a charge upon the receivership estate of the character of operating expenses and are payable out of the net income or in case of a sale of the assets of the receivership out of the sale proceeds.[8]

Although a note may have been handed to a receiver that he might allow it as a mortgage debt, he promising to attend to it, and negligently failing to do so, he can not be held answerable as receiver in a court of chancery for such neglect. The liability is a personal one solely, to be enforced at law. Keene v. Gaehle, 56 Md. 343.

The liability of a receiver for the negligence or torts of his servants and employees is not an individual one, but merely in an official capacity. McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452 (affirmed in 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796); Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130; Gray v. Grand Trunk W. Ry. Co., 156 Fed. 736, 84 C. C. A. 392.

In such case the liability is official. McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452, 141 U. S. 327, 35 L. Ed. 796, 12 Sup. Ct. 11; McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; Combs v. Smith, 78 Mo. 32; Bonner v. Mayfield, 82 Tex. 234, 18 S. W. 305; Texas & P. Ry. Co. v. Geiger, 79 Tex. 13, 15 S. W. 214.

Damages for loss of property through the negligence of a receiver in possession of a storage warehouse may be charged against the property when it is turned over to its owner. Shedd v. Seefeld, 230 Ill. 118, 120 Am. St. Rep. 269, 13 L. R. A. (N. S.) 709, 82 N. E. 580.

[8] Bartlett v. Cicero Light etc. Co., 177 Ill. 68, 69 Am. St. Rep. 206, 42 L. R. A. 715, 52 N. E. 339; Knickerbocker v. Benes, 195 Ill. 434, 63 N. E. 174.

A claim for a tort as a rule ranks as an unsecured claim. Pennsylvania Steel Co. v. New York City R. Co., 165 Fed. 457.

One claiming a right of action for a tort against a corporation in the hands of a receiver can not sue the receivers, either at law or in equity, for the damage so suffered by him. Healy v. Defiance City Bank, 160 Ill. App. 625; Healy v. Smith, 160 Ill. App. 627.

Where the receiver of an insolvent trust company continues, under order of the court, to collect for a bank the rents of a lot mortgaged to it, as the trust company had done, the bank is not necessarily liable to a tenant from whom the rents are collected for the negligence of the receiver's employee in repairing the mortgaged lot. Carlon v. City Savings Bank, 91 Neb. 790, 137 N. W. 852.

The liability of a receiver for damages caused by the negligence of their servants in operating properties under his control is generally regarded as an official and

The rule in this respect was stated in the following language in an early case:[9]

"A receiver, as such, upon principle and authority, is not personally liable for the torts of his employees. Were he so liable, few men would take the responsibility of such a trust; it is only when he himself commits the wrong, that he is held personally liable. The proceeding against him, as receiver, for the wrongs of his employees, is in the nature of a proceeding *in rem,* and

not a personal liability. Knickerbocker v. Benes, 93 Ill. App. 305.

Under Rev. Stat., 1895, arts. 1472 et seq., relating to the application of funds in the hands of a receiver and the liability of property after redelivery, the owner will not be responsible for liabilities of the receiver for torts on the redelivery of the property without sale, unless the property is equal to such claims in value or such liability has been imposed on the owner by the decree as a condition of the return. Kirby Lumber Co. v. Cunningham, (Tex. Civ.) 154 S. W. 288.

Rev. Stats., art. 3017, authorizing an action for the death of any person caused by the wrongful act, negligence, unskilfulness, or default of another, does not authorize an action against the receiver of a private corporation for death caused by his negligence. Parker v. Dupree, 28 Tex. Civ. 341, 67 S. W. 185.

The judgment, therefore, should not be rendered against a receiver individually, but as receiver, payable out of the funds held by him in that capacity, in due course of administration of his receivership. McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; Robinson v. Kirkwood, 91 Ill. App. 54; Louisville Southern Ry. Co.'s Receivers v. Tucker's Admr., 105 Ky. 492, 49 S. W. 314; Camp v. Barney, 4 Hun (N. Y.) 373; Eddy v. Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063.

It is the settled doctrine of the federal courts that a receiver is not personally liable for injuries arising through negligent operation of the property not due to his personal negligence, but an action against him for such injuries is in law one against the receivership, in which the judgment recovered can be enforced only against the property or funds in his hands, and which can not be maintained after the receivership has been closed and the receiver discharged. Gray v. Grand Trunk Western Ry. Co., 156 Fed. 736, 84 C. C. A. 392.

9 Davis v. Duncan, 19 Fed. 477. See, also, Farmers Loan & T. Co. v. Central R. Co., 7 Fed. 537, 2 McCrary 181.

The judgment for damages resulting from a tort committed by an employee of a receiver should be against the receiver in his official capacity, to be paid by him in the course of the administration of the receivership. McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631.

renders the property in his hands, as such, liable for compensation for such injuries."

If the receiver commits a tort while acting beyond the scope of his authority, he will be personally liable therefor.[10] However, a receiver is not liable for a tort committed by the defendant prior to his appointment.[11]

While a court of chancery appointing a receiver will throw around him its shield of protection in all necessary cases, yet it can not be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by him as receiver, that he is an officer of court acting under a decree of a court of chancery. The obligations and duties which the receiver assumes are, in all cases, and like all other persons, to be measured by the nature and character of the business which he engages in. Thus it can not be contended that the receiver who is the mere custodian of property, answerable only for its safe keeping and due return when called upon for that purpose, occupies a similar position with like responsibilities to the receiver, who by virtue of his official position is placed in possession of, and is charged with the management and control of a railway where he by virtue of his undertaking assumes the functions of a common carrier, and where in his dealings he is constantly brought in contact with the public. In the latter case his responsibilities are largely increased. The

10 Curran v. Craig, 22 Fed. 101; Bank of Montreal v. Thayer, 7 Fed. 622, 2 McCrary 1; Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.

And where a receiver wrongfully takes possession of property, he will become personally liable for the tort even though he acted under his official authority. Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303; Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982.

Where a receiver becomes a trespasser by reason of forcibly taking possession of property contrary to an order restraining him from doing so, he will be liable as such trespasser. Manning v. Monaghan, 1 Bosw. (N. Y.) 459.

11 Northern Pac. R. Co. v. Heflin, 83 Fed. 93, 27 C. C. A. 460; Dillon v. Oregon etc. R. Co., 75 Fed. 949.

very nature of the business carries with it extraordinary duties and corresponding liabilities, and hence it is that courts are more disposed to charge this class of receivers with a greater degree of responsibility, and recognize in the public, and those dealing with them, greater privileges and greater facilities for relief, not only in matters purely *ex contractu* but more especially in matters *ex delicto*.[12]

Where the receivership estate is chargeable for the damages resulting from a tort, it is immaterial that successive receivers have been appointed, since the receivership is continuous regardless of changes in the personnel of the receiver, who is merely the arm of the court.[13]

§ 59. Right of Receiver to Make Repairs.

The receiver derives his power, primarily, from the court, and his official action, duties, and responsibilities are measured by the scope of the order which, after his qualification, constitutes him receiver, and such supplementary orders and directions as he may subsequently receive in the due administration of the estate or matters in controversy. His discretionary powers are limited, as a rule, to those acts and transactions which are incident to the general scope of authority given to him. He is an officer of the court, and in this sense has been considered the hand of the court, and as such he has been held bound to render to the court a strict account of his official action.[1] As courts of equity, and those exercising equitable jurisdiction, have extended their jurisdiction, along with the general growth of remedial jurisprudence, the functions of the receiver have been increased very mate-

12 Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424.

13 Knickerbocker v. Benes, 195 Ill. 434, 63 N. E. 174.

1 Chancellor Bland, in Williamson v. Wilson, 1 Bland Ch. (Md.) 418; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438.

rially as compared with receiverships in the earlier stages of English and American courts.[2]

The receiver, occupying a position of perfect independence, so far as the parties are concerned, appointed by the court by reason of such relation, and reflecting as he does the impartiality of the court as between conflicting interests, is not the agent or special representative of the contestants or either of them. Neither the law nor the court will permit him in his administration to manifest the slightest inclination towards one party or the other. He is a trustee of the strictest character, conserving the interests of all parties with special favors for none,[3] and the property and funds confided to his care

2 "In the progress and growth of equity jurisdiction, it has become usual to clothe such officers with much larger powers than were formerly conferred." Mr. Justice Swayne in Davis v. Gray, 83 U. S. (16 Wall.) 203, 219, 21 L. Ed. 447, 452.

3 Day v. Postal Tel. Co., 66 Md. 354, 7 Atl. 608; Commonwealth v. Franklin Ins. Co., 115 Mass. 278; First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 60 Mich. 487, 27 N. W. 657; Green v. Bostwick, 1 Sandf. Ch. (N. Y.) 185; Devendorf v. Dickinson, 21 How. Pr. (N. Y.) 275; Curtis v. Leavitt, 1 Abb. Pr. (N. Y.) 274; Brown v. Northrup, 15 Abb. Pr. N. S. (N. Y.) 333; Corey v. Long, 43 How. Pr. (N. Y.) 492, 497; Brown v. Warner, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032; Davis v. Duke of Marlborough, 2 Swanst. 108; Portman v. Mill, 8 L. J. Ch. N. S. 161.

The receiver does not in any special sense represent the party upon whose motion he is appointed, more than any other party to the cause. He owes an equal duty to all, and is responsible to the court alone. Baker v. Backus Adm'r, 32 Ill. 79; Beverley v. Brooke, 4 Gratt. (Va.) 187, 208; First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 60 Mich. 487, 27 N. W. 657; Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. Ed. 341, 10 Sup. Ct. 1013; Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183; Snow v. Winslow, 54 Iowa 200, 6 N. W. 191.

He is not to be controlled by the representatives of any party to the suit. Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 417.

His powers and duties are measured by the order of court making the appointment and the established rules and practice of such court. Battle v. Davis, 66 N. C. 252.

See. also, Skinner v. Maxwell, 66 N. C. 45, 68 N. C. 400; Booth v. Clark, 58 U. S. (17 How.) 322, 15 L. Ed. 164; Green v. Bostwick, 1 Sandf. Ch. (N. Y.) 185; Hunt v. Wolfe, 2 Daly (N. Y.) 298, 303;

are *in custodia legis,* and these it is his duty to guard and preserve with scrupulous care.[4]

This position of trust and independence he continues to occupy until the litigation is brought to an end, and it is judicially ascertained to whom the property or its possession rightfully belongs, after which he becomes the representative of such successful party; or where the property is sold for the benefit of creditors, he is the hand of the court and the agent of the creditors in the distribution of the proceeds. He is in no sense, however, the representative of those who are not parties to the suit, or become such during its progress.[5]

Van Rensselaer v. Emery, 9 How. Pr. (N. Y.) 135; Corey v. Long, 43 How. Pr. (N. Y.) 492, 497; Devendorf v. Dickinson, 21 How. Pr. (N. Y.) 275; Kaiser v. Kellar, 21 Iowa 95; Snow v. Winslow, 54 Iowa 200, 6 N. W. 191; Hooper v. Winston, 24 Ill. 353; Ellicott v. Warford, 4 Md. 80; Williamson v. Wilson, 1 Bland Ch. (Md.) 418; Coburn v. Ames, 57 Cal. 201.

Where property is placed in the hands of a receiver, upon a decree for the plaintiff, the receiver's duties, as such, are at an end, and he holds merely as trustee for the plaintiff, and the goods can be levied on in his hands, for the plaintiff's debts. Very v. Watkins, 64 U. S. (23 How.) 469, 16 L. Ed. 522. And see Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183; In re Colvin's Estate, 3 Md. Ch. 278; Ellicott v. Warford, 4 Md. 80; King v. Cutts, 24 Wis. 627; Meier v. Kansas Pac. Ry. Co., 5 Dill. 476, Fed. Cas. No. 9395.

In respect to the dissolution of corporations, where by the act of dissolution the corporation in effect makes an assignment for the benefit of its creditors, in which case the receiver takes only the rights of the corporation such as could be asserted in its own name, and therefore in such case is the representative of the corporate body itself and not of its creditors or shareholders. Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680.

4 Ashurst v. Lehman, 86 Ala. 370, 5 So. 731; Gayle v. Johnson, 80 Ala. 388; Coburn v. Ames, 57 Cal. 201, Hooper v. Winston, 24 Ill. 353; Corey v. Long, 43 How. Pr. (N. Y.) 492, 497; Devendorf v. Dickinson, 21 How. Pr. (N. Y.) 275; Hunt v. Wolfe, 2 Daly (N. Y.) 298, 303; Skinner v Maxwell, 66 N. C. 45, 68 N. C. 400; Battle v. Davis, 66 N. C. 252.

5 Howell v. Ripley, 10 Paige (N. Y.) 43. In a case where a creditor's bill is filed in behalf of the complainants therein, and not in behalf of other creditors, the receiver is not necessarily a trustee for the benefit of all creditors, but for the benefit of those creditors in whose behalf he is appointed. Young v. Clapp, 147 Ill.

In handling the receivership, a receiver should exercise the same degree of discretion which an ordinarily prudent man of business exercises in the management of his own affairs.[6]

From the general nature of the duties of a receiver to preserve the property we believe that the authority to make such reasonable repairs to the property as would appear to be necessary to prevent the property from depreciation and decay would be a duty on the part of the receiver. But the power of the receiver to make repairs without an order of court was under the early decisions regarded as very limited,[7] although allowances for repairs were allowed where it was shown that the expenditures were essential to the preservation of the property or for the lasting benefit of the estate,[8] or where the

176, 32 N. E. 187, 35 N. E. 372; Russell v. Chicago Trust & Sav. Bank, 139 Ill. 538, 17 L. R. A. 345, 29 N. E. 37; Bostwick v. Menck, 4 Daly (N. Y.) 68; Manley v. Rassiga, 13 Hun (N. Y.) 288.

6 McKennon v. Pentecost, 8 Okla. 117, 56 Pac. 958.

7 Hooper v. Winston, 24 Ill. 353; Attorney General v. Vigor, 11 Ves. Jr. 563; Ex parte Hilbert, 11 Ves. Jr. 397.

8 Central Trust Co. v. Wabash etc. R. Co., 52 Fed. 908; Thornhill v. Thornhill, 14 Sim. 600; Blunt v. Clitherow, 6 Ves. 799; Attorney General v. Vigor, 11 Ves. 563.

But in Wyckoff v. Scofield, 103 N. Y. 630, 9 N. E. 498, it was held that a receiver in a foreclosure suit has no authority without the consent of the court to make repairs.

In Edee v. Strunk, 35 Neb. 307, 53 N. W. 70, an order appointing a receiver was regular on its face and apparently within the jurisdiction of the court and therefore prima facie valid under which the receiver collected money and applied the same in payment of taxes and for repairs which were necessary, such an order is a sufficient justification in a suit brought against the receiver to recover rents collected by him after the order appointing him has been vacated for want of sufficient notice of the application. If, however, the receiver claims rights or property he, in such case, is required to show a valid appointment, though it is unnecessary to show each step taken in the proceeding. (See Johnson v. Powers, 21 Neb. 292, 32 N. W. 62, distinguished.) Cf. In re O'Connor, 65 Hun 620, 19 N. Y. Supp. 971, 47 N. Y. St. Rep. 415; Rockwell v. Merwin, 45 N. Y. 166.

A receiver is not authorized without a previous order of court to incur any expense on account

receiver acted in good faith for the best interests of the estate or where it was necessary to act quickly in order to prevent damages.[9]

It may be said in a general way that before the court will make an allowance for such purpose without an order previously authorizing expenditures, it must appear that had application been made the court without doubt would have granted the order in the first instance.[10]

If, however, he spends any large amount without the authority of the court he does so with a risk of having such items as do not meet with the court's approval disallowed in his accounts,[11] and if in the making of repairs he disregards the orders of the court not to spend money on repairs, his payments will be disallowed.[12]

The proper practice for the protection of the receiver is to provide in general terms in the order of appointment of the receiver for the making of repairs, and, of course, in the event of the making of substantial repairs to obtain an order of court authorizing them.[13]

The power of the court to authorize the receiver to make repairs, and charge the expense to the estate, is

of property in his hands beyond what is absolutely essential to its preservation and use as contemplated by his appointment. Cowdrey v. Galveston, H. & H. R. R. Co., 93 U. S. 352, 23 L. Ed. 950.

9 The court may leave to the discretion of its receiver the price to be paid for work which he is authorized to contract for. Girard Life Ins. A. & T. Co. v. Cooper, 162 U. S. 529, 40 L. Ed. 1062, 16 Sup. Ct. 879; Heffron v. Milligan, 40 Ill. App. 291; Thornhill v. Thornhill, 14 Sim. 600; McCartney v. Walsh, Hayes 29, note.

10 Brown v. Hazlehurst, 54 Md. 26.

11 Graham v. Noakes (1895), 1 Ch. 66.

12 See Blunt v. Clitherow, 6 Ves. 799.

13 Where the receiver of a railroad is by the order of the court directed to continue the operations of the road and keep the property in repair, he may make such repairs without further orders of the court. Mercantile Trust etc. Co. v. Southern Iron Car Line, 113 Ala. 543, 21 So. 373.

An order to change the location of a railroad and the building of a bridge should be made only upon the report of a master showing the necessity. Hand v. Savannah etc. R. Co., 10 S. C. 406.

much more liberal, and necessarily must be, in case of receiverships of railways, where not only the interests of the parties are involved, but the convenience of the public is to be conserved.[14] A railroad receiver may contract with another company for exchange of track facilities.[15] But there is a limitation on the power of the receiver to make contracts, and he has no right to make a contract involving large outlays that may extend beyond the lifetime of the receivership.[16]

§ 60. Expenditures for Supplies, Labor, and the Like.

It may be stated as a general proposition that the ordinary outlays where the amounts are small, and which are necessary to preserve and protect the property from loss or injury, may be made by the receiver as fairly within the line of discretion which is necessarily allowed to him, intrusted, as he is, with the faithful and successful management of the property.[1] In cases, however, involving

14 Hoover v. Montclair & G. L. R. Co., 29 N. J. Eq. 4; Stanton v. Alabama & C. R. Co., 2 Woods 506, Fed. Cas. No. 13296; Bright v. North, 2 Phill. 216; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; Morison v. Morison, 7 DeG. M. & G. 214.

15 Jourdan v. Long Island R. Co., 42 Hun (N. Y.) 657; see further under title of Railroads.

16 Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554, 38 L. Ed. 819, 14 Sup. Ct. 915.

In Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672, the court says: "It has come to be settled law that a court of equity may, and in most cases ought to authorize its receiver of a railroad property to keep it in repair, and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested." Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895.

1 Kneeland v. American Loan & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; Union Trust Co. v. Souther, 107 U. S. 591, 27 L. Ed. 488, 2 Sup. Ct. 295; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 289, 27 L. Ed. 117, 119, 1 Sup. Ct. 140; Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895; Missouri Pac. R. Co. v. Texas & P. Ry. Co., 41 Fed. 319.

In Teutonia Bank etc. Co. v. Security Brewing Co., 137 La. 1046, 69 So. 833, the court said:

"The argument that the provision in act 212 of 1910 authorizing a receiver to borrow money and issue certificates therefor, to be taxed as costs, excludes the idea that he may incur debts for necessary supplies, does not appear to us to be well founded. The law-

large outlays his business sagacity would suggest, and it is the duty of the receiver to apply to the court for its sanction and authority for the contemplated expenditure.[2] Assuming this application to have been made, it becomes a matter of importance to determine the scope of power the court will exercise in authorizing its receiver to make expenditures upon the trust property in the shape of supplies, labor, improvements, etc.

maker, we think, proceeded upon the theory that a receiver to whom authority is granted to conduct as that of a going concern the business of a corporation of which he is placed in charge would have the right to incur debt for the material and supplies necessary to the business as an incident to that authority, but that, in the event of his being obliged to borrow money, something more specific in the way of a grant might be required, either for the borrowing or the issuance of the certificates evidencing the transaction, or, as is quite likely, it may have been considered that, whilst authority to buy supplies on credit might be safely conferred, authority to borrow money had best be exercised under the eye of the court in each instance. Whilst, therefore, the right of one who should lend money to a receiver without obtaining the certificate required by the statute to recover from the receivership may well be doubted, that fact does not bear upon the right of the seller of necessary supplies so to recover, since, as we have stated, the exercise of the right by the receiver to buy such supplies is incidental to the discharge of the duty imposed upon him."

In Kneeland v. Bass Foundry & Mach. Works, 140 U. S. 592, 35 L. Ed. 543, a claim was allowed for supplies furnished to a receiver, appointed on the application of a judgment creditor, and ordered to be paid from the proceeds of sale, where so far as the record showed that was the only fund available for its payment and where the supplies were necessary for the continued operation of the road, and had gone into the general property covered by the mortgage, which was sold at the foreclosure sale, upon the authority of Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140; Union Trust Co. v. Souther, 107 U. S. 591, 27 L. Ed. 488, 2 Sup. Ct. 295; Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895; Burnham v. Bowers, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675.

A temporary receiver is not liable as such on a contract for the employment of a truckman; where he has not been authorized to make such contract. Meyer v. Lexow, 1 App. Div. 116, 37 N. Y. Supp. 67.

[2] Cowdrey v. Galveston, H. & H. R. Co., 1 Woods 331, Fed. Cas. No. 3293.

The right to incur such expenditures being curbed by the limitation that they be reasonable and essential for the preservation of the property, it necessarily follows that each case must be determined by a consideration of the nature of the property constituting the receivership estate and the general purpose of the receivership. The question naturally arises in connection with the operation of the receivership property as a going business.

§ 61. Conducting the Receivership as a Going Business.

Both in England and this country, the law of receivership has been extended by statutory enactment to many subjects, not previously embraced in the ordinary chancery jurisdiction, and the powers, duties, and relationship of the receiver have been likewise greatly increased, and in many cases, particularly with regard to insolvent corporations, he is vested with all the property and effects of the corporation, the power to sell and dispose of the same and distribute the proceeds to its creditors and stockholders. The functions of this class of receivers are *sui generis* and a resort to the statute must be had in order to ascertain the extent of their powers.

Considerable confusion exists amongst the decisions in respect to the right of a court to conduct the receivership as a going concern, but we believe that the principle governing the rule to be followed in such cases is of such a clear-cut character that no difficulty ought to exist in applying it to concrete cases. The principle which should always be adhered to in such circumstances is that the main purpose of the receivership is the preservation of the property constituting the receivership estate. If the business in the hands of the receivership is one of such a nature that a cessation of business will result in a loss of the property or a great depreciation in its value, the court should direct the receiver to continue such opera-

tion,[1] otherwise and ordinarily a receiver does not continue the business as a going one indefinitely. Such a

1 The case of Appeal of Pramuk, 250 Pa. 45, 95 Atl. 326, is an instance where the receiver of a brewing company which was "manufacturing and selling malt and brewed liquors," was authorized by the court to carry on the business and allowed to borrow $25,000 to be used in replenishing stock and supplies and renewing equipment essential to continue the business as a going concern. The business was carried on for thirty-five months, when it was adjudged a bankrupt in the federal court.

The bankruptcy court in In re Consumers Albany Brewing Co., 216 Fed. 988, with the consent of more than 90 per cent of the bondholders, consented to an order directing the trustee to run a brewery as a going concern on the ground that it was essential to the protection and preservation of the estate.

An order authorizing a receiver to borrow given sums of money to carry on the business does not entitle him to purchase goods on credit in excess of such amount. Haines v. Buckeye Wheel Co., 224 Fed. 289, 139 C. C. A. 525.

The object of appointing a receiver is to preserve the property for the benefit of all parties interested, and this object is sometimes best attained by continuing a business, which will be done where the interests of all parties will be best preserved by doing so. Knickerbocker v. McKindley Coal etc. Co., 172 Ill. 535, 64 Am. St. Rep. 54, 50 N. E. 300.

A receiver appointed on application of a subscriber to secure the location of a factory, for the purpose of protecting the interests of the subscriber, should not be authorized to continue the business generally, but only to collect debts and protect the property. Vance v. Shiawassee Circuit Judge, 102 Mich. 342, 60 N. W. 761.

The receivership of an insolvent company was created at the instance and for the benefit of its bondholders though the bill therefor was filed by the trustees for creditors, to whom it made an assignment, the expenses of the effort to carry on the business through the receivers will be preferred to the claim of the bondholders, because of having obtained release of a steamer of the company from a libel, though the decree authorizing the receivers to obtain the release provided the bondholders should be subrogated to the right of the libelant. Jackson Coal & Coke Co. v. Phillips Line, 114 Va. 40, 75 S. E. 681.

A court of equity is not in general authorized to empower a receiver of a mere private corporation, having no duty to perform a service of a public nature, to incur liabilities in the operation of the property of the corporation, and to give such liabilities priority over existing lien-holders who are not parties to the receivership proceedings, and have not consented to or acquiesced therein, in the absence of some special equity in favor of general creditors. But in respect to railroad and other public service corporations in the operation of which the

condition would doubtless arise where the value of the business consists largely in its good will or location as a

public have an interest, where the duty to preserve the property and the public interest requires a continuance of the operation, and perhaps in other peculiar and special cases, owing to the nature of the property and the rights of the parties therein, a court of equity may, in the exercise of an extraordinary power committed to it for the public good, direct its receiver to maintain and operate the property of the corporation. Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699.

If a manufacturing concern with a quantity of raw material is in receivership, court may direct accumulated raw material manufactured into marketable product and to this end can authorize receiver to contract debts. American Pig Iron etc. Co. v. German, 126 Ala. 194, 85 **Am. St. Rep.** 21, 28 So. 603.

A receiver acting as manager of a hotel is not answerable for a small sum of money loaned to a guest. Heffron v. Rice, 149 Ill. 216, 41 **Am. St. Rep.** 271, 36 N. E. 562.

In Truman v. Redgrave, 18 Ch. D. 547, the court appointed managers to carry on the business of a hotel.

A receiver who, without an order of court, employs a person to manage a hotel owned by the company over whose property he is receiver, and afterwards leases it to such manager without notice to a person furnishing the hotel with supplies, becomes personally liable. Sayles v. Jourdan, 50 Hun 604, 2 N. Y. Supp. 827, 19 N. Y. St. Rep. 349.

A managing receivership of a private business corporation is never undertaken, except with the view of winding up its affairs and the sale of its property; the business being taken over and continued in order that the whole may be disposed of in the end as a going concern. And where such receivers have conducted the business for eleven months at a loss, contracting a large indebtedness which they have no means of paying, and who failed to keep cost sheets which would have shown the condition of the business and as were kept by like concerns, will be charged with personal liability for so much of such indebtedness as might have been prevented by proper care and attention to the conduct of the business. Gutterson & Gould v. Lebanon Iron etc. Co., 151 Fed. 72.

Where a receiver of a corporation is managing the property with a view to primary operation and contingent liquidation instead of the opposite, the remedy is by proceedings to compel him to perform his duty. Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262.

The court appointing a receiver may not authorize the receiver to continue the business, in the absence of consent of prior contract lien creditors. Stacy v. McNicholas, 76 Ore. 167, 144 Pac. 96, 148 Pac. 67.

A court can not, by means of a receivership in aid of execution, conduct the business of a private partnership as it might that of a railroad or other business charged with a public duty. First Nat.

going business at a particular place or in its organized sales system. A condition which would result in great

Bank v. Cook, 12 Wyo. 492, 2 L. R. A. (N. S.) 1012, 76 Pac. 674, 78 Pac. 1083.

A receiver appointed to take charge of a stock of groceries pending litigation can not conduct a general grocery business therewith, unless specifically ordered by the court to do so. Face v. Hall, 183 Mich. 22, 148 N. W. 777.

In United States Inv. Corp. v. Portland Hospital, 40 Ore. 523, 56 L. R. A. 627, 64 Pac. 644, 67 Pac. 194, a receiver was appointed over a hospital and directed to operate it.

The receiver's possession of property does not justify him, without an order of court expressly authorizing him, or the business is such as to imperatively require it, to open a business with the property or moneys in his hands. Hence he has no authority unless expressly authorized by the court, or the business is such as to imperatively require him, to open a drug business with the property or moneys in his hands and employ therein his son, who is not a druggist, and run a physician's office in connection therewith. Terry v. Martin, 7 N. M. 54, 32 Pac. 157.

Leave to continue the business was ordered in the following cases: Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510; Graham v. Graham, 2 Vict. Rep. 145.

In Cake v. Mohun, 164 U. S. 311, 17 Sup. Ct. 100, 41 L. Ed. 447, a case where the expenditures of a receiver in operating a hotel were given precedence over a debt secured by mortgage, the Supreme Court of the United States said:

"While, as a general rule, a receiver has no authority, as such, to continue and carry on the business of which he is . . . receiver, there is a discretion on the part of the court to permit this to be done when the interests of the parties seem to require it; and in such cases his power to incur obligations for supplies and materials incidental to the business follows as a necessary incident to the office," citing Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408.

The conditions imposed by act No. 159 of 1898 and No. 212 of 1910 on a receiver's exercise of authority to borrow money, held not to prevent him from incurring debts necessary to carry on the brewing business placed in his hands. Teutonia Bank & Trust Co. v. Security Brewing Co., 137 La. 1046, 69 So. 833.

In Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45, the court said:

"The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested thereby. Bank v. Western Carolina Bank, 127 N. C. 432, 433, 37 S. E. 461; Pelletier v. Greenville Lumber Co., 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855; Fisher v. Bank, 132 N. C. 776, 44 S. E. 601; Kneeland v. American Loan & Trust Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950. In International Trust Co. v. Decker Bros.,

loss might also occur in mining operations, caused by the filling of the mine with water or by the drilling of other oil wells near oil wells in the hands of a receiver, thereby causing a migration of the oil to such new wells. Another distinction which is well recognized is the operation of public utilities. In such cases the right of the public to have the public utility operated as a going concern has been universally regarded as a valid reason for the issuance of receiver's certificates for the continuance of the business. A detailed discussion of the decisions in respect to public utilities and mining operations will be undertaken in the sections relating to those topics. The question also crops out in the cases involving the issuance of receiver's certificates. In fact, the propriety of continuing the business is generally the question which is the fundamental one when a request is made by the receiver to issue receiver's certificates, since the desirability of continuing the business is generally apparent where the assets of the receivership are sufficient for that purpose without a resort to receiver's certificates. Another question which often arises in this connection is the one whether the expenses incidental to the operation of the business should take priority over contract liens, such as mortgages and the like, or be payable only out of the income. In this respect the rule is that expenses incurred

152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152, the court, quoting from International Trust Co. v. United Coal Co., 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59, said:

" 'We are of opinion that, in administering the affairs of an ordinary insolvent private business corporation for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property, superior to that of prior lien-holders, without their consent.' Union Trust Co. v. Southern Sawmills & L. Co., 166 Fed. 193, 92 C. C. A. 101."

A receiver can not, without discretion of the court, incur any expense beyond what is absolutely essential to the preservation and use of the property. Cowdrey v. Galveston H. & H. R. R. Co., 93 U. S. 352, 23 L. Ed. 950.

by the receiver in the operation of the property not necessary for the care and preservation of the property should be paid as far as possible from the income of the property, but any balance of the operating expenses must share with the general expenses of the receivership.[2]

It is, however, the duty of receivers on ascertaining that the business of the receivership is being conducted at a loss to make no payments to its creditors except pro rata, and for preferences given after that time they will be held personally accountable to other creditors.[3]

2 Stacy v. McNicholas, 76 Ore. 167, 144 Pac. 96, 148 Pac. 67.

The appointment of a receiver to protect and preserve property pending litigation does not ipso facto affect the status of liens existing upon the property; but, where a receiver is lawfully appointed at the instance and for the benefit of lien creditors, all proper charges, expenses, and liabilities incurred as incident to duly conferred receivership powers and duties may be a charge upon the earnings and corpus of the property superior to the lien creditors who take part in or expressly or impliedly consent to or acquiesce in the receivership proceedings. Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699.

In Ellis v. Vernon Ice, Light & Water Co., 86 Tex. 109, 23 S. W. 858, the Supreme Court of Texas said:

"The conduct of a business that has proved insolvent is not likely to yield a net income, and, if the creditor of the receiver could only look to such income for the satisfaction of their claims, he would be unable to obtain credit, and the operation of the works would be impracticable. Accordingly, the rule is that the expense of administering and preserving the property is to be charged, first, upon the net income, and, if that be not sufficient, then upon the property itself or its proceeds upon sale."

In First National Bank v. Ewing, 103 Fed. 168, 43 C. C. A. 150, the United States Circuit Court of Appeals held that receiver's certificates and operating expenses for which no certificates had been issued were equally entitled to precedence over the claims of the holder of first and second mortgages on a railroad, and that, though the bank, holder of the mortgage bonds, was not a party to the proceeding in which the receiver was appointed, its president was aware of the receivership and of the application for authority to issue certificates, and was bound by that action.

3 Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

Where a receiver continues without the court's order, the operations of the company placed in its charge, as a going concern, and thereby sustains a loss, such loss must be borne by the receiver,

Where a receiver is directed by the court to continue the business of the receivership, he will be obligated to pay as part of the operating expenses of the business payments to an injured employee due him under a workmen's compensation act, since such payments are regarded as part of the compensation due him for services rendered and in legal effect not distinguishable from ordinary wages.[4]

and the amount of the same deducted from his commissions. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 So. 162.

[4] Wood v. Camden Iron Works, 221 Fed. 1010.

In the above case the court said: "Before the appointment of the receiver the defendant corporation had become liable to make certain weekly payments to some injured employees and to the representatives of some who had been killed, in accordance with the provisions of the New Jersey employers' liability act (P. L. 1911, p. 134). As respects one employee, payments were required to be made pursuant to a judgment of the Common Pleas Court of Camden County, N. J.; but no suits had been instituted for the others. The defendant corporation made the payments to which the persons were respectively entitled, until the receiver was appointed. The receiver has now petitioned the court for instructions as to whether he should continue to make these payments.

"It is urged, on behalf of the receiver, that as long as he continues to run the business of the defendant he is obligated, under the provisions of the above-mentioned statute, to continue to make the weekly payments. I think his contention is correct. The act provides that, when an employer and an employee shall, by agreement, either express or implied (as therein provided), accept the provisions of section 2 of the act, compensation for personal injuries, or for the death of an employee, shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in the act. The schedule provides for weekly payments, based on the amount of the employee's wages and the extent of the injury received. It has been held by the Supreme Court of New Jersey, in Interstate Telephone & Telegraph Co. v. Public Service Electric Co., 86 N. J. L. 26, 90 Atl. 1062, that the obligations and rights thus created are contractual, and that the payments which the act requires to be made to the injured employee, or to his representatives in the event that he is killed, are part of the compensation of the employee for services rendered, and, in legal effect, are indistinguishable from ordinary wages. Mr. Justice Swayze, in writing the opinion of the Supreme Court, said (on page 1063):

" 'It [the compensation provided for in the act] is none the less compensation for labor done be-

The powers of active receivers, to whom are confided the management of going concerns, are necessarily much broader than the powers of passive receivers, who merely preserve the property, collect the assets, and report the fund to the court for distribution.[5]

cause the statute directs that its payment shall be distributed over a certain number of weeks in the future.'

"I think that the logical result of such construction is that the contract of employment, provided for in the statute, is to pay, in consideration of work to be done, so much during the time the employee is working, and, if he shall be injured, his wages shall be considered to have been increased in the proportions allowed by the statute for the time therein provided, the excess to be payable at certain designated periods in the future.

"Paragraph 8 of section 2 of this act provides that:

" 'Such agreement . . . shall bind the employee himself, and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.'

"As before shown, one of the terms of the agreement is that, if the employee shall be injured, the employer, in consideration of the work which the employee has done, shall make the deferred payments at specified times. The act specifically provides that the agreement shall bind 'those conducting the employer's business during bankruptcy or insolvency.' it therefore follows that a receiver, who is conducting the business of the original employer during insolvency, as in this case, is, by the terms of the act, bound to make the payments which the employee (or his representatives) was entitled to receive from the original employer during the time that he conducts the business. It is thus a burden placed upon the continuance of the business. If, in any given case, it is deemed proper that the business of the employer should be continued during bankruptcy or insolvency, or any part thereof, the law provides that the agreement which was originally entered into between the employer and the injured employee, and every part thereof, must be fulfilled by the receiver to the same extent as the employer would have been compelled to fulfill it. It therefore follows that, as the requirement to make the weekly payments to the employee, or his representatives, is a burden cast by the law upon those who continue the business, the payments to be made by the receiver must be classed as operating or administrative expenses.

"The receiver will therefore be instructed to continue to make the payments as long as he continues to conduct the business, such payments to be considered operating expenses, and paid in the same way as wages of other employees are paid."

5 State Bank of Virginia v. Domestic Sewing Mach. Co., 99 Va.

But even though the receiver is empowered to undertake new enterprises, such power should be exercised with great caution and only under exceptional circumstances.[6]

Funds to operate a private business should not ordinarily be authorized if these funds, represented by receiver's certificates, are to be given priority over bondholders' mortgage liens.[7]

In some instances receivers have been empowered to complete construction work under way at the time of the appointment of the receiver, or start new enterprises,[8] but most of such cases arise in connection with the completion of public utilities which were not completed for lack of funds and for the completion of which receiver's certificates are issued.

An order appointing a receiver of a corporation, with power to administer its affairs for the best interest of all, does not confer upon the receiver power to continue the operations of the corporation and incur liabilities as a going concern, but such power must be given in express and precise language.[9]

411, 86 Am. St. Rep. 891, 39 S. E. 141.

[6] Fidelity Title & Trust Co. v. Kansas Natural Gas Co., 219 Fed. 614.

[7] Central Trust & Sav. Co. v. Chester County Electric Co., 9 Del. Ch. 247, 80 Atl. 801.

[8] It is sometimes necessary for the receiver to complete contracts partially executed. Taylor v. Neate, L. R. 39 Ch. Div. 538. See, also, Meridian News & Pub. Co. v. Diem & W. Paper Co., 70 Miss. 695, 12 So. 702.

Nor in a matter involving the violation of a contract will the court through its receiver set up a new business, or engage in the manufacture of proprietary articles involving secret formulas. Merrell v. Pemberton, 62 Ga. 29.

The court will not as a rule order its receiver to operate a business which has not yet been commenced. Merrell v. Pemberton, 62 Ga. 29.

Where a construction company became insolvent, and a receiver was appointed, he may continue the work, and persons furnishing labor or material at his request are entitled to be first paid. Guimarin & Co. v. Southern Life & Trust Co., 100 S. C. 12, 84 S. E. 298.

[9] Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 So. 162.

The order in such cases should be broad in its terms so as to give the receiver the large discretionary powers necessary for the proper handling of a business enterprise. And it is, of course, more advisable to obtain general or special orders authorizing the receiver to conduct the receivership as a going business in advance of doing so than to take the risk of having the expenses incidental thereto refused on an accounting.[10]

Where the receiver is directed to continue the business of the receivership, the court will not interfere with the exercise of his discretion in the employment of the agents and servants for that purpose unless he abuses such discretion.[11]

Where the order of the court merely authorizes the receiver to borrow a definite sum for the purpose of continuing the business, the receiver's powers in the prosecution of the business are limited, and it was held that he has no authority to make purchases on credit and bind the estate in his hands for the payment of the debts so contracted without the express authority of the court.[12]

It is different, where the order of the court directing him to continue the business does not contain language limiting his powers in the prosecution of the business.[13]

10 Allen v. Hawley, 6 Fla. 142, 164, 63 Am. Dec. 198; Lehigh Coal & Nav. Co. v. Central R. Co., 41 N. J. Eq. 167, 3 Atl. 134; Jackson v. De Forest, 14 How. Pr. (N. Y.) 81; Heatherton v. Hastings, 5 Hun (N. Y.) 459; Marten v. Van Schaick, 4 Paige (N. Y.) 479; Langdon v. Vermont & C. R. Co., 54 Vt. 593; Clarke v. Central R. R. & B. Co., 66 Fed. 16; Platt v. Philadelphia & R. R. Co., 65 Fed. 660; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 59 Fed. 514.

11 Taylor v. Sweet, 40 Mich. 736.

12 Haines v. Buckeye Wheel Co., 224 Fed. 289, 139 C. C. A. 525.

13 The power to continue business of a bankrupt corporation through a receiver or trustee implies the power to make debts, to provide for their payment, and to borrow money for urgent necessities. In re Erie Lumber Co., 150 Fed. 817.

Where a receiver is appointed to run a hotel and make such purchases as may be necessary, he has implied authority to purchase on credit, in the absence of any provisions thereto in the order of appointment. Highland Ave. etc. R. Co. v. Thornton, 105 Ala. 225, 16 So. 699.

Under an order appointing a receiver and authorizing him to continue the business of the receivership, operate its factory and purchase all necessary supplies and materials and employ hands for that purpose, those dealing with him are bound to know that he possesses limited powers and that he is constantly subject to the orders of the power which created him. They must also be held to know that he can make no contract effectual against the trust which was not first authorized or subsequently ratified.[14]

Where, under special circumstances or conditions, or in peculiar classes of property such as public service corporations, a court of equity appoints a receiver at the instance and for the benefit of lien creditors, and upon a proper showing confers on him authority to operate the property for the benefit of the creditors, all proper expenses and liabilities incurred in the operation may be a first charge on the income from the property, or, if it is insufficient, on the corpus of the property to the exclusion even of the prior liens. Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699.

Under the "companies act" of 1862, which provided that the official liquidator should have power, with the sanction of the court, "to carry on the business of the company, so far as may be necessary for the beneficial winding up of the same," it was held that the word "necessary" as used in the act had sole reference to the "beneficial winding up" of the business of the company, and not with a view of its continuance in business, no matter if the continuance of the business would be beneficial to the shareholders. In re Wreck, Recovery, and Salvage Co., L. R. 15 Ch. Div. 353.

In Teutonia Bank etc. Co. v. Security Brewing Co., 137 La. 1046, 69 So. 833, the court said: "We are of opinion that the authority vested in, and the duty imposed on, the receivers, to operate the brewery as a going concern, carried with it the authority to incur such expenses as were necessary to the performance of that duty, and that the expenses so incurred fall within the category and enjoy the privileges established in favor of law charges."

In Cake v. Mohun, 164 U. S. 311, 41 L. Ed. 447, 17 Sup. Ct. 100, the receiver was expressly authorized by the order of the court "to carry on and manage the business of keeping said hotel in substantially the same manner as it has heretofore been carried on," and it was held that the receiver had power to incur obligations for supplies and materials incidental to the business.

14 Brunner, Mond & Co. v. Central Glass Co., 18 Ind. App. 174, 63 Am. St. Rep. 339, 47 N. E. 686.

In the above case the court said: "Under the order of appointment,

Where a business is being operated as a going concern with the knowledge or consent of secured creditors, they are estopped to deny that supplies furnished to the receiver should be paid in preference to the debt due them.[15]

the receiver had the right to apply money in his hands belonging to the trust at the time he entered upon the discharge of his duties, or money received thereafter from its earnings, for such purposes as were necessary, in his judgment, within the purview of the order, to carry on the business, taking the risk, if any, that the court would approve his action. The order was not, we think, broad enough to authorize him to bind the trust by a contract for supplies for a period of ten months in advance, without the sanction of the court. Without such sanction, the court would be free to deal with it as it deemed just; to modify, approve, or disregard it entirely. It was in the power of the court to close up the receivership at any time, and the exercise of this discretion was not to be hampered by a contract of the receiver extending engagements for stated periods."

A receiver is the agent of the court, and those who deal with him do so with reference to his authority as receiver; the nature and extent of which they must take notice, and those who sell goods to a receiver do so on the faith of the property or business of the receivership, and with presumed knowledge of the receiver's authority. Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699.

15 Teutonia Bank & Trust Co. v. Security Brewing Co., 137 La. 1046, 69 So. 833.

In the above case the court said: "It is clear, therefore, that the Teutonia bank not only knew what was done and being done, but that it provoked the action; and this court can hardly be expected to believe that the Interstate Bank was not equally well informed.

"In Knickerbocker v. McKindley Coal & Mining Co., 172 Ill. 535, 50 N. E. 300, 64 Am. St. Rep. 54, it was said by the Supreme Court of Illinois in regard to the operation of a hotel:

" 'The appellants are estopped from saying that appellees should not be paid for the coal and groceries furnished by them to the receiver, when the receiver was running the hotel with their consent (and acquiescence) and with their furniture and fixtures. It is impossible to conceive how a hotel can be operated properly without coal and without groceries.'

"And so it may be said here. It is impossible to conceive how a brewery can be operated without malt, hops, coal, wagons, horses, lights, etc., and it would be absurd to suppose that those necessities would be furnished by persons dealing in them to receivers placed in charge of a going brewery for the benefit of the creditors as well as its owners, if those interested parties were at liberty at any time to appropriate the property of the concern to the payment

Where a receiver of a corporation is ordered by the court to operate the property in the usual course of business, and purchases necessary goods, and the sale is to him as receiver, and there is no assumption of personal liability and no fraud, the receiver is, in general, not liable individually for the purchases.[16]

But where such a receiver operates the property at a loss contrary to prior statements made by him in his accounts and in an answer to a petition for his removal, he will be charged personally with such losses.[17]

In England, it is customary for the court to appoint a manager of a business or undertaking for the purpose of winding up and selling it. It is an interim management the necessity for which is the result of the jurisdiction to wind up and sell as a going concern.[18]

Under such an appointment the manager is, however, merely to carry the business on in accordance with the general course of that particular business.[19]

of their debts, and leave the debts so created through their agency and for their advantage unpaid.

"It is said that the operation of the brewery did not inure to the advantage of the bondholders, but was altogether disastrous, which is quite true. But the experiment was theirs, nevertheless, and, as the profit would have been theirs, if it had proved successful, they, and not the persons who furnished, on credit, the means with which it was carried on, should bear the loss."

16 Hillsborough Grocery Co. v. Ingalls, 60 Fla. 105, 53 So. 930.

17 Covington v. Hawes-La Anna Co., 245 Pa. 73, Ann. Cas. 1915D, 1254, 91 Atl. 514.

18 Sheppard v. Oxenford, 1 K. & J. 491; Steer v. Steer, 2 Dr. & Sm. 311; Truman v. Redgrave, 18 Ch. D. 547; Taylor v. Neate, 39 Ch. D. 538; Makins v. Percy Ibbotson & Co. (1891), 1 Ch. 133; Whitley v. Challis (1892), 1 Ch. 64.

In Gardner v. London etc. Ry., L. R. 2 Ch. App. 201, 212, Cairns, L. J., said: "Now I apprehend that nothing is better settled than that this court does not assume the management of a business or undertaking except with a view to the winding up and sale of the business or undertaking. The management is an interim management; its necessity and its justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends."

19 Taylor v. Neate, 39 Ch. D. 538.

CHAPTER IV.

GENERAL RULE AS TO WHO MAY BE APPOINTED RECEIVER.

§ 62. The General Rule.

In the selection of a person to act as receiver the court exercises a judicial discretion which is governed by certain well defined principles. Although a receiver is not a public officer,[1] he is, as has been shown before, an officer of the court or, as has been frequently stated, an arm of the court. His acts in so far as he executes the orders and directions of the court are acts of the court itself and he must account to the court for all of his acts. But he also sustains an important trust relationship toward the parties interested in the receivership. Hence, it is apparent that he must be a person competent to perform the duties required of him in the dual capacity just mentioned.[2] He should be a person unexceptional to all of the interested parties[3] and indifferent and impartial

1 Cohnen v. Sweenie, 105 Mich. 643, 63 N. W. 641.

2 Simpson v. Ottawa & P. R. Co., 1 Ont. Ch. Chamb. 99; Supton v. Stephenson, 11 Ir. Eq. 484; Wynne v. Lord Newborough, 15 Ves. Jr. 283; Tharpe v. Tharpe, 12 Ves. Jr. 317; Taylor v. Life Association, 3 Fed. 465, 13 Fed. 493.

In making the appointment, all private considerations and preferences are not to be considered; "No man and the counsel of no man has a right to complain that he or his particular friend is not appointed a receiver; especially where the assets, as in these bank cases, to be entrusted to his responsibility are counted not by thousands but by hundreds of thousands." In re Empire City Bank, 10 How. Pr. (N. Y.) 498; Williamson v. Wilson, 1 Bland. Ch. (Md.) 418; Smith v. New York Consol. Stage Co., 28 How. Pr. (N. Y.) 208; In re Empire City Bank, 10 How. Pr. (N. Y.) 498; Perry v. Oriental Hotel Co., L. R. 5 Ch. App. 420; Cookes v. Cookes, 2 DeG. J. & S. 526; Wynne v. Lord Newborough, 15 Ves. Jr. 283.

3 Hooper v. Winston, 24 Ill. 353; Baker v. Backus, 32 Ill. 79; Kaiser v. Kellar, 21 Iowa 95; Williamson v. Wilson, 1 Bland. Ch. (Md.) 418; Ellicott v. Warford, 4 Md. 80; Merchants' Nat. Bank v. McLeod, 38 Ohio St. 174; Waters v. Carroll, 9 Yerg. (Tenn.) 102; Richards v. Chesapeake & O. R. Co., 1 Hughes

as to all the parties.[4] The decisions in respect to the propriety of appointing various persons as receivers do

28, Fed. Cas. No. 11771; Simpson v. Ottawa & P. R. Co., 1 Ch. Chamb. 99; Brant v. Willoughby, 17 Grant Ch. (Ont.) 627; Wilson v. Poe, 1 Hog. 322; Corey v. Long, 43 How. Pr. (N. Y.) 492, 497; Devendorf v. Dickinson, 21 How. Pr. (N. Y.) 275; Osborn v. Heyer, 2 Paige (N. Y.) 342; Brown v. Northrup, 15 Abb. Pr. N. S. (N. Y.) 333; Curtis v. Leavitt, 1 Abb. Pr. (N. Y.) 274; Van Rensselaer v. Emery, 9 How. Pr. (N. Y.) 135.

A person not familiar with the business of the receivership, it has been held, ought not to be appointed even though he agrees to be directed by a person who is familiar with it. Lupton v. Stephenson, 11 Ir. Eq. 484.

[4] The receiver should be a person who is indifferent as between the parties. Spring Valley Water Co. v. San Francisco, 225 Fed. 728, 140 C. C. A. 209.

In Northern Brewery Co. v. Princess Hotel, 78 Ore. 453, 153 Pac. 37, the court said:

"A receiver is a ministerial officer of the court of equity which appoints him. He is presumed to be indifferent as between the parties to the suit, and holds the property committed to him in trust for all the parties interested therein, his title and possession being that of the court. State v. Norfolk etc. R. Co., 152 N. C. 785, 67 S. E. 42, 26 L. R. A. (N. S.) 710, 21 Ann. Cas. 692.

"'The general principle, very well settled in the books,' says Mr. Chief Justice Winslow in Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1195, 1197, 'is that a party to the cause will not ordinarily be appointed receiver unless both parties consent, or there are special circumstances present which make such an appointment clearly for the best interest of all concerned. The reason is that the receiver is an officer of court, whose buiness it is to administer his trust impartially for the benefit of all concerned, and hence he should have no special interests which might influence him in his conduct of the trust in matters where his interests and the interest of any party to the action may clash.'

"The plaintiff herein, being a corporation, could act only by its agents, one of whom was Paul Dauschel, its treasurer. Though the defendants Anderson, Paget, and Thacher consented to the appointment of a receiver, it can not be said, from an inspection of the transcript before us, that they acquiesced in Dauschel's selection, or waived any objection they might have had against him by reason of his interest in the subject-matter of the suit as the plaintiff's representative."

A receiver should be an impartial and indifferent person. Neither a party to a suit or a trustee, whose business it is to watch a receiver, should be appointed. These rules, however, relax in the interests of all the parties, and are, therefore, not without exception. Watson v. Cudney, 144 Ill. App. 624.

A receiver should be impartial, and it is improper to appoint as receiver the agent of the petition-

not, in fact, go further than hold that the person selected should be impartial in his treatment of the interested parties. If he is an impartial person, it is immaterial what particular relationship he sustains to the receivership estate or parties thereto, although courts do not ordinarily place themselves in the position of being criticised for appointing persons who by their status or relationship to the parties or fund might be presumed to be biased. Of course, an officer of a corporation who has been guilty of mismanagement or unfaithful acts resulting in bringing the corporation to the condition in which a receivership is necessary will not be appointed a re-

ing creditor, in absence of circumstances showing his special fitness, or the propriety of appointing one so closely connected with the parties in interest. Virginia-Carolina Chemical Co. v. Hunter, 84 S. C. 214, 66 S. E. 177.

A receiver should generally be one who is indifferent between the parties, and subject to no influence except to conserve the property for the benefit of those finally entitled thereto. Graham v. Hundley Dry Goods Co., (Mo.) 177 S. W. 600; Farmers' Loan etc. Co. v. Northern Pac. R. Co., 66 Fed. 169.

It has been held that he should have no personal interest in the property. Runyon v. Farmers' & M. Bank, 4 N. J. Eq. 30; Williamson v. Wilson, 1 Bland. Ch. (Md.) 418; Ellicott v. Warford, 4 Md. 80; but see Atkins v. Wabash, St. L. & P. R. Co., 29 Fed. 161; Tripp v. Chard R. Co., 21 Eng. L. & Eq. 53.

It is a rule of general application that a receiver should be a person wholly impartial and indifferent toward all parties interested in the fund or property to be administered, and, generally speaking, officers and directors of a corporation involved in insolvency should not be appointed to the position. Although this rule is not inflexible, it should be observed where such officers or directors have by their bad management contributed to the insolvency. Coy v. Title Guarantee & Trust Co., 157 Fed. 794.

A receiver, except in rare cases, must be a person who is indifferent between the parties litigant, and must so remain, giving neither party favor or advantage. Lehman v. Trust Co. of America, 57 Fla. 473, 49 So. 502; Bolles v. Duff, 54 Barb. (N. Y.) 215, 37 How. Pr. (N. Y.) 162; Atkins v. Wabash, St. L. & P. R. Co., 29 Fed. 161; In re Northumberland & D. Dist. Bkg. Co., 2 DeG. & J. 508.

The person selected should not have an improper partiality toward one of the parties to the proceeding. Blakeway v. Blakeway, 2 L. J. Ch. N. S. 75.

ceiver of the defunct or failing corporation. A failure on the part of a person to make a success of a business enterprise is no more of a recommendation for appointment as receiver than it would be for any other position requiring business ability and integrity. On the other hand, it not infrequently happens that a business enterprise finds itself in failing circumstances through no particular incompetency of its managers and in such circumstances the managers may be persons so familiar with its affairs and needs as to appear to the court to be best fitted to act as a receiver. The best practice in cases in which an owner or party interested in the receivership is appointed as receiver, is to obtain the approval of the appointment by those whose interests might be presumed to be injured by the appointment.

In the consideration of the eligibility of specific persons for the position of receiver an important matter consists in what are the causes and objects of the receivership. If the cause of action is based on acts of a fraudulent nature or a hostile claim of ownership, the object of the receivership would not be accomplished by appointing the perpetrators of the alleged wrongs in the position of receiver of the property or fund in controversy. If, on the other hand, the object of the proceeding is merely the voluntary dissolution of a partnership or corporation in which it is necessary to have an interim holder of the title and possession pending the final judgment, one of the interested parties would undoubtedly make an ideal receiver.

The statutes of the various states contain, as a general rule, limitations in respect to the eligibility of various classes of persons.

§ 63. Eligibility of Parties, Owners, and Other Interested Persons.

The mere fact that one is a party to the suit[1] or interested in the business,[2] which is about to be placed under a receivership, is not sufficient to disqualify him from being appointed receiver.

1 Downshire v. Tyrrell, Hayes 354; Hubbard v. Guild, 1 Duer (N. Y.) 662; Fenn v. Bolles, 7 Abb. Pr. (N. Y.) 202; Hanover Fire Ins. Co. v. Germania Fire Ins. Co., 33 Hun (N. Y.) 539; Robinson v. Taylor, 42 Fed. 803; Jeffery v. Smith, 1 Jac. & W. 298; Boyle v. Bettws Llantuit Colliery Co., L. R. Ch. Div. 726; Hyde v. Warden, L. R. 1 Exch. Div. 399; Taylor v. Eckersley, L. R. 2 Ch. Div. 302; In re Lloyd, L. R. 12 Ch. Div. 447.

Being a party to the suit does not disqualify a person from being appointed receiver. People v. Illinois Bldg. etc. Assn., 56 Ill. App. 642.

In Pawley v. Pawley (1905), 1 Ch. 593, a defendant was appointed receiver, without compensation.

In Davis v. Barrett, 13 L. J. Ch. 304, a defendant who was a mortgagee of the property involved was appointed receiver over it.

A party to the action may propose himself as receiver. See, Meaden v. Sealey, 6 Ha. 620; Cookes v. Cookes, 2 D. J. & S. 526; but, see, Davis v. Duke of Marlborough, 2 Sw. 118.

But under a statute which prohibits the appointment of any "party or attorney, or other person interested in an action," as receiver, one who had been a receiver under a previous order of appointment which had been vacated, is not ineligible. Robinson v. Dickey, 143 Ind. 214, 42 N. E. 638.

A solvent partner who is a party to the suit may be appointed receiver of the partnership property without compensation. Ex parte Stoveld, 1 Glyn & J. 303.

In a suit to dissolve a partnership, one of the partners may be appointed receiver even though the other partners do not consent to the appointment if the court is satisfied that the appointment is for the best interests of the estate. Sargant v. Read, 1 Ch. D. 600; Collins v. Barker (1893), 1 Ch. 578.

In Budget v. Improved etc. Syndicate, W. N. 1901, 23, a debenture holder in a suit by him sought to have himself appointed receiver and the court did so subject to all of the other debenture holders consenting to the appointment.

The appointment of an improper person as receiver does not render the appointment void. San Antonio etc. Ry. Co. v. Adams, 11 Tex. Civ. 198, 32 S. W. 733.

2 An interest in the business of the defendant corporation does not necessarily disqualify, but a lack of interest is a strong recommendation. Bayne v. Brewer Pottery Co., 82 Fed. 391.

One who advanced the money to redeem the receivership estate from a tax sale which was about to become absolute, is not dis-

But, on the other hand, the courts also state that, as a general rule, a party to the suit ought not to be appointed as receiver therein.[3] And under the English practice it is said that upon a showing of great urgency the court may appoint the plaintiff as receiver even ex parte.[4]

But where a party to the action has been appointed receiver, it has been conditioned upon his acting without compensation.[5]

And in accordance with this aversion of the courts to appoint persons who are interested in the receivership fund, it has been held that the court should not appoint as receiver a creditor[6] or other person interested in the

qualified from appointment on account of the liability of the estate to him. Roby v. Title Guarantee etc. Co., 166 Ill. 336, 46 N. E. 1110.

Ownership of the property involved in a litigation will not render the owner ineligible to appointment as receiver of the interest of another in the profits to be derived from the sale of such property, especially where the interest of the owner is not in conflict with the interests of the creditors of such other person. Jenkins v. Purcell, 29 App. D. C. 209, 9 L. R. A. (N. S.) 1074.

In some circumstances an interested party may be appointed receiver. Iroquois Furnace Co. v. Kimbark, 85 Ill. App. 399.

3 It is improper to appoint the plaintiff as receiver. Jordan v. Jordan, 121 Ala. 419, 25 So. 855.

As a general rule a party to the suit will not be appointed unless both parties consent or there are special circumstances which make such an appointment decidedly for the best interests of the receivership. Bartelt v. Smith, 145 Wis. 31, Ann. Cas. 1912A, 1195, 129 N. W. 782.

A party to the proceeding will not, save under exceptional circumstances, be appointed without the consent of all the parties. In re Lloyd, 12 Ch. D. 451.

4 Taylor v. Eckersley, 2 Ch. D. 302; Hyde v. Warden, 1 Exch. Div. 309; Fuggle v. Bland, 11 Q. B. D. 711.

5 Wilson v. Greenwood, 1 Sw. 471; Blakeney v. Dufour, 15 Beav. 40; Sargant v. Read, 1 Ch. D. 600; In re Prytherch, 42 Ch. D. 590; In re Golding, 21 L. R. Ir. 194.

6 A creditor ought not, ordinarily, be appointed. Geyser Min. Co. v. Bank of Salt Lake, 16 Utah 163, 51 Pac. 151.

One who is deeply interested in the estate, either as owner or creditor, or who is so closely connected with interests as to be open to grave suspicion of bias, ought not to be appointed receiver of an estate in the custody of the court. Decker Bros. v. Berners Bay Min. & Mill. Co., 2 Alaska 504.

receivership property[7] or a partner in a proceeding to wind up its affairs.[8] And where a person stands charged with some acts of a fraudulent or improper character in respect to the receivership property, it is obvious that he should not be appointed receiver over it.[9]

7 Lupton v. Stephenson, 11 Ir. Eq. 484.

An adverse party who is bitterly opposed by the other ought not to be appointed. Attorney General v. Gee, 2 Ves. & Ben. 208.

He must not be partner of plaintiff's solicitor. Merchants & M. Nat. Bank v. Kent, Cir. Judge, 43 Mich. 292, 5 N. W. 627. Nor should an officer of a corporation or other person intimately connected with its management. Baker v. Backus, Admr., 32 Ill. 79; Benneson v. Bill, 62 Ill. 408; Attorney General v. Bank of Columbia, 1 Paige (N. Y.) 511; In re Eagle Iron Works, 8 Paige (N. Y.) 385. It was done, however, in Gibbes v. Greenville & C. R. Co., 15 S. C. 304, but the propriety of the order does not seem to have been seriously contested, but turned upon the question as to whether the officers were in fact receivers; see, also, Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849, 4 Hughes 415; Albany City Bank v. Schermerhorn, Clarke Ch. (N. Y.) 297; Re Fifty-four First Mortgage Bonds, 15 S. C. 304, the president and directors of a railroad company were ordered to continue in possession and management of a road, not as officers of the road, but as officers of the court.

One having an interest in a lease of the property in controversy should not be appointed. Wood v. Oregon Dev. Co., 55 Fed. 901.

One who interpleads in the action attacking an assignment in which a receiver is asked is an interested party under a statute prohibiting such interested parties from being appointed. But where he has acted as receiver with the consent of all the parties, his appointment will not be disturbed. Tait v. Carey, 3 Ind. Terr. 765, 49 S. W. 50.

But the sheriff was held not a "person interested" within Rev. Civ. St. 1911, art. 2129, so as to prevent his appointment as a receiver in a divorce action. Crawford v. Crawford (Tex. Civ.), 163 S. W. 115.

8 Todd v. Rich, 2 Tenn. Ch. 107; but see Miller v. Jones, 39 Ill. 54.

9 A person who had been the assignee under a general assignment of the property, which had been set aside on the ground of having been fraudulent, is not eligible for appointment of receiver over the property, since he might be compelled to account to himself. Eichberg v. Wickham, 21 N. Y. Supp. 647.

Smith v. New York Consol. Stage Co., 28 How. Pr. (N. Y.) 208; Williamson v. Wilson, 1 Bland. Ch. (N. Y.) 418. See, Hanover Fire Ins. Co. v. Germania F. Ins. Co., 33 Hun (N. Y.) 539; Wynne v. Lord Newborough, 15 Ves. Jr. 283.

§ 64. Eligibility of Attorneys, Trustees, and the Like.

Generally the trustee of an estate will not be appointed receiver over it on the theory that it is his duty to watch the proceedings in order to see that the receiver performs his duty.[1]

Although in exceptional circumstances as where he has a special knowledge of the estate, he has been appointed upon condition of receiving no compensation.[2]

The theory of the rule in this respect is that one whose duty it is to watch the interests of a person whose personal interests may conflict with the duties of the receiver should not be placed in a position where any question may arise as to whom he owes a primary duty. And for the same reason it is held that a guardian, executor or next friend of an infant is ineligible to be appointed receiver over the estate under his charge.[3]

1 Anon. v. Jolland, 8 Ves. Jr. 72; Sykes v. Hastings, 11 Ves. Jr. 363; Sutton v. Jones, 15 Ves. Jr. 587.

2 Hebbert v. Jenkins, cited in Sykes v. Hastings, 11 Ves. Jr. 363.

A trustee may be appointed receiver for the trust estate in the sound discretion of the court, if it appear that the appointment will be for the best interest of the estate. Patterson v. Northern Trust Co., 230 Ill. 334, 82 N. E. 837, affirming judgment, 132 Ill. App. 63.

The solicitor under a commission of lunacy ought not be appointed receiver of the estate of the lunatic. Ex parte Pincke, 2 Meriv. 452.

The position of receiver is incompatible with that of trustee in bankruptcy. In re Stuyvesant Bank, 5 Ben. 566, Fed. Cas. No. 13581.

In Bury v. Newport, 23 Beav. 30, a person who had been receiver of the estate of a testator who appointed the receiver as trustee of his estate, was continued as receiver with compensation.

Where it is deemed advisable to appoint a trustee as such receiver, he will generally be required to act without compensation. In re Bignell v. Chapman (1892), 1 Ch. 59.

3 In Gardner v. Blane, 1 Ha. 551, a testamentary guardian and executor was appointed receiver on condition that he act without compensation.

The administrator of a deceased partner may be appointed receiver over the partnership estate. Miller v. Jones, 39 Ill. 54.

A court will not appoint an executor or trustee of an estate as receiver over the same property, Sykes v. Hastings, 11 Ves. Jr. 363; Sutton v. Jones, 15 Ves. Jr. 584;

As a general rule an attorney of any of the persons connected with the litigation is held ineligible,[4] although there are cases in which such attorneys have been appointed.[5] Attorneys not connected with the litigation

Anon. v. Jolland, 8 Ves. Jr. 72; unless the circumstances of the case render it necessary so to do. Newport v. Bury, 23 Beav. 30; Sykes v. Hastings, supra; but see Bolles v. Duff, 54 Barb. (N. Y.) 215; Miller v. Jones, 39 Ill. 54.

The duty of the next friend of an infant to check the accounts of a receiver makes him ineligible to be appointed receiver. Stone v. Wishart, 2 Madd. 64. See, also, Taylor v. Oldham, Jac. 527, where Lord Eldon refused to sanction the appointment of the son of the next friend.

4 An attorney in the cause should not be appointed receiver. Baker v. Backus, Adm'r, 32 Ill. 79; Emmons v. Davis etc. Pottery Co., (N. J. Ch.), 16 Atl. 157.

An attorney for a creditor of the defendant should not be appointed, since his duties may conflict with the interests of the other parties to the litigation. Geyser Min. Co. v. Bank of Salt Lake, 16 Utah 163, 51 Pac. 151; In re T. L. Kelly Dry-Goods Co., 102 Fed. 747.

A member of a firm of lawyers which represents the complainant should not be appointed. State Trust Co. v. National Land etc. Co., 72 Fed. 575.

The law partner of plaintiff's counsel should not be appointed, even by consent. Merchants etc. Bank v. Kent, Circuit Judge, 43 Mich. 292, 5 N. W. 627.

And it has been held that even with the consent of the parties, the plaintiff's solicitor should not be appointed, on the ground that it is his duty to see that the receiver performs his duties. Watson v. Arundel, 9 Ir. Eq. 324.

Nor one of plaintiff's attorneys. Re Lloyd, L. R. 12 Ch. Div. 447; Garland v. Garland, 2 Ves. Jr. 137; not, however, if both plaintiff and defendant's attorneys are appointed. See, also, Shannon v. Hanks, 88 Va. 338, 13 S. E. 437.

That a temporary receiver is connected with the firm of counsel for complainant in the suit in which he was appointed renders him ineligible for the appointment of permanent receivers. State Trust Co. v. National Land I. & Mfg. Co., 72 Fed. 575.

Under the English practice it has been held that the solicitor of a party ought not be appointed because it is his duty to check the receiver's accounts. Garland v. Garland, 2 Ves. Jr. 137; Wilson v. Poe, 1 Hog. 322; Re Lloyd, 12 Ch. D. 449.

5 Attorneys of the parties to the litigation have been appointed and appellate courts have refused to regard such appointments as an abuse of discretion. Fisher v. Southern Loan & Trust Co., 138 N. C. 90, 50 S. E. 592; Shannon v. Hanks, 88 Va. 338, 13 S. E. 437.

In suit by minority stockholders against corporation, charging mismanagement and fraud of majority, it is not necessarily wrong to appoint an attorney in the cause receiver, though practice is not to be commended, unless by consent.

have universally been held competent for appointment.[6] But the fact that a person had been acting as a trustee of the receivership property will not disqualify him from being appointed where he is not so acting at the time of the appointment.[7]

§ 65. Eligibility of Court or Other Officials.

Upon the ground that one of the duties of a Master in Chancery is to look over and check the accounts of a receiver, it has been held, under the English practice, that he is ineligible to be appointed receiver,[1] and the practice has also been followed in this country.[2] And a person whose privileges are such as not to subject him to the ordinary process of the courts by commitment as for contempt, such as a peer of the realm has been ineligible.[3]

Clerks of court have been appointed as receivers, but they are not by virtue of their offices receivers,[4] and necessarily act as individuals, although a contrary view would appear from one of the decisions.[5] In some instances the right of a clerk of court to be appointed re-

Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358.

6 But there is no objection otherwise to a solicitor or barrister where he is eligible to be appointed receiver. Della Camea v. Hayward, M'Clell. & Y. 272; Wynne v. Lord Newbrough, 15 Ves. 284; Wilson v. Poe, 1 Hogan 322; Garland v. Garland, 2 Ves. Jr. 137.

7 Patterson v. Northern Trust Co., 132 Ill. App. 208; judgments affirmed 82 N. E. 837, 230 Ill. 334, and 231 Ill. 22, 121 Am. St. Rep. 299, 82 N. E. 840.

1 Ex parte Fletcher, 6 Ves. Jr. 427; Stone v. Wishart, 2 Madd. 63.

2 Benneson v. Bill, 62 Ill. 408; Kilgore v. Hair, 19 S. C. 486; Allen v. Cooley, 60 S. C. 353, 38 S. E. 622.

But it has been held that the appointment of a master in chancery, who is a party to the suit, as receiver, is harmless error if the decree is otherwise harmless. Briggs v. Reynolds, 176 Ill. App. 420.

3 Attorney-General v. Gee, 2 V. & B. 208.

4 Hammer v. Kaufman, 39 Ill. 87; Kerr v. Brandon, 84 N. C. 128; Rogers v. Odom, 86 N. C. 432; Waters v. Carroll, 9 Yerg. (Tenn.) 102.

In a South Carolina case it was held improper to appoint a clerk of court as receiver. White v. Britton, 72 S. C. 175, 51 S. E. 547.

5 The court may appoint the clerk of court to be receiver, and

ceiver is either prohibited entirely by statute or only allowed upon the written consent of all of the parties.[6] And under the English practice a receiver-general who had given security to the government was held ineligible.[7]

§ 66. Effect of Relationship to Judge or Parties.

The acts of Congress and the statutes of the various states generally contain provisions which contain prohibitions against persons holding certain relationships toward the appointing judge being appointed. These legislative enactments are salutary rules which are the results of the exercise of nepotism on the part of some courts to the detriment of the litigants.[1]

Where a person who was related to one of the parties and also to one of the creditors was an active participant in the controversy involved in the litigation, it was held that he was an improper person to act as receiver.[2] But unless some special unfitness or bias can be shown, we know of no objections against the appointment of a relative of any of the parties to the litigation in the ab-

his sureties on his official bond will be liable. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

6 A creditor is not by the mere fact of being a creditor disqualified from being appointed receiver. Barber v. International Co., 73 Conn. 587, 48 Atl. 758; Moore v. Taylor, 40 Hun (N. Y.) 56.

7 In Attorney-General v. Day, 2 Madd. 246, it was held that the receiver-general of a county who in that capacity had given security to the Crown to secure any indebtedness which might accrue to it, was not a proper person to be appointed, since the Crown might by its process take all of his property.

The reasoning of the above case would not, however, be applicable in a case where the receiver furnishes a bond to secure the funds passing through his hands.

1 Where no objection was made at the time of the appointment of a receiver that he was a relative of the judge and no showing is made that he is incompetent or untrustworthy, or any evidence that he is such a relative except an affidavit that the affiant is so informed and believes, the court will not consider the objection. State v. Farmers' etc. Ins. Co., 90 Neb. 664, Ann. Cas. 1913B, 643, 134 N. W. 284.

In this connection, see statutes of the various states.

2 Williamson v. Wilson, 1 Bland. (Md.) 418.

sence of statutory prohibition or limitation. Courts, however, in such cases should be astute to ascertain that such a person is impartial and competent for the trying duties which may be exacted of him.

§ 67. Whether Candidate for Receiver May be a Non-Resident.

Ordinarily a receiver should not be appointed who resides outside of the jurisdiction of the appointing court,[1] but he need not necessarily be a resident of the district in which he is appointed.[2] It is obvious, however, that he should reside where he is subject to the process of the court which appoints him.

An ancillary receiver need not be a resident of the state in which he is appointed.[3]

§ 68. Eligibility of a Corporation to Act as Receiver.

It is not essential that a receiver be an individual. The court may appoint a corporation to act as a receiver if the corporation has power under its charter to act in that capacity.[1] This is merely in accord with the rule which permits trust companies to act as executors and trustees. The wisdom of permitting a corporate body which can act only through various corporate officers to act as an officer of the court in the capacity of a receiver, may well be questioned on the ground that only a thinking individual can properly interpret the orders and directions of the court in those instances where time is not available for the advice of counsel.

1 Chamberlain v. Greenleaf, 4 Abb. N. C. (N. Y.) 92; Watson v. Bettman, 88 Fed. 825.

2 Bayne v. Brewer Pottery Co., 82 Fed. 391.

In McGilliard v. Donaldsonville etc. Mach. Works, 104 La. 544, 81 Am. St. Rep. 145, 29 So. 254, in answer to an argument, which was not properly raised by the record, the court said: "We will state, however, that if the receiver resides at a great distance from the property of which he has control, it may prove detrimental to the interests of the company."

3 Bayne v. Brewer Pottery Co., 82 Fed. 391.

1 In re Knickerbocker Bank, 19 Barb. (N. Y.) 602; Roby v. Title Guarantee etc. Co., 166 Ill. 336, 46 N. E. 1110.

§ 69. Method Used by the Court in Making the Selection.

The course of practice which obtained with the English Court of Chancery in respect to the selection of a receiver was to refer the question to a Master in Chancery. The interested parties then appeared before the master and presented the various candidates and their qualifications, whereupon he made the appointment and reported it to the court.[1]

The English practice was followed in New York prior to the adoption of the code system of procedure in that state.[2]

Where the matter of appointment was referred to a master under the English practice his judgment was conclusive unless some substantial proof was given to the contrary,[3] and his action was never disturbed except on special grounds.[4]

And when the appointment was made by the Master in Chancery, objections not based on principles of law were not considered.[5]

The decision of the trial court in respect to the selection of the receiver was not disturbed unless the objection to the appointment substantially amounts to an abuse of discretion.[6] The mere claim that the nominee rejected by the master in making his appointment was more compe-

1 Thomas v. Dawkin, 1 Ves. Jr. 452; Garland v. Garland, 2 Ves. Jr. 137; Tharpe v. Tharpe, 12 Ves. 317; Wynne v. Lord Newborough, 15 Ves. 283.

2 In re Eagle Iron Works, 8 Paige (N. Y.) 385.

3 Garland v. Garland, 2 Ves. Jr. 137; Creuze v. London, 2 Bro. C. C. 253; Thomas v. Dawkin, 1 Ves. Jr. 452; Anon., 3 Ves. Jr. 515; Wilkins v. Williams, 3 Ves. Jr. 588; see Wynne v. Lord Newborough, 15 Ves. Jr. 283; Hughes v. Williams, 6 Ves. Jr. 459; Tharpe v. Tharpe, 12 Ves. Jr. 317.

4 Tharpe v. Tharpe, 12 Ves. Jr. 320; Bowersbank v. Collosseau, 3 Ves. Jr. 164; Creuze v. London, 2 Bro. C. C. 256; Garland v. Garland, 2 Ves. Jr. 137; Anon., 3 Ves. Jr. 515; Wilkins v. Williams, 3 Ves. Jr. 588; Thomas v. Dawkin, 3 Bro. C. C. 508; Re Eagle Iron Works, 8 Paige (N. Y.) 385.

5 Cookes v. Cookes, 2 DeG. J. & S. 530.

6 Perry v. Oriental Hotels Co.,

tent than the one selected was held insufficient to induce the court to consider the matter.[7]

In making the selection of the receiver the circumstances shown by the pleadings and the interests of the various parties are naturally considered.[8]

In exercising its discretion in selecting the receiver the court is open to receive suggestions and recommendations from the litigants and parties interested in the litigation. Other things being equal and the persons proposed by the various parties to the proceeding being unobjectionable, the court will give preference to the suggestion made by the plaintiff.[9]

A stranger to the proceeding is not allowed to participate in the selection of the party to be appointed receiver.[10]

If the litigants can agree upon a person to be selected by the court as receiver, the court will, if it deems the person selected a proper one, accept the selection so made, and in the event that the litigants have made a private agreement with him in respect to his compensation, may also approve such a contract.[11] Where the bill

L. R. 5 Ch. 421; Northard v. Proctor, 1 Ch. D. 4.

Inasmuch as the appointment is peculiarly within the judicial discretion of the court appointing, it is rarely that the appellate court will interfere with the selection made. Cookes v. Cookes, 2 De G. J. & S. 526; but see Perry v. Oriental Hotel Co., L. R. 5 Ch. App. 420; Gardner v. Howell, 60 Ga. 11; Gunby v. Thompson, 56 Ga. 316; Crawford v. Spurling, 56 Ga. 611; Robenson v. Ross, 40 Ga. 375; Cohen v. Meyers, 42 Ga. 46; Reid v. Reid, 38 Ga. 24; Re Eagle Iron Works, 8 Paige (N. Y.) 385.

Selection of receiver in a stockholders' suit against corporation lies largely in discretion of the court. Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358.

7 Anonymous, 3 Ves. 515.

8 Wood v. Hitchings, 4 Jur. 858.

9 Wilson v. Poe, 1 Hog. 322; Watkins v. Worthington, 2 Bland. (Md.) 509.

10 Attorney General v. Day, 2 Madd. 246.

The proposal of a person as a receiver must come from a party interested in the litigation. Bagot v. Bagot, 2 Jur. 1063.

11 In Polk v. Johnson, 160 Ind. 292, 98 Am. St. Rep. 274, 66 N. E. 752, the court said: "We assume at the outset that there is no rea-

prays for the appointment of a particular person as receiver and the court appoints such person, it will be

sonable ground for discussion upon the first proposition advanced by appellee, viz., that the litigants have no power to select a receiver for the court by private agreement, even though such agreement is based upon their views of the fitness of the one chosen, and economy to the trust in his appointment. We also take it to be generally acknowledged that the appointment of the receiver, and the fixing of his compensation, are judicial acts that can not be abdicated by the court to one or both the parties to the suit. But while it must be conceded that the ultimate appointments rest solely with the court to be determined by the exercise of his discretion, we find no principle recognized by the authorities, or supported by sound reason, that forbids the judge the freest access to the counsels and opinions of those interested in the trust, with respect to the proper selection. Indeed there are many reasons why the cautious judge would seek the advice of others, in cases where he has imperfect knowledge of the fitness of available men, even outside the parties in interest. There is nothing peculiar in the appointment of a receiver, that his selection must be evolved wholly from the personal knowledge and observations of the judge.

"The usual course of practice in the English Court of Chancery in such matters was to refer the selection to a master. Then interested parties were at liberty to appear before the master and nominate suitable persons, from among whom the master would choose the one whose qualifications and fitness his judgment most approved, and report his selection to the court. A similar practice also prevailed in New York prior to the adoption of the present Code of Procedure. High on Receivers, 3d ed., §§ 63, 64.

"The same considerations that induced the reference to a master under the old practice are now applicable to the judge, who is called upon to act without reference, and who will usually give favorable consideration to one who has been agreed upon by the parties. High on Receivers (3d ed.), § 65; Beach on Receivers, (2d ed.), §§ 30, 31; Smith on Receivers 62.

"But it is argued that the agreement entered into for the purpose of influencing the appointment was an unwarrantable interference with the freedom of judicial action, and invalid for public policy. It will be borne in mind that in the appointment of a receiver, or other such administrative officer, the chief ends to be attained are efficiency and economy in the administration of the trust. It is the officer and not the mode of selection that the law regards as important; and, outside those prohibited by statute, the judge, in the exercise of his sound discretion, will select from those available the one whom he believes, from all the circumstances, will give the most beneficial service. And if efficiency and economy can be secured by private agreement, open and fairly entered into, with

presumed that the court made the appointment on its own judgment.[12] According to the practice obtaining in the Irish Court of Chancery, it is not the practice to appoint a person as receiver who has been agreed upon by the parties.[13]

The eligibility of one acting as a receiver can not be raised in a collateral action. The question must be raised before the appointing court.[14]

An objection to the personnel of a receiver is made too late if not interposed until over three years after the appointment. Such an objection should be made at the time of the appointment.[15] And where one has consented to the appointment of a particular person, he is estopped to object that the receiver is disqualified by interest within the meaning of the statute.[16]

one who is willing to perform the work of administering for considerations moving to him wholly outside the trust, we perceive no principle of law, or public policy, that forbids the making of such a contract. The court will closely scrutinize the bargain, when known to him, and if it seems clear that the bargainer is qualified, and the contract free from overreaching and will be beneficial to the trust, the court may properly respect the contract, and make the appointment in pursuance of its terms. State v. Johnson, 52 Ind. 197; Ross v. Conwell, 7 Ind. App. 375, 34 N. E. 752; Bate v. Bate, 74 Ky. (11 Bush) 639; Ephraim v. Pacific Bank, 136 Cal. 646, 648, 69 Pac. 436; Steel v. Holladay, 19 Ore. 517, 25 Pac. 77; Secor v. Sentis, 5 Redf. Sur. (N. Y.) 570; Bowker v. Pierce, 130 Mass. 262; In re Hopkins, 32 Hun (N. Y.) 618; Rote v. Warner, 9 Ohio C. D. 536, 540, 17 Ohio Cir. Ct. Rep. 342, 350; McCaw v. Blewit, 2 McCord Eq. (S. C.) 90; Bassett v. Miller, 8 Md. 548; Dolfield v. Kroh, 62 Md. XI; Koch's Estate, 148 Pa. St. 159, 23 Atl. 1057; In re Hay's Estate, 183 Pa. St. 296, 38 Atl. 622; Kerr on Receivers, 3d ed., 185."

In this respect see, also, Hanover Fire Ins. Co. v. Germania Fire Ins. Co., 33 Hun (N. Y.) 539.

12 Johns v. Johns, 23 Ga. 31.

13 Leach v. Tisdal, 4 Ir. Ch. (N. S.) 209.

14 Metropolitan Nat. Bank v. Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Missouri Pac. Ry. Co. v. Love, 61 Kan. 433, 59 Pac. 1072.

15 Patterson v. Northern Trust Co., 132 Ill. App. 208; judgments affirmed, 82 N. E. 837, 230 Ill. 334, and 82 N. E. 840, 231 Ill. 22, 121 Am. St. Rep. 299.

16 East Tennessee Telephone Co. v. Watson, 147 Ky. 462, 144 S. W. 375.

The same person will not be appointed receiver in two cases where the suits are conflicting.[17]

The court may appoint several persons as receivers. In fact it is a common practice where the property consists of a large business to appoint two, and sometimes in the case of railway receiverships, three receivers.[18]

As a general rule the appointment of a receiver rests in the sound judicial discretion of the court so far as the person selected is concerned, under all the circumstances of the particular case,[19] but the court will favorably consider the selection of the parties in interest and will invite suggestions and recommendations.[20]

The same rules which apply to the appointment made by a master are equally applicable to a selection made by the court, and the discretion given to the court in the selection is rarely interfered with.[21]

The selection of receivers in classes of cases in which special qualifications or circumstances are considered in the selection, such as in respect to corporations, public utilities, mortgages, and the like, will be further considered under their respective heads.

17 Re City etc. Ins. Co., 25 W. R. 342.

18 In Gay v. Hudson River Electric Power Co., 173 Fed. 1003, three receivers were appointed in a creditor's bill to wind up the affairs of eight corporations engaged in the production and sale of electrical power and gas, and which were run as one corporation.

Three receivers were also appointed in the Northern Pac. Railroad Co. receivership. Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 61 Fed. 546.

19 Smith v. New York Consol. Stage Co., 28 How. Pr. (N. Y.) 208; Williamson v. Wilson, 1 Bland. Ch. (Md.) 418; Perry v. Oriental Hotels Co., L. R. 5 Ch. App. 420; Cookes v. Cookes, 2 De G. J. & S. 526.

20 Watkins v. Worthington, 2 Bland. Ch. (Md.) 509; Hanover Fire Ins. Co. v. Germania F. Ins. Co., 33 Hun (N. Y.) 539.

21 Williamson v. Wilson, 1 Bland. Ch. (Md.) 418; Shannon v. Hanks, 88 Va. 338, 13 S. E. 437; Cookes v. Cookes, 2 De G. J. & S. 526; Perry v. Oriental Hotels Co., L. R. 5 Ch. App. 420.

CHAPTER V.

TRUST ESTATES AND FIDUCIARY RELATIONS.

1. Trusts and Trust Relations.

§ 70. General Principles Applicable.

The jurisdiction over trusts, express and implied, being always one within the domain of a court of equity, it is obvious that a court of equity has an inherent power to displace a trustee by substituting a receiver whenever the case is brought within the general equitable principles essential for the appointment of a receiver. Following the general rule applicable to all cases of receivership, it is apparent that there must be some misconduct on the part of the trustees or conditions of the trust fund which show danger of an impending irreparable loss, in order to justify the remedy of receivership.[1]

Courts are reluctant to taking property out of the hands of a trustee under an express trust, in whose fitness and integrity the creator of the trust has shown his confidence by placing the administration of the trust in him,

1 Latham v. Chafee, 7 Fed. 525. Where nothing is shown indicating a breach of trust on the part of the trustee chosen by agreement, and nothing indicating danger to the trust fund, the trustee will not be enjoined in the management of the trust estate, nor will a receiver be immediately appointed. Gale v. Sulloway, 62 N. H. 57.

Courts of equity have jurisdiction over all questions relative to the establishment and preservation of trusts and may act upon the application of any one interested. Holbrook v. Fyffe, 164 Ky. 435, 175 S. W. 977, the court saying: "It is a well settled principle of law that courts of equity have jurisdiction of all questions relative to the establishment, protection, enforcement, and preservation of trusts, on either real or personal property, and this they may do upon the application of the person or persons interested. 39 Cyc. 588. A court of equity has jurisdiction in the suit of a cestui que trust to enforce the trust, or change the trustee, and compel any person, who has gotten possession of the trust fund knowingly, to surrender it. Bixler's Trustee v. Taylor, 3 B. Mon. (42 Ky.) 362."

and by its order placing it in the hands of a receiver, and they will not do so upon slight grounds.[2] In other words, a strong case must be shown in order to displace a trustee who is willing to act by the appointment of a receiver.[3] The court will not, of course, interfere by the appointment of a receiver if the plaintiff may obtain relief through an adequate remedy at law.[4] Courts have

2 For a case in which the allegations of the bill were held insufficient to warrant the court in taking property from the hands of trustees and placing it in the custody of a receiver, see Pyles v. Riverside Furniture Co., 30 W. Va. 123 (145), 2 S. E. 909.

In Rousseau v. Call, 169 N. C. 173, 85 S. E. 414, the court said: "This, then, in our opinion, being a trust fund for a designated purpose, it was clearly within the power of the court, exercising jurisdiction in law and equity, to appoint a receiver whenever it was sufficiently made to appear that such a course was necessary to the preservation of the fund or a due and proper execution of the trust. 5 Pomeroy, Equity Jurisprudence, § 89; Kerr on Receivers, pp. 20, 21; Alderson on Receivers, § 474. True it is that the possession and control of a trustee will not be disturbed on light or insufficient grounds (2 Perry on Trusts, § 819), but, the power being conceded or existent beyond question, and the court, in the exercise of its jurisdiction, having entered judgment appointing plaintiff receiver, its judgment is not open to collateral attack, and, even if the order was improvidently made, its propriety is not open to question on this suit."

Etowah Min. Co. v. Wills Valley Min. etc. Co., 106 Ala. 492, 17 So. 522; Latham v. Chafee, 7 Fed. 525; Middleton v. Dodswell, 13 Ves. 268; Barkley v. Lord Reay, 2 Hare 306; Poythress v. Poythress, 16 Ga. 406; Ogden v. Kip, 6 Johns. Ch. (N. Y.) 160.

The appointment of a receiver and the taking away through him of the control of an old and established business from the hands of a trustee who has had an active interest therein for years and who was acting under the direction of a court of chancery, without any showing of cause therefor, and without the consent of the majority interest in the trust, is improper. Rich v. Mulloney, 121 Ill. App. 503.

3 Poythress v. Poythress, 16 Ga. 406; Smith v. Smith, 2 Y. & C. 361; Bainbridge v. Blair, 4 L. J. Ch. (N. S.) 207.

4 That the holder of notes of a club, known to him to be ultra vires, threatened to foreclose the deed of trust securing them, held no ground for a receiver, as the invalidity of the notes could be collaterally set up against any sale. Price v. Bankers' Trust Co. of St. Louis, (Mo.) 178 S. W. 745.

The allegation that in the event of the proposed sale by the trustees, defendants would collect the attorney's fees and trustee's fees provided for in the notes and

always very jealously guarded and protected the rights of the beneficiaries to a trust fund and the trustee is required to exercise the greatest care and diligence in the care and management of the trust property. Receiverships in so far as they are applicable to trust properties and trustees usually occur in connection with trusts, either express or implied, arising out of the relation of the ordinary express trusts, formed for the various purposes for which such trusts have been created, testamentary executors, administrators, guardians of infants and insane persons, and other fiduciary relations created by statute or agreements of the parties.

But the appointment of a receiver in lieu of a receiver rests in the sound judicial discretion of the court as in the appointment of receivers generally.[5]

§ 71. Various Circumstances in Which Receiver Appointed in Lieu of Trustee.

A receiver may be appointed in lieu of a trustee where the trustee has misappropriated or lost the trust property,[1] or where a trustee is guilty of misconduct,

deeds of trust, and which were alleged to be unreasonable, clearly is not an equitable ground for a receivership. Floore v. Morgan, (Tex. Civ.) 175 S. W. 737.

[5] Janeway v. Green, 16 Abb. Pr. (N. Y.) 215, note.

[1] Gildersleeve v. Lester, 68 Hun (N. Y.) 532, 22 N. Y. Supp. 1026.

Where a portion of a trust fund has been lost, that loss is prima facie evidence of a breach of duty on the trustees, sufficient to authorize the interference of the court by the appointment of a receiver. Evans v. Coventry, 5 D. M. & G. 918.

A bill brought to remove a trustee to whom personal property has been assigned for the benefit of creditors and to appoint a receiver for the trust property to be sufficient must contain full and precise allegations showing the necessity for the removal and that there is danger of loss or misappropriation of the trust property. Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660; Kanawha Coal Co., v. Ballard & W. Coal Co., 43 W. Va. 721, 29 S. E. 514; Wilson v. Maddox, 46 W. Va. 641, 33 S. E. 775; Penn v. Whiteheads, 12 Gratt. (Va.) 74; Hogg's Eq. Proc., § 745.

It has been said that if from the threats or acts of the tenant for life there appears an intention of suffering the lease to expire the court may appoint a re-

waste, or other improper disposition of the trust property,[2] or where he is guilty of fraud,[3] or where the trus-

ceiver for the estate to provide a fund for the renewal. Bennett v. Colley, 2 M. & K. 233.

2 Evans v. Coventry, 5 De G. M. & G. 911; Howard v. Papera, 1 Madd. 142; Middleton v. Dodswell, 13 Ves. 266.

Where a trustee is charged with abusing his trust, a receiver may be appointed. Boyd v. Murray, 3 Johns. Ch. (N. Y.) 48.

If it can be satisfactorily established that parties in a fiduciary position have been guilty of a breach of duty, there is a sufficient foundation for the appointment of a receiver. Evans v. Coventry, 5 D. M. & G. 918; Baylies v. Baylies, 1 Coll. 537; Brenan v. Preston, 2 D. M. & G. 839; Bainbrigge v. Blair, 3 Beav. 421; Brooker v. Brooker, 3 Sm. & G. 475; Nothard v. Proctor, 1 Ch. D. 4; Hamilton v. Gridlestone, W. N., 1876, 202.

Where there has been negligence or improper conduct on the part of a trustee, and the fund is in danger, the appointment of a receiver is a matter of right. Jenkins v. Jenkins, 1 Paige (N. Y.) 243.

Where a trustee is guilty of a breach of trust and is insolvent, he may be displaced by a receiver. Van Epps v. Van Epps, 9 Paige (N. Y.) 237.

Where there is a trust fund in danger of being wasted or misapplied, a court of equity will interfere, upon the application of any of the creditors, either in his own behalf or in behalf of himself and the other creditors, and by the appointment of a receiver, or in some other mode, grant relief. Jones v. Dougherty, 10 Ga. 273.

A suit by a beneficiary against the trustees, in which the complaint alleges delinquencies on the part of the defendants as fiduciaries, is one in which the appointment of a receiver may be asked as ancillary to the suit, provided such appointment may subserve the purpose of it. Hartnett v. St. Louis Min. & Mill. Co., 51 Mont. 395, 153 Pac. 437.

Where a trust fund is in danger of misapplication or waste, chancery will interfere at the instance of those interested, and appoint a receiver, or in some other mode prevent the destruction of the fund. And this rule applies to executors and administrators as well as other trustees. Calhoun v. King, 5 Ala. 523.

To warrant a court of equity in granting an injunction and receiver in a suit for maladministration of trust funds, there must be proof that the funds have been invested in some tangible property, on which complainant can equitably claim a line. If moneys have been so expended that they can not be traced or identified, there is no opportunity for these remedies to attach. Allen v. Freedman's Savings & Trust Co., 14 Fla. 418.

But in the absence of mismanagement or incompetency, a receiver will not be appointed if the trustee has sufficient power. Buxton v. Monkhouse, Coop. Ch. 41; Barkley v. Reay, 2 Hare 308.

3 Vernon v. Kinzie, 2 U. C. Jur. 40.

tee has failed to obey an order to pay over money due from him in respect to an alleged breach of trust.[4]

A receiver may be appointed where it is necessary to prevent a transfer of property held in trust.[5]

A receiver may be appointed where an action is pending to determine the distributive shares of the beneficiaries.[6]

Where disputes and dissensions arise among trustees, who are to collect the rents of property for beneficiaries, as to the management of the property resulting in a failure to collect them, the beneficiaries may have a receiver to collect the rents.[7]

A mere denial of holding property in trust does not render the appointment of a receiver necessary where

It is not cause for the appointment of a receiver that trustees for sale have let a purchaser into possession before they received the purchase-money, since the court will not necessarily infer this to be misconduct. Browell v. Reed, 1 Ha. 434.

A receiver was appointed of the rents and profits of an estate for the purpose of accumulating a fund, where the tenant for life had fraudulently obtained a sum of stock to which the trustees of the settlement were entitled. Woodyatt v. Gresley, 8 Sim. 180.

[4] Coney v. Bennett, 54 L. J. Ch. 1130; Leathes v. Leathes, Weekly Notes, 1882, 71; Whiteley v. Learoyd, 56 L. T. 846.

[5] Lutt v. Grimont, 17 Ill. App. 308.

[6] Carson v. Combe, 86 Fed. 202, 29 C. C. A. 660.

Thus, where coupon bonds or other property not ear-marked with the trust are placed in the hands of a de facto trustee or custodian, by the agreement of the beneficiaries, and they become dissatisfied and file a bill for accounting and distribution, and where there is protracted litigation between the parties in interest, and the trustee, though denying any danger to the trust fund, is anxious to be relieved from a troublesome and thankless duty, the court may appoint a receiver. Fidelity Ins. & T. Co. v. Huber, 13 Phila. (Pa.) 52.

[7] Wilson v. Wilson, 2 Keen 249.

A receiver will also be appointed where the co-trustees can not act through disagreement among themselves. Bagot v. Bagot, 10 L. J. Ch. N. S. 116; and also, where the trustees who were to manage a business and were themselves not qualified to do so, but could not agree in appointing some person as manager, a receiver was appointed. Hart v. Denham, W. N., 1871, 2.

there is no apprehension of loss and the defendant is financially responsible.[8]

It is always essential that there be a danger of loss of the trust property in order to render the appointment of a receiver proper.[9]

Where a trust fund is created by persons subscribing money for a designated purpose the court may appoint a receiver to preserve the fund or execute the trust.[10]

In other words, if there is danger of the trust property being lost by reason of a failure of any of the parties connected with the trust taking necessary or proper steps for its protection, a receiver may be appointed for that purpose.[11]

8 Hamburgh Mfg. Co. v. Edsall, 7 N. J. Eq. 298.

In Sheppard v. Oxenford, 1 K. & J. 492, where a man, who had accepted and held moneys for particular persons, certain trusts, afterwards denied the legality of the trusts on which he held the moneys, the court appointed a receiver.

A receiver will not be appointed on the application of one who claims to hold the fund in absolute ownership instead of in trust. Richards v. Barrett, 5 Ill. App. (5 Bradw.) 510.

But it has also been held that where a trustee repudiates the trust it is proper to put the property in the hands of a receiver. McCandless v. Warner, 26 W. Va. 754.

9 Richards v. Barrett, 5 Ill. App. (5 Bradw.) 510.

In an application to discharge a trustee, and for the appointment of a receiver for the trust estate, it must be made to appear that the property is in danger and that the trustee is irresponsible. Haines v. Carpenter, Fed. Cas. No. 5905 (1 Woods 262); affirmed (1875) 91 U. S. 254, 23 L. Ed. 345.

A receiver may be appointed to preserve a trust estate and prevent its diversion from the owner. Knight v. Knight, 75 Ga. 386.

10 Rousseau v. Call, 169 N. C. 173, 85 S. E. 414.

A receiver will also be appointed when the property of a debtor has been vested in trustees for the benefit of his creditors, and the appointment is necessary for the protection of the property. Waterlow v. Sharp, W. N., 1867, 64.

A receiver may be appointed where property has been devised to a wife upon her promise to dispose of it in a certain way which she fails to do. Podmore v. Gunning, 5 Sim. 435.

11 In a case where the trust fund is not in danger, the court will refuse to appoint. Richards v. Barrett, 5 Ill. App. 510. It is the peril of the trust fund alone that moves a court to dispossess a trustee from the exercise of his legal

In a suit to compel a trustee to account for trust funds, which he should pay over to the beneficiary, and which

rights over the trust fund, and unless such peril is shown by specific allegations, supported by clear proof, the court will not interfere. Fort Payne Furnace Co. v. Fort Payne Coal & I. Co., 96 Ala. 472, 38 Am. St. Rep. 109, 11 So. 439; Sims v. Adams, 78 Ala. 395; Simmons Hardware Co. v. Waibel, 1 S. D. 488, 36 Am. St. Rep. 755, 11 L. R. A. 267, 47 N. W. 814; Phelan v. Eaton, 3 Vict. Rep. 13.

Where a trustee omits to act when required to do so, or is wanting in necessary care and diligence in the due execution of his trust which he has undertaken, a court of equity will interfere by the appointment of a receiver. Jones v. Dougherty, 10 Ga. 273.

The manifest abuse of a trust by an habitual and prospective course of dealing, bringing the property into danger, is sufficient ground for the appointment of a receiver. Chase's Case, 1 Bland. (Md.) 206, 17 Am. Dec. 277.

Where the trustee loans part of the trust fund to a banking firm of which he is a member and the firm shortly afterwards becomes insolvent, a receiver may be appointed. North Carolina R. Co. v. Wilson, 81 N. C. 223.

Where a seller sold building material to a trustee who used it in improving the trust property and the seller did not know that the property was held in trust, a receiver was appointed to apply the portion of the rents due to the improvements to the debt. Malone v. Bruce, 60 Ga. 152.

Where, through a trustee's act, serious loss of trust funds is likely to occur, the court may appoint a receiver; hence, where a trustee paid over half of the trust fund to an irresponsible person, who agreed to maintain the cestui, which the trustee was bound to do, the court should appoint a receiver. Holbrook v. Fyffe, 164 Ky. 435, 175 S. W. 977, the court saying: "Wherever, through the trustee's acts or misconduct, waste or other serious loss is likely to arise, the court may order the trust funds placed in the hands of a receiver. The appointment of a receiver, however, is a matter within the sound discretion of the court, and before exercising it the court will take in consideration all of the circumstances of the case.

"It seems that in this case Holbrook had paid $300—one-half of the fund—to a financially irresponsible party, without requiring any security for the performance of what he obligated himself to do, and we are not able to say that the court in any wise abused its discretion by removing the trustee and requiring the funds turned over to the receiver of the court, and authorizing him to collect them."

Where land is left in trust to one person to pay the income thereof to another for life, with remainder to the heirs and assigns of the beneficiary forever, and the trustee dies, the court may, in an action of foreclosure by one to whom the beneficiary has mortgaged the property, appoint a receiver, to protect the interests of all parties, if no proper person can

he retains because of an alleged claim against the beneficiary for breach of contract, it is proper to appoint a receiver to take charge of the fund.[12]

But it is not sufficient ground for the appointment of a receiver that one of several trustees is inactive or has disclaimed,[13] although where there were two trustees and one having died, the survivor refused to act, the beneficiaries may have a receiver appointed.[14] And where there are three trustees and two of them chose to act separately and take title to property in their own names, omitting the name of the third trustee, the beneficiaries may have a receiver appointed.[15]

And where the purposes of a trust agreement have failed because of the trust being void, a certificate holder

be found to take the trust. Wilson v. Russ, 17 Fla. 691.

If a tenant for life of leaseholds, who is regarded as a trustee for the remainderman, be bound to renew, and by his threats or acts manifest an intention not to renew the lease, the remainderman may file a bill, and have a receiver appointed for the purpose of providing the renewal fine out of the rents and profits of the estate, and if the period of renewal has already expired, a receiver may be appointed on proof of the tenants for life default. Bennett v. Colley, 5 Sim. 192; s. c., 2 M. & K. 233.

Where property is bequeathed in trust for the purpose of having the income applied to certain beneficiaries, but without power in the trustees to sell or mortgage, if the trustee fails to pay the taxes and as a consequence it will be sold on a tax sale, a receiver may be appointed to mortgage it to raise money to redeem it from the sale. Burroughs v. Gaither, 66 Md. 171, 7 Atl. 243.

Where the income of property belongs to a mother and the property itself to her children, but the trustee, with the approval of the mother, incurs debts partly for the betterment of the property and partly for the benefit of the mother, a receiver may be appointed for the purpose of applying the income to the payment of the debts. Robert v. Tift, 60 Ga. 566.

For a somewhat similar case, see Woodyatt v. Gresley, 8 Sim. 180.

12 Hagenbeck v. Hagenbeck Zoological Arena Co., 59 Fed. 14.

13 Browell v. Reed, 1 Ha. 434.

A disclaimer of the trust by one of several trustees does not in law affect the estate of the others, and in such circumstances the trust is vested exclusively in those who have not disclaimed. Small v. Marwood, 9 B. & C. 300; Townsor v. Tickell, 3 B. & Ald. 31.

14 Palmer v. Wright, 10 Beav. 237.

15 Swale v. Swale, 22 Beav. 584.

in such trust has a right to demand that the affairs should be wound up, and his interest protected, and in such a case it is proper for the court to appoint a receiver, upon the application of the certificate holder, although the property may be in the hands of parties of the highest standing for business capacity and integrity of character.[16]

But a receiver will not be appointed over a trust estate merely because the estate has depreciated and the incumbrances have increased unless it be shown that such condition was caused by the bad management of the trustee.[17]

A receiver may be appointed where it appears that the trustees have an undue leaning or bias towards one of the contending parties.[18]

If a trustee is insolvent and there is a probability of the property claimed as part of the trust fund being fraudulently disposed of before the termination of the litigation, a receiver will be appointed on a showing of a probable recovery by the plaintiff.[19]

Likewise where it is shown that defendant holding a fund as agent in trust for plaintiff was insolvent, so that no judgment against him could be collected on execution, the court, at plaintiff's instance, should have appointed a receiver.[20]

And where there is imminent danger of the trustee, who is insolvent, disposing of the trust property before a receiver could be appointed if he had notice of the application, the court may even appoint a receiver *ex parte*.[21]

16 Cameron v. Havemeyer, 25 Abb. N. C. (N. Y.) 438, 12 N. Y. Supp. 126.

17 Barkley v. Lord Reay, 2 Hare 386.

18 Earl Talbot v. Hope Scott, 4 K. & J. 139.

19 Ellett v. Newman, 92 N. C. 519; Gawthrope v. Gawthrope, W. N., 1878, 91.

20 Driskill v. Boyd, (Tex. Civ.) 181 S. W. 715.

21 Culver v. Guyer, 129 Ala. 602, 29 So. 779.

But it is not sufficient cause for the appointment of a receiver that

But where the trustee is willing to give security, the appointment of a receiver will be refused.[22]

A receiver, however, will not be appointed where complainant's debt had at first been charged against the trustee individually and not as trustee, even if the trustee is personally insolvent.[23]

A receiver will not be appointed to take charge of a trust fund, merely because the trustee has mixed such fund with his own funds, where there is no pretense that the fund is thereby endangered,[24] but a receiver will be appointed if the trust funds are thereby endangered.[25]

Inasmuch as some time necessarily elapses between the institution of proceedings for the removal of a trustee and the appointment of his successor, and as interests of the beneficiaries might be prejudiced, receivers are sometimes appointed to manage the trust estate meanwhile,[26] but a strong showing of necessity must be shown in such circumstances.[27]

the trustees or executors are poor or in mean circumstances. Anon., 12 Ves. 4; Howard v. Papera, 1 Madd. 142.

22 Branch v. Ward, 114 N. C. 148, 19 S. E. 104.

In a suit to enforce plaintiff's rights to a trust fund, the court refused to appoint a receiver upon condition that the defendant furnish a bond conditioned to account to the plaintiff for all property which had come into his possession. Baker v. Bartol, 7 Cal. 551; Mead v. Orrery, 3 Atk. 235.

23 Hatcher v. Massey, 66 Ga. 66.

24 Orphan Asylum Society v. McCartee, 1 Hopk. Ch. (N. Y.) 429. See, also, Goodyear v. Betts, 7 How. Pr. (N. Y.) 187.

25 A special receiver of the assets of an insolvent firm, assigned to a trustee for the benefit of creditors, may be appointed and required to duly administer the same under the directions of a court of equity, where it is made to appear that such trustee is violating his duty to keep the trust property distinct from his individual funds and safely deposit the same in some bank or other like place for safe-keeping, to the injury or great risk of injury to the beneficiaries, or that he is wasting or misappropriating such fund or a material part thereof, or that there is danger of such misappropriation. Wagner v. Coen, 41 W. Va. 351, 23 S. E. 735.

26 Calhoun v. King, 5 Ala. 523; Edie v. Applegate, 14 Iowa 273; Janeway v. Green, 16 Abb. Pr. (N. Y.) 215 n; Beverley v. Brooke, 4 Gratt. (Va.) 187, 208.

27 The court will not appoint a

Where there is but one trustee and he departs from the jurisdiction of the court, a receiver may be appointed over the estate,[28] but where there are several trustees and merely one resides out of such jurisdiction, it will not be deemed necessary to appoint a receiver,[29] although one may be appointed where the other trustees are not active in the trust.[30]

Inasmuch as the beneficiaries or parties beneficially interested in an estate are in equity the owners of it, should they concur in an application for a receiver and the trustee consent, it is the practice for the court to make the appointment, provided that the usual bond is furnished.[31]

Courts, if they prefer, may order an immediate sale of the property held in trust, instead of appointing a receiver to manage it.[32]

It has been held that a receiver will not be appointed at the instance of a beneficiary who has but a very small interest in the profits growing out of a contract.[33]

receiver appointed for a trust estate while chancery proceedings are pending for the removal of a trustee unless a very strong case is made out. Poythress v. Poythress, 16 Ga. 406.

28 Noad v. Backhouse, 2 Y. & C. Ch. Cas. 529; Dickens v. Harris, 14 L. T. 98; Taylor v. Allen, 2 Atk. 213; Smith v. Smith, 10 Ha. App. 71.

Where a trustee who has been ordered to pay certain money in court on account of an alleged breach of trust removes beyond the jurisdiction of the court so that the order can not be enforced by attachment, it is proper to appoint a receiver over his property. In re Coney, 29 Ch. D. 993.

29 Westby v. Westby, 2 Coop. C. C. 210.

30 And a receiver has been ordered when four trustees had been named in a will and one died, and another was abroad, and the third had scarcely interfered in the trust, and the fourth submitted to a receiver by his answer. Tidd v. Lister, 5 Mad. 429.

31 Brodie v. Barry, 3 Mer. 695. See, also, Bartley v. Bartley, 9 Jur. 224; Bromwell v. Reid, 1 Hare 434.

But the usual recognizances will not be dispensed with. Manners v. Furze, 11 Beav. 30; Tylee v. Tylee, 17 Beav. 583.

32 Alemany v. Wensinger, 40 Cal. 288.

33 Webb v. Van Zandt, 16 Abb. Pr. (N. Y.) 314, note.

A receiver will not be appointed where a contract is held by a trustee for the benefit of several per-

Where there are conflicting claimants of a trust fund who are prosecuting separate suits in the same court, and a receiver is appointed in one suit, his appointment will inure to the benefit of the plaintiff in the other suit, if upon the adjudication it is ascertained that the plaintiff in the latter suit has a superior right to the trust fund.[34]

And where a receiver of trust property has been appointed, it is proper for the court to continue him on the expiration of the trust, if the persons who are entitled to the possession as tenants in common disagree among themselves, and there is no prospect that they can act harmoniously.[35]

So, also, since a receiver is appointed for the benefit of all the parties interested, a receiver so appointed will not be discharged merely on the application of the party at whose instance the appointment was made.[36] Where a receiver is appointed over a trust fund, the order of appointment is not subject to collateral attack in an action by the receiver to recover the trust fund.[37]

§ 72. Receivership in Case of Trustee Ex-Maleficio.

Where a person is charged with being a trustee *ex-maleficio* because of having fraudulently collected moneys from different persons under false representations and it is charged that all such funds are commingled and the total fund is insufficient to satisfy the claims of the beneficiaries, a receiver may be appointed over the fund even though the involuntary trustee denies the charge.[1]

sons, on the application of a beneficiary, having but a small interest in the profits, where the appointment would operate to deprive the contractors of money sufficient to perform the contract, and the trustee is pecuniarily responsible and not guilty of a breach of duty involving moral turpitude. Devlin v. Hope, 16 Abb. Pr. (N. Y.) 314.

34 Beverley v. Brooke, 4 Gratt. (Va.) 187.

35 Ball v. Tompkins, 41 Fed. 486.

36 Bainbrigge v. Blair, 3 Beav. 423 (per Lord Langdale).

37 Rousseau v. Call, 169 N. C. 173, 85 S. E. 414.

1 In Cook v. Flagg, 233 Fed. 426, the defendant was charged as being a trustee ex maleficio and the appointment of a receiver was

sought. The sufficiency of the bill was raised by demurrer and the Circuit Court of Appeals through Judge Mayer said:

"The substance of the bill is that Flagg, not a member of the stock exchange, devised a fraudulent scheme for speculating in stocks; that on the faith of his representations plaintiff and many others intrusted him with their money to the extent of an estimated aggregate of $1,100,000; that Flagg never had any real transactions in the purchase or sale of stocks; that the amount obtained by Flagg from plaintiff at different dates and by virtue of the fraudulent representations aggregated $10,020, only $2800 of which was paid over to plaintiff, and then as pretended profits, when there were no profits; that all the representations made by Flagg were false, and known by him to be false; that the money obtained from others than plaintiff was so obtained on similar representations; that the funds are mingled; and that some $200,000 in Flagg's control will fall short of satisfying the aggregate claims of $1,100,000. The relief prayed for is an injunction, the appointment of a receiver, an ascertainment of the claims to the fund, and an appropriate distribution.

"In a letter to Mr. Goodwin, Assistant Attorney-General, dated August 25, 1909 (referred to in one of the moving affidavits), Flagg, in explaining his method of doing business, in order to satisfy the officials that he was not using the mails unlawfully, stated:

" 'Every dollar of the securities and the cash deposited with Mr. Flagg by all the customers belong to them, and not to Mr. Flagg. Mr. Flagg is merely a broker, and is handling his customers' funds, and is charged with the handling of cash and securities as a fiduciary.'

"In opposition to the motion, Flagg filed an answer and an affidavit, setting forth that his transactions with Cook and others were legitimate, and vigorously taking issue with the condemnatory allegations of the moving papers.

"We think the bill states a cause of action in equity in that Flagg became Cook's trustee ex maleficio. Pomeroy's Equity Jurisprudence (3d ed.), § 1053; In re Berry, 147 Fed. 208, 77 C. C. A. 434; United States v. Carter, 172 Fed. 1, 96 C. C. A. 587, affirmed 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594; Marshall v. de Cordova, 26 App. Div. 615, 50 N. Y. Supp. 294. There is a trust fund ex maleficio participation in which by many people similarly situated is necessary in order to have a just distribution. While the fund is created in a different way from that in Guffanti v. National Surety Co., 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848, the ultimate principle is the same.

"There being a cause of action in equity, the next question is whether the court abused its discretion in appointing a receiver. The mere denial by a defendant of what is alleged against him by a plaintiff, is not enough to justify the court in refusing to extend its protective arm.

"Here was a situation where the fund in hand was far less than necessary to satisfy the total of claims which could be made. The defendant had been convicted of a

§ 73. Receivership in Case of Trustee Ex-Officio.

Where a trust has been created by an act of the legislature and the chief executive officers of the state are intrusted with the management of the trust fund, it must be a very strong case which would induce a court to take the property out of the hands of such trustees *ex-officio* and place those duties in the hands of a receiver appointed by it. If such trustees are guilty of breach of duty they can be enjoined and they can be made personally responsible, while the trust fund can be followed in the hands of persons improperly obtaining it. But the courts are bound to show great respect to a co-ordinate branch of the court and for that reason will endeavor to secure the rights of the beneficiaries in such a fund in some manner other than by removing the official personages to whose administration it has been intrusted, and especially where no charges of incapacity or want of integrity have been made against the trustees. Another point to be considered in such circumstances is the fact that the officials who are to act as such trustees are con-

crime against the United States for using the mails to invite just such transactions as that with plaintiff. It was alleged that he was financially irresponsible and that there was no reason to doubt that allegation and no affidavit of any disinterested person to the contrary. If no injunction issued, defendant could do what he pleased with the fund, and at the end of a litigation plaintiff and those similarly situated might have their labor for their pains. On the other hand, if defendant succeeded on the trial, the sole injury to him would be the delay caused by the lawsuit, the expeditious disposition of which could and can be had without difficulty, if defendant himself is diligent.

"It seems to us that the District Judge was right, and, had he denied the motion, grave injustice might have been visited upon those who claim to have been defrauded. It will be understood that we do not pass on the merits of the issues which are now being tried, including the complicated transactions in dispute arising out of the system, which defendant urgently contends are legitimate. We are considering solely the order here under review on the papers as they were presented to the District Court."

stantly being changed by the suffrages of the people.[1] But a receiver was appointed over a fund of which a city was a compulsory trustee in a famous case in the federal courts arising in New Orleans.[2]

§ 74. Receivership Over Trustee of Persons Interested in Public Contract.

Where a trustee has been appointed to receive the money due on a contract for the performance of certain public work and distribute it to the various parties interested, a receiver will not be appointed to take charge of the contract where it is not shown that the trustee is guilty of any misconduct and the petition for the appointment of a receiver is from only one of the several parties interested in the contract, and it appears that the appointment of the receiver may destroy the value of the contract.[1]

§ 75. Receivership Over Trustees Who Are Charged With Fraud.

The appointment of a receiver in equitable proceedings instituted for the purpose of setting aside assignments made for the benefit of creditors where fraud is alleged and shown in the transaction, is frequent, but in such case there must be proof of insolvency of the

1 Vose v. Reed, 1 Woods 647, Fed. Cas. No. 17011.

In the above case certain public lands had been vested by an act of the legislature in the governor and other state officials as trustees, for the purpose of creating an internal improvement fund and to serve as a guaranty of certain railroad bonds. The trustees were directed to fix the price at which the land was to be sold and to make provisions for its drainage and settlement. The court refused for the reasons set forth in the text to appoint a receiver over the lands and thereby displace the official trustees.

2 Where a city was the compulsory trustee of a fund and was neither a debtor nor creditor in respect to the fund, and a receiver is appointed over the fund, the city is not subject to suit in controversies relating to it, but such litigation should be directed against the receiver. Wilder v. New Orleans, 67 Fed. 567.

1 Devlin v. Hope, 16 Abb. Pr. (N. Y.) 314.

assignee and such a state of facts shown as renders it probable that the property will be disposed of in fraud of creditors' rights,[1] but if it be shown that the assignee is solvent and the fraud is denied by the answer a receiver will not be appointed pending the litigation.[2] This doctrine is based upon the principle that courts are, at best, slow to interfere with the possession of a trustee apparently in the lawful custody of property charged with a trust, in a matter of assignment recognized by law, and where the assignor has a right to dispose of his property in such manner as shall seem to him best, subject only to the rights of *bona fide* creditors therein.

Where a trustee has conveyed property in which a beneficiary claims an interest and the beneficiary seeks to set the conveyance aside as a fraud upon the beneficiaries, the court may appoint a receiver and require the defendants to convey the property to him.[3]

1 Ellett v. Newman, 92 N. C. 519. In this case an action was brought to set aside an assignment alleged to be fraudulent and void as to creditors when it appeared that there was reasonable ground to apprehend that the goods involved in the action might be disposed of fraudulently before the case could be tried upon its merits, and thus render a judgment ineffectual. The court said: "The authority of the court to preserve property, the subject of litigation, pending the action, until final judgment, and then to apply it as justice may require, is too manifest to admit of question, and such authority should be exercised when it appears that there is reasonable ground to believe that the plaintiff may recover, and the interference of the court is necessary to protect the property in question pending the controversy." Citing Parker v. Grammer, 62 N. C. 28; Craycroff v. Morehead, 67 N.C. 422; Morris v. Willard, 84 N. C. 293; Levenson v. Elson, 88 N. C. 182.

2 Levenson v. Elson, 88 N. C. 182.

3 Gunn v. Blair, 9 Wis. 352.

Inasmuch as the appointment of a receiver rests in the sound discretion of the court, such an appointment will not be disturbed on appeal, when made on a bill by a creditor charging that the defendant debtors had conveyed their property, including a large mercantile establishment, on a trust for the purpose of defrauding their creditors, as was known to the trustee, which allegations were not denied by either the debtors or the trustee. Lyle v. Commercial Nat. Bank, 25 S. E. 547, 93 Va. 487.

But in the case of creditors assailing a conveyance of a debtor as in fraud of creditors, there must be a showing of either fraud or insolvency.[4]

Where the defendant is able to respond to any judgment which may be rendered against him, a receiver will be refused in a suit to set aside a conveyance on the ground of fraud.[5]

Thus where it is sought to set aside an assignment by a debtor to a trustee for the benefit of his creditors on the ground of fraud, a receiver will not be appointed over the property pending the litigation where the fraud is denied and the trustee is financially able to respond to any judgment which may be recovered against him.[6]

A receiver may, however, be appointed in a suit to recover a fund in the hands of a financially responsible defendant who is charged with fraudulent conduct in respect to it and who is attempting to dispose of his property in the jurisdiction of the appointing court.[7]

In a suit by the seller to recover goods fraudulently purchased, a receiver may be appointed.[8] But where the property over which a receiver is sought was acquired through fraud by the corporation of which the plaintiff was a shareholder and with his knowledge and that he acquiesced in the fraud for several years, a receiver will be denied.[9]

§ 76. Effect of Appointment of Receiver on the Trust Property.

If property is held by a person or corporation in trust and a receiver is appointed over the property of such person or corporation, the trust property nevertheless continues to be impressed with the trust relationship.

4 Stillwell v. Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963.

5 Turnipseed v. Kentucky Wagon Co., 97 Ga. 258, 23 S. E. 84.

6 Levenson v. Elson, 88 N. C. 182.

7 Bird v. Lanphear, 92 Hun 567, 36 N. Y. Supp. 1069.

8 Martin v. Burgwyn, 88 Ga. 78, 13 S. E. 958.

9 Hager v. Stevens, 6 N. J. Eq. 374.

This is, of course, on the ground that the receiver takes the property of the defendant subject to all existing liens and equities.[1] Where a trust fund passes into the hands of a receiver, the beneficiaries are always entitled to follow it if the fund can be identified. The rule in this respect was stated by the federal court in the following language:[2]

"While the right to follow misapplied moneys as trust funds into the hands of a receiver has been extended in modern decisions, there has never been in the federal courts a departure from the principle that there must be some identification of the property followed with the trust funds. Some of the latest cases say that it is sufficient to show that the property in the possession of the receiver has been increased or augmented by the trust funds. But that is only a different way of stating the earlier rule. It can not be shown that property in the hands of a receiver has been increased by trust funds unless it is shown that they were converted into or com-

1 Where certain accounts are set aside and collected by the bookkeeper of the debtor under an agreement that the accounts are to be used to reimburse a bank for advances, they are impressed with an equitable trust in favor of the bank as against the receiver of the debtor. Atlantic Trust Co. v. Carbondale Coal Co., 99 Iowa 234, 68 N. W. 697.

A trustee is not subject to be compelled to surrender the collateral held by him to receivers of the insolvent debtor until the debt is paid, but after default to be entitled to administer the trust as against the receivers. Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12.

Where a foreign corporation places securities with a state official in trust to secure any judgments which may be secured against it, such official will not be required to turn them over to its ancillary receiver. Kelsey v. Republic Sav. etc. Assn., 110 Fed. 40.

Land held in trust does not pass to a receiver so that he may sell the same. Jackson v. Horton, 126 Ill. 566, 21 N. E. 490; Boid v. Dean, 48 N. J. Eq. 193, 21 Atl. 618.

And so where a note is given to a company for a particular purpose, a receiver of such company stands in no better position than the company and can treat such note only as the company could have done. Bell v. Shibley, 33 Barb. (N. Y.) 610.

2 American Can Co. v. Williams, 178 Fed. 420, 101 C. C. A. 634.

mingled with it. If the plaintiff's contention be well founded, and to follow misappropriated moneys it is only necessary to show that a receiver has, and that the trustees had, assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate. To adopt this view is to do away with all the equitable principles out of which the right to follow trust funds grew."

If a receiver taking possession of trust funds receives any profit or benefit therefrom he will be liable for the same to the beneficiaries.[3] And where a receiver makes an unauthorized disposition of a trust fund to a person cognizant of the breach of it, who invests the money, the person becomes a trustee *in invitum* of such fund.[4] And where a receiver intermingles a trust fund with the property of the estate, the beneficiaries are entitled to a preference over general creditors. The reason for this rule was stated as follows:[5]

"The foundation of the right on the part of the owner of a trust fund to a preference over general creditors in payment out of a fund or estate that has passed to the assignee or receiver of an insolvent person or corporation is that the trust fund has been wrongfully confused or intermingled with the property of the insolvent, or has been used to increase the value of the property, thereby increasing the amount or value of the funds or estate

3 Hooper v. Winston, 24 Ill. 353; Battaile v. Fisher, 36 Miss. 321; Adair County v. Ownby, 75 Mo. 282; In re Commonwealth Fire Ins. Co., 32 Hun (N. Y.) 78; Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520; Manning v. Manning's Ex'rs, 1 Johns. Ch. (N. Y.) 527; Hinckley v. Gilman, C. & S. R. Co., 100 U. S. 153, 25 L. Ed. 591; Potts v. Leighton, 15 Ves. Jr. 273; Baldwin v. Crawford, 2 Chamb. Ch. (Ont.) 9. A receiver is liable for a trust fund in the hands of the party for whom he is receiver. Reynolds v. Aetna Life Ins. Co., 28 App. Div. 591, 51 N. Y. Supp. 446.

4 Goldthwaite v. Ellison, 99 Ala. 497, 12 So. 812.

5 Beard v. Independent Dist. of Pella City, 88 Fed. 375, 379, 31 C. C. A. 562.

passing into possession of the assignee or receiver; that, if this intermingling had not taken place, the fund passing to the receiver would have been so much less; that the creditors have only the right to subject the property of the debtor to the payment of their claims, and therefore the creditors can not complain if the total fund coming into the hands of the receiver is reduced by the amount necessary to make good to the owner of the trust fund the sum which was wrongfully used in augmenting the fund or property passing to the receiver. Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors."

In respect to questions whether a receiver is or is not liable to claimants of a trust fund, a frequent point of controversy is whether a trust fund actually exists. In other words, it is often questionable whether the transaction constitutes a trust at all, either express or implied.[6]

[6] Contracts by which a mercantile company agreed to receive goods of the other parties into its store for sale and to account for the proceeds, construed may be of such a character as not to raise an implied trust or to give the owners of the goods any greater rights than other creditors as against the funds in the hands of receivers of the company. Isaac McLean Sons Co. v. William S. Butler & Co., 208 Fed. 730.

Where an auctioneer, who habitually deposits the proceeds of his sales to his own credit in the bank in which he does business and a customer who knows of this custom permits him to deposit funds from the sale of his own goods, he becomes a general creditor of the auctioneer, and a receiver of the auctioneer is entitled to take charge of the fund. Levy v. Cavanagh, 2 Bosw. (N. Y.) 100.

Where a receiver has an account as receiver and also a personal account in the same bank, and an attachment execution issues against the moneys in his personal account, and it appears that he had deposited two checks belonging to the receivership in his personal account, but it also appears that the amount of the first check had been withdrawn prior to the attachment, and there is evidence that the second check

Where a debtor has deposited collateral with a trustee as security for payment of his debt, the trustee can not be compelled to surrender the collateral to receivers of the insolvent debtor until the debt is paid, and after default, if the trust be one to apply the proceeds of the collateral for the benefit of the secured creditor, the trustee is entitled to administer the trust as against the receivers of the insolvent debtor.[7]

had been deposited in the personal account to reimburse him for advances previously made to the receivership, the attachment will hold all of the moneys in the receiver's personal account. The doctrine of following trust funds wrongfully converted by a trustee is not applicable to the facts of such a case. North American Savings Co. v. Ulrich, 42 Pa. Super. Ct. 624.

Where the principal debtor assigned its property to a trustee for the benefit of its creditors, but the trustee did not take actual possession thereof, and a receiver was appointed at the suit of a surety who did take possession and disputed the assets, and it appeared that the holder of a note had no part in the assignment nor assented thereto, the surety can not claim discharge on the ground that the property assigned was sufficient in value to pay all of the principal's debts. Manufacturers' Nat. Bank v. Chabot & Richard Co., 114 Me. 514, 96 Atl. 836.

Where no title passed to a buyer in a conditional sale contract because of failure to pay price prior to bankruptcy, no title passed to trustee. Southern Hardware & Supply Co. v. Clark, 201 Fed. 1, 119 C. C. A. 339; Andre v. Murray, 179 Ind. 576, 101 N. E. 81.

7 Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12.

In so holding, the court in the above case, speaking through Justice Wheeler, said:

"The authorities are in practical agreement in this doctrine and in its application. In Cooke v. Warner, 56 Conn. 234, 14 Atl. 798, an insurance company had voluntarily deposited with the State Treasurer securities in trust for its policy holders. The company became insolvent, and receivers were appointed. In a suit brought by the receivers claiming these securities, we held that this fund was a trust fund which would not be taken by the receivers from the trustee. Matter of Home Provident Safety Fund Assn., 129 N. Y. 288, 29 N. E. 323; Matter of Binghamton Gen. Elec. Co., 143 N. Y. 261, 38 N. E. 297; Ruggles v. Chapman, 59 N. Y. 163, 165; Risk v. Kansas Trust & B. Co. (C. C.), 58 Fed. 45; Fidelity Ins. T. & S. D. Co. v. Roanoke Iron Co. (C. C.), 81 Fed. 439; Real Estate Trust Co. v. New England L. &. T. Co. (C. C.), 93 Fed. 701; Brady v. Furlow, 22 Ga. 613. This rule rests upon the inviolability of contracts.

The appellee contends that the trust companies, as the holders of the mere legal title, hold the collateral subject to the order of the

§ 77. Whether Trustees Can Declare Default in Collateral Trust Agreement After Receivership.

Where a trust agreement is made as security for the payment of a debt and a receiver is appointed over the property of the debtor, such appointment does not pre-

court as to what is for the best interests of (1) the debenture holders, and (2) the general creditors. This conflicts with the rule universally laid down that pledged collateral can not be taken out of the hands of the pledgee by the court, and if the pledge be upon trust to collect the collateral after default and apply the proceeds to the secured debt, the trustee is entitled to administer the trust as against the receiver of the debtor. The appellee further contends that the order appealed from neither interferes with the vested rights of the trustees in this fund, nor with their possession, since it merely provides the means of liquidating it and then places it in the hands of the trustees for the benefit of the debenture holders. Let us see first some of the things the trustees agreed to do under the trust agreements. . . .

"When the receivers compromise claims and pay their own expenses and services out of the collected collateral, the collateral is deposited in ways contrary to the trust. Whether or not this course will benefit these funds is of no pertinency. The sole question is, Does it breach the contract between banking company and trust companies? If a court may in this case take property held in trust out of the hands of the trustees, administer it through a receiver, and turn the net proceeds back to the trustees, it may do this in every instance where property is placed in the hands of a trustee to secure a debt. And it would seem to follow that every agreement of lien or pledge may be similarly breached with impunity. The order, in our judgment, impairs the contract created by the trusts. It is also questionable, whether, so far as the absent and unwarned debenture holders are concerned, this constituted 'due process.'

"In one part of their brief the appellees say the authority of the trustees under the trust agreement ceased upon the naming of the receivers, and their authority can be only such as the court may now give them. This method of abolishing a trust is, we think, so new as never to have received judicial approval. A court of equity has control of trusts and trustees; it may, for cause, displace a trustee appointed by contract or otherwise, and name another in his stead. It may not order a receiver to act as and for a trustee.

"When the trustee is carrying out the trust it may not limit the exercise by the trustee of his powers under his trust agreement; it may restrain an abuse of his power, but it can not control the exercise of the legal discretion vested in him under the trust agreement."

vent the trustees from declaring on a default which occurs subsequent to the receivership, since it is immaterial whether the debtor is a going concern or under a receiver because of insolvency at the time of the default. The receiver can not by virtue of the receivership obtain any greater rights under the trust agreement than the debtor itself could have had if it had not been placed under a receiver.[1]

1 In Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12, the agreements under which mortgages were placed by a banking company in trust as security provided that on default the trustees could sell the collateral and provided that no such sale should be made at less than the face value of the collateral with accrued interest, except on consent of the banking company, its successors, or assigns, and that the trustee should not be liable for any act or omission, except for bad faith in executing the trust.

It was contended that the trustees could not declare a default under the agreement while the property of the debtor was under a receiver, but the court in answer to the arguments on that point said:

"The receivers further contend that, although the trust agreements provide for a default in the payment of principal and interest and a sale thereafter, the default in contemplation was one which occurred while the Banking Company was a going concern and not one occurring after insolvency. They find support for this claim in the terms of the agreements:

" 'But no sale thereof shall be made at a less rate than the face value with accrued interest of said collateral, except upon the written consent of said banking company, its successors and assigns.'

"And in the provision that the trustee—

" 'shall not in any case be liable for any act or omission, except for bad faith, in the execution of its trust.'

"From these provisions the receivers insist that the right to sell or collect this collateral never arose, since the default never had arisen prior to the receivership, and no right to sell had then matured, and the receivership suspended the contract between the banking and trust companies. If it be true that under the trust agreements this collateral was placed in the hands of the trustees without furnishing them the means of protecting the debenture holders by collection of the collateral upon the insolvency of the debtors, perhaps a court of equity may give the trustees power to collect. But it could only act upon application to the court to secure its aid in administering the trust. No such application was before the court. Taking the collateral from the trustees and turning it over to the receivers to collect is a very different procedure from that of invoking the court of equity to assist the trustee to ad-

§ 78. Whether Receivership Deprives Trustees of Availing Themselves of Their Ordinary Remedies.

A court of equity has no power to direct that a receiver act as and for a trustee. While such a court has power to restrain a trustee from abusing his powers it can not control the exercise of the discretion vested in him by the trust agreement.[1] The general rule is that a receiver takes property subject to all equities and liens existing

minister his trust. The right of the trustee to collect after insolvency was not, upon this theory, suspended; it never arose. But we think the agreements are not susceptible of this construction. It would be singular if a business of such magnitude and age should make the trust agreements, upon the faith of which its bonds were sold, incapable of affording protection to their holders in the common contingency of insolvency. The nature of the business and the salability of these bonds required such a provision. So long as the banking company met its financial obligations, there was no reason why it should not retain the record title to the collateral and collect the income. When it was in default, either as a going concern or an insolvent concern, it was imperative, in the interest of the debenture holder, that the trustees should have the power to collect both the income and principal of the collateral. Then it was arose the necessity for having the right to record the assignments and to compel the banking company to deliver the abstracts of title and other papers relating to the collateral. The agreements give this power and do not limit the default to that of a going concern; with these broad provisions there was no occasion to specify whether the default referred to was that of a going or an insolvent concern. . . .

"Two cases are the main reliance of the receivers. The first (Miles v. New South Bldg. & L. Assn. [C. C.], 95 Fed. 919) does hold that receivers, under circumstances such as are present in this case, may, by order of court, take possession of collateral held by a trustee and collect the collateral and hold the same as a separate fund subject to the trust under which the trustee held. We think this case is against authority, and certainly against settled principle. The second (Girard Trust Co. v. McKinley-Lanning Loan & T. Co. [C. C.], 135 Fed. 180) held the trust agreement gave the trustee no power to administer the assets in case of general insolvency, basing this construction chiefly upon the facts that the agreement of trust made no provision for payment to the trustee for its services in administering the trust after insolvency. In this case there is provision for paying the trustee."

1 Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12.

at the time of his appointment. From this rule it is apparent that the contractual rights of the trustees and beneficiaries can not be impaired by the receiver. But there is a nice distinction between the obligations of the contract, which are secured inviolate by the constitutional provisions protecting such contractual obligations and the remedies to enforce such obligations. There is often much confusion in distinguishing between matters which go to the essence of the contract and matters which merely go to the remedy. And there is a like confusion in distinguishing between laws which abolish the remedy and laws which merely substitute another remedy of an adequate character. It is not within the domain of our subject to go into the various distinctions in respect to these constitutional questions.

It is obvious that the obligation of a contract which can not be impaired by the Legislature also can not be impaired by the courts.[2] The Legislature is required to have some method of procedure reasonably adequate to afford relief.[3]

The impairment of the obligation of a contract forbidden by the constitution includes all cases where the substitution of a different remedy is of one in substance more difficult, more burdensome and uncertain than the one repealed and which appreciably lessens the value of the contract.[4]

The rule applicable to bankruptcy cases is also applicable to receiverships in this respect, and in a recent case[5] the court, in setting forth the rule, said:

"It is always onerous to a lienor to have his general right to enforce his valid liens interfered with, and this should not be done to his serious substantial injury except

2 Galey v. Guffey, 248 Pa. 523, 94 Atl. 238.

3 Bost v. Cabarrus County, 152 N. C. 531, 67 S. E. 1066.

4 City of Cleveland, Tenn., v. United States, 166 Fed. 677, 93 C. C. A. 274.

5 In re Morse, 210 Fed. 900.

in rare instances. On the other hand, the mortgaged property of a bankrupt should not be sacrificed by hasty sales or under such circumstances that the rights therein, if any, of general creditors are destroyed or seriously impaired."

We have no doubt that a receivership court would have the right to enjoin the enforcement of a lien or trust, if the elements of fraud or oppression entered into the manner of such enforcement,[6] and especially where equities existed in favor of the debtor whom the receiver represented. In fact, the jurisdiction to interfere in the matter at all would be dependent upon an equity or right existing in favor of the receiver. The long-continued restraining of the remedy provided for in the contract might, however, amount to such a deprivation of any remedy whatever as would violate the constitutional rights of the trustees and beneficiaries.

The stipulation in a deed of trust which provides for the time, conditions, and terms of a sale of the property upon a failure of the grantor to pay the debt is of the essence of the obligation of the contract, and an act of the Legislature which stays the collection of debts for a limited period and which forbids sales under deeds of trust is unconstitutional.[7]

Where the contract parties agree on the remedy it has been held that the remedy becomes a part of the contract and can not be affected by any subsequent statute without

[6] In re Jersey Island Packing Co., 138 Fed. 625, 2 L. R. A. (N. S.) 560, 71 C. C. A. 75, a bankruptcy case, in which a sale by trustees under a deed of trust was restrained. The purpose of the restraining order was to conserve the grantors' equity for the benefit of unsecured creditors. There were elements of fraud in the proposed sale by the trustees in that the proposed sale was concealed from the parties interested in seeing that the property brought the best price possible at such a sale. The court, however, admitted that it could not interfere with the proposed sale unless an "equally efficient and adequate remedy is substituted."

[7] Taylor v. Stearns, 18 Gratt. (Va.) 244.

an impairment of the obligation thereof. Hence, in such circumstances, secured creditors of an individual whose estate has been placed in the hands of a receiver can not be enjoined from adopting and applying such legal remedies as are allowed them by their contract at the times permitted by the contract.[8]

But when parties undertake to fix the remedies by which their obligations are to be enforced, they do so subject to the paramount right of the state to determine as to the policy which the general good requires to be done, since no vested right in any particular remedy.[9] The right to change the remedy is, however, subject to the limitation that the Legislature can not take away the whole remedy or impose such burdens or restrictions on it as materially impair the value and benefit of the contract.[10]

After the appointment of a receiver over the property, if a trustee or lien holder desires to commence legal proceedings in respect to the property, it will be necessary to obtain leave of the receivership court under the general practice prevailing in regard to matters within the jurisdiction of such courts.[11]

The principles of this section are necessarily applied in foreclosure proceedings under mortgages and other

8 Galey v. Guffey, 248 Pa. 523, 94 Atl. 238.

9 Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163, 27 Sup. Ct. 755; Henley v. Myers, 76 Kan. 723, 736, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173 (affirmed 215 U. S. 373, 54 L. Ed. 240, 30 Sup. Ct. 148); Conkey v. Hart, 14 N. Y. 22.

In Handy v. Chatfield, 23 Wend. (N. Y.) 35, the court said: "It is the business of the legislature and the courts to regulate the forms in which judicial proceedings shall be conducted and those forms can not be controlled by any stipulation of the parties; for example, an agreement that an action of covenant may be maintained on a contract by parol, or that two distinct causes of action may be inserted in one count."

10 Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; South Fork Canal Co. v. Gordon, 73 U. S. (6 Wall.) 561, 18 L. Ed. 894.

11 The necessity to obtain leave of court will be discussed under the chapter devoted to Courts.

liens and in sales under deeds of trust, and the cases dealing with those topics will be found under their respective heads.

§ 79. Right of Trustee to Bind His Beneficiaries by His Acts.

Where an application for a receiver for a corporation is made by the trustee in a trust deed to secure the holders of the bonds, a bondholder, being a beneficiary under the trust, is bound by the *bona fide* acts of the trustee, so long as he does not appear in the proceeding individually.[1]

2. Estates of Decedents.

§ 80. General Principles Applicable.

Although a court of chancery has an undoubted right to appoint a receiver over the estate of a decedent and thereby displace an executor or administrator, it will not do so except in cases where there appears to be a very urgent necessity in order to preserve and protect the property from injury or loss or where there is no one legally competent to administer the estate, or where those charged with such duty are violating their trust.

The reason for this rule is in the principle that where the law has created an office and charged the occupant with the duties appertaining thereto, no court will willingly step in and, through its officers, assume the functions of the legally constituted authorities, and particularly so where another court is given jurisdiction to adequately and completely protect the interests of all parties concerned, as in the administration of estates. The probate courts, and those of similar jurisdiction, are usually clothed with ample and complete power in this regard.

And where the executor or administrator is guilty of misconduct or violating his trust, the statutory provisions

1 Title Ins. & Trust Co. v. California Development Co., 171 Cal. 227, 152 Pac. 564.

in most of the states contain ample provisions for his removal and the appointment of a suitable successor. A survey of the cases bearing on the question will show that most of the decisions on the subject are early ones and rendered under different conditions than exist at the present time. In our opinion the only circumstances in which a receiver is properly appointed over the estates of decedents are pending the taking of possession by an executor or administrator or pending the proceedings necessary to remove unfaithful officials and appoint their successors, and even in such circumstances, it will generally be found that modern statutes provide for *ex parte* administrators to protect the estate until permanent officers can be appointed by the probate courts. Hence the question to be investigated upon an application for the appointment of a receiver over an estate of a decedent is whether there is an adequate statutory provision existing in the particular state to remedy the evil which is set forth as the ground for the appointment of a receiver.

§ 81. Receivership Pending Institution of Probate Proceedings.

As was suggested in the preceding section, courts of equity will under exceptional circumstances appoint a receiver in lieu of an executor or administrator where there is a strong showing of an abuse of trust but they are reluctant to act and do so with extreme caution.[1] The theory upon relief by way of the appointment of a receiver is given for the purpose of preventing a probable injury or loss to the estate, although past wrongs may be considered in determining the probability of future ones.[2] For these reasons it is obvious that a very

1 Dougherty v. McDougald, 10 Ga. 121; Harrup v. Winslet, 37 Ga. 655; Powell v. Quinn, 49 Ga. 523; West v. Mercer, 130 Ga. 357, 60 S. E. 859; Stairley v. Rabe, McMul. Eq. (S. C.) 22; Shannon v. Davis, 64 Miss. 717, 2 So. 240; Haines v. Carpenter, 1 Woods 262, Fed. Cas. No. 5905; Middleton v. Dodswell, 13 Ves. 266; Steele v. Cobham, L. R. 1 Ch. App. 325.

2 A receiver will not be appointed

strong case must be shown in order to take the assets of an estate out of the hands of an executor or administrator and place them in that of a receiver. The court administering the estate in probate has jurisdiction to discharge the administrator and appoint a new one and compel such officials to account to the court in respect to their stewardship. Hence there must be a showing of an immediate danger of waste or of a wrong which the court acting in its probate capacity is incapable of effectually remedying or preventing. And whatever charges are made in such a case must be made with certainty.[3]

In all cases, however, the appointment of a receiver rests in the sound judicial discretion of the court, under all the circumstances of the case.[4]

The general rule is that a receiver of the assets of a decedent will be appointed in equity if it appears from all the circumstances that there is no executor or admin-

over an estate in the hands of an administrator on account of misconduct of the decedent during his lifetime where no charges of waste or misconduct are made against the administrator. Perrin v. Lepper, 56 Mich. 351, 23 N. W. 39.

[3] Powell v. Quinn, 49 Ga. 523; Wanneker v. Hitchcock, 38 Fed. 383.

A receiver is not granted over an estate, where no grounds are shown why an administrator could not be appointed immediately. Jones v. Frost, 3 Madd. 1.

[4] In Ladd v. Harvey, 21 N.H. 514, the court say: "Where there is some evil actually existing, or some evidence of danger to the property upon the filing of the answer, a receiver will be appointed. Hugonin v. Basely, 13 Ves. Jr. 105. So, where before answer there is evidence that the property is in danger from insolvency actually existing or expected. Middleton v. Dodswell, 13 Ves. Jr. 266. And a receiver will be appointed before answer where justice requires it. Duckworth v. Trafford, 18 Ves. Jr. 283. The exercise of the power to appoint a receiver must depend upon sound discretion, and be a case in which it must appear fit and reasonable that some indifferent person under approved security should receive and distribute the issues and profits for the greater securities of all the parties concerned. Verplank v. Caines, 1 Johns. Ch. (N. Y.) 57. A receiver is proper if the fund is in danger, and this principle reconciles the cases found in the books. Orphan Asylum Society v. McCartee, 1 Hopk. Ch. (N. Y.) 429, 435."

istrator in existence, where there is imminent danger of the property of the decedent being taken from the state, leaving no other property liable to pay creditors, and the person in possession is insolvent or a nonresident.

In such a case it is essential that the plaintiff should show, first, either a clear legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction, and, secondly, it must appear that the property was obtained by the defendant through fraud, or that the property itself or the income from it is in danger of loss from negligence, waste, misconduct, or insolvency.[5]

Under the practice obtaining in the English Court of Chancery, receivers were appointed by it pending proceedings in the ecclesiastical court for the probate of a will or the administration of an estate. The ground for the interposition of the court of equity was the fact that there was no one legally entitled to administer the estate and the receivership proceeding was employed for the purpose of preserving the estate pending the litigation.[6] It was necessary, however, that the property of the estate was in danger of loss.[7]

5 Flagler v. Blunt, 32 N. J. Eq. 518.

It would appoint a receiver if it appeared from all circumstances of the case that there was no executor or administrator in existence with the right and power to act as such, notwithstanding that there was no ground laid for interference in respect of any improper conduct of the parties. Watkins v. Brent, 1 M. & C. 97.

6 Watkins v. Brent, 1 Myl. & Cr. 97, Marr v. Littlewood, 2 Myl. & Cr. 454; Parkin v. Seddons, L. R. 16 Eq. 34; Grimston v. Turner, 18 W. R. 724, 22 L. T. 646; In re Goods of Pryse (1904), P. 301; Overington v. Ward, 34 Beav. 175.

Before the grant of administration, a receiver and manager may be appointed to carry on the business of an intestate. Blackett v. Blackett, 19 W. R. 559; In re Wright, 32 Sol. J. 721.

Pending the probate of a will the court will appoint a receiver, but the appointment of receivers elsewhere than in the probate division is discouraged. In re Parker, 54 L. J. Ch. N. S 694

7 Evans v. Coventry, 5 D. M. & G.

In England upon the abolition of the ecclesiastical courts by the establishment of the courts of probate, the act[8] authorized that court, pending any proceeding respecting the validity of a will, the revocation of a probate or administration, to appoint an administrator with the powers of a general administrator other than that of distribution.

Since the enactment of the act establishing the court of probate, the English chancery courts do not appear to be called upon as frequently to appoint receivers, and in one case[9] the court referred to the jurisdiction conferred by the act and refused to appoint a receiver in a case where an administrator had been appointed on the ground that such an appointment would tend to create an apparent conflict between the two courts which would be an unwise thing to do. But where the court has not exercised its power to appoint an administrator *pendente lite,* the equity court will intervene in by the appointment of a receiver in a proper case.[10] The court of equity will

917; Knight v. Duplessis, 1 Ves. 324; Richards v. Chave, 12 Ves. 462.

8 Court of Probate Act 1857 (20 & 21 Vict., ch. 77).

9 Veret v. Duprez, L. R. 6 Eq. 329; see, also, Hitchen v. Birks, L. R. 10 Eq. 471.

10 Parkin v. Seddons, L. R. 16 Eq. 34.

If an administrator ad litem has not been appointed by the probate division, the chancery division will, as a matter of course, appoint a receiver. Cf. in the Goods of Pryse (1904), P. 301.

There must be a lis pendens to justify the making of an order for a receiver before grant of probate or administration, and entering a caveat, the fact that it has been warned by the executor, does not constitute a lis pendens. Salter v. Salter (1896), P. 291.

Where, pending litigation, a receiver had been appointed by the Court of Chancery, with authority to collect the outstanding personal estate until administration, and with liberty to apply for letters of administration, a general grant of administration was made to the receiver. In re Mayer L. R. 3 P. & M. 39; In re Moore (1892), P. 145.

As soon as the chancery court finds some one appointed by the probate court as an administrator, even although he is only appointed pendente lite, it will discharge the order for a receiver and will allow the administrator to administer the estate, but it will exercise a supervisory jurisdiction in the mat-

not, however, usurp the probate jurisdiction of the regular probate courts.[11]

The same general principles applied by the English courts are applied by the courts of our own country subject to the statutory provisions existing in the different states. The essential point in all applications for receivers in such circumstances is that there must be a danger of loss of assets belonging to the estate which can be guarded against by the appointment of a receiver. In proper cases under the general principles applicable to the law of receiverships, our courts appoint receivers pending the probate of a will or the issuance of letters of administration,[12] but such jurisdiction is merely concurrent and the plaintiff will be bound by prior decisions in the cause.[13]

§ 82. Receivership Pending Will Contest.

Where by reason of a contest in the court of probate there is no proper person to receive the estate, a

ter. Per Lord Penzance, L. R. 1 P. & M. 733.

11 A receiver pendente lite can not be appointed of the estate of a testator, where a caveat has been entered and warned, and appearance has been entered, but no writ has been issued. Salter v. Salter, 65 L. J. P. D. & A. N. S. 117 (1896), P. 291, 75 L. T. N. S. 7.

Even though a receiver has been appointed during a litigation in a proper court, the court will not order the person named as executor to pay into court money into his hands belonging to the testator's estate received previously to the appointment of the receiver. Reed v. Harris, 7 Sim. 639, Edwards v. Edwards, 10 Ha. App. 63.

Although the court will also appoint a proper person to protect a testator's estate, where the circumstances require it, until a legal personal representative is appointed, an action to protect and also to administer the estate is irregular. Overington v. Ward, 34 Beav 175; cf.. Nothard v. Proctor, 1 Ch. D 4.

12 A court of equity may call in the assets of the estate from the personal representative, and place them in a receiver's hands. Davis v. Chapman, 83 Va. 67, 5 Am. St. Rep. 251, 1 S. E. 472; Robinson v. Taylor, 42 Fed. 803; Underground Electric Rys. Co. v. Owsley, 176 Fed. 26, 99 C. C. A. 500.

13 Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547, 4 Sup. Ct. 619; Arrowsmith v. Gleason, 129 U. S. 86, 32 L. Ed. 630, 9 Sup. Ct. 237. But see McCauley v. McCauley, 202 Fed. 280.

receiver may be appointed.[1] And where a bill is filed by a devisee to try the validity of a will as to real estate the court will, under special circumstances, appoint a receiver.[2]

1 It is not an unlawful interference for an executor to take possession of testator's property pending probate of his will and to remove it to another place for safe-keeping; and, in the absence of allegations of incompetency, dishonesty, or insolvency, or of wasting assets, such acts furnish no ground for the appointment of a receiver at the suit of a creditor. Dickinson v. Powers, 140 App. Div. 105, 125 N. Y Supp. 949.

Rendall v Rendall, 1 Hare 152. In Wood v. Hutchings, 2 Beav. 289, an appeal was pending in the privy council from the ecclesiastical court, and the power of the administrator pendente lite had been suspended by an inhibition from the appeal court and there was no one, pending the litigation, to care for the estate.

An action for a receiver, pending a litigation as to probate, ought not to seek discovery in reference to the merits of the litigation; for the plaintiff can not by one action obtain specific relief, and also discover on a matter distinct from that specific relief. But the mere fact of discovery being sought in an action will not prevent the appointment of a receiver, where there is a clear title to relief. Wood v. Hutchings, 3 Beav. 504.

Where an executor, by agreeing with his opponents that the question as to the validity of the supposed testamentary papers should be tried in a suit to recall probate, had treated himself as not being complete executor, a receiver was appointed. Watkins v. Brent, 1 M. & C. 97.

If the question be whether the party claiming to be the executor is so de jure or not, a receiver will be appointed. Rendall v Rendall, 1 Ha. 155.

2 Middleton v. Sherburne, 4 Younge & C. 358. But not in the absence of an allegation of the insolvency of those in possession of the land. Bryan v Moring, 94 N C. 694.

Receivers have been appointed where there were contests over the probate of different wills. See Montgomery v. Clark, 2 Atk. 378; Marr v. Littlewood, 2 Myl. & C. 454; Jones v. Goodrich, 10 Sim. 327; Watkins v. Brent, 1 Myl. & C. 97; Whitworth v. Whyddon, 2 Macn. & G. 52; Vodmore v. Gunning, 5 Sim. 485.

A receiver will not be appointed on application of a devisee under a contested will except in a clear case of right of recovery and where there is danger of loss. Clark v. Dew, 1 Russ. & M. 103.

Where there are concurrent actions in the chancery division of the High Court of Justice and in an inferior court which has jurisdiction in the subject-matter, the chancery court may, in special circumstances, appoint a receiver in the chancery action. Northard v. Proctor, 1 Ch. D. 4.

Where, pending a contest in the ecclesiastical court as to the valid-

Where different executors were contesting the right to probate the estate, a receiver was appointed *pendente lite*.[3]

And where there is a showing of fraud on the part of the persons contesting a will and it appears that the object of the contest is the delay of the probate of the will, the court of equity will appoint a receiver, notwithstanding that the ecclesiastical court in which the contest was pending could have appointed an administrator *pendente lite*.[4]

But the court is reluctant to appoint a receiver and thereby interfere with the person in possession under a will where the property is of small value.[5]

Where an administrator of a life estate has been appointed and has partially administered the estate, a receiver will not be appointed, however proper it might have been to do so in the first instance.[6]

But where a large amount of vacant land formed part of a decedent's estate, the court properly appointed a receiver to rent the land, pending an action by the executor to construe the will, to allot dower to the widow, and to settle the estate.[7]

Although where a devise under a will is presumptively valid, a receiver will not be appointed where no danger of loss or insolvency on the part of the persons in possession is shown.[8]

ity of two wills, the plaintiff filed a bill for a receivership of the testatrix's estate, and to set aside an assignment made by her to the defendant, the court refused to appoint a receiver to the property comprised in the assignment, that being claimed by the defendant independently of either will. Jones v. Goodrich, 10 Sim. 327.

3 Anderson v. Guichard, 9 Hare 275.

4 Atkinson v. Henshaw, 2 Ves. & Beav. 85.

5 Whitworth v. Whyddon, 2 Macn. & G. 52.

6 Shannon v. Davis, 64 Miss. 717, 2 So. 240.

7 Clay v. Anderson, 141 Ky. 455, 132 S. W. 1039.

8 In Richter v. Lindemann, 166 App. Div. 33, 152 N. Y. Supp. 784, the suit was by an heir for partition of the estate on the ground

In a suit to annul probate, the court upon the application of the acting executor appointed a receiver where it was shown that the opposing party had notified the creditors of the estate not to pay the acting executor, since such acts on his part tended to hinder the collection and preservation of the estate.[9]

Where there is a contest between parties interested in an estate, growing out of the validity of a will, and a receiver has been appointed prior to the appointment of an administrator *pendente lite,* and the contest is likely to be protracted, it is proper to order the receiver to turn over to the administrator *pendente lite* the personal and real estate belonging to the testate. This is based upon the fact that the orphans' court appointing the administrator is the proper court for the adjudication of the matters in dispute, and the jurisdiction of the chancery court was temporary and for the purpose of preserving the property until such time as the proper court appointed a person with full power to protect and preserve the property.[10]

§ 83. Whether Receivership After Judgment in Will Contest.

Under the provisions of the New York statute relating to the contest for the revocation of a will and confining the issue to whether the writing produced is or is not the last will of the testator, it has been held that the court

that certain devises by the will and deeds placed in escrow as provided in the will were invalid and a receiver was sought. The court refused to make the appointment on the ground that the devise was presumptively valid and that the court in such circumstances would not disturb the possession of the parties where no danger of loss or insolvency was shown.

9 Marr v. Littlewood, 2 M. & C. 454.

10 A court of chancery can not appoint a receiver after the granting of letters pendente lite by the orphan's court, and if such receiver has been appointed prior thereto, his powers cease after the grant, and he will be discharged and directed to deliver over the property to such administrator. In re Colvin's Estate, 3 Md. Ch. 278.

can not appoint a receiver after final judgment to preserve the real property pending an appeal. The title to the property in such a case passes to the heirs at law and possession must be recovered in the proper form of action for the recovery of the possession of real property.[1]

§ 84. Receivership Where Executor or Administrator Is Charged With Fraud, Mismanagement, or Waste.

There must be a strong case made for the appointment in order to justify a court in interfering in the matter of trustees who have been appointed, or authorized to act under the orders of another court of competent jurisdiction, and especially so in the case of executors who are presumed to have been appointed by reason of some peculiar fitness or confidence reposed in them by the testator.[1]

[1] Johnson v. Cochrane, 91 Hun 163, 36 N. Y. Supp. 287.

[1] Haggarty v. Pittman, 1 Paige (N. Y.) 298, 19 Am. Dec. 434; Burt v. Burt, 41 N. Y. 46; Beverley v. Brooke, 4 Gratt. (Va.) 187, 208; Bainbridge v. Blair, 4 L. J. Ch. N. S. 207; Smith v. Smith, 2 Younge & C. 361; Middleton v. Dodswell, 18 Ves. Jr. 286.

In Shannon v. Davis, 64 Miss. 717, 2 So. 240, it is held that where an administrator has been appointed and has partially administered the estate, a receiver is improper, though it might have been proper to appoint in the first instance. In Perrin v. Lepper, 56 Mich. 351, 23 N. W. 39, it was held that in the absence of proof of waste on the part of the administrator, or danger to the estate, the appointment would not be made. Cooley, J., says: "Receivers are not appointed by way of punishment of parties, and especially of dead parties, for their misconduct." The court, however, will not hesitate where the administrator is seeking to administer property the title to which appears to be in another. Hill v. Arnold, 79 Ga. 367, 4 S. E. 751; cf. Stairley v. Rabe, McMull. Eq. 22; Middleton v. Dodswell, 18 Ves. Jr. 68. And see Rendall v. Rendall, 1 Hare 152, where the vice chancellor reviews the English doctrine upon this subject. And in Haines v. Carpenter, 1 Woods 262, Fed. Cas. No. 5905, the court refused to entertain a bill to appoint a receiver upon the ground that the executor had qualified and given bond for the discharge of his trust and had taken possession of the estate under the provisions of the will of the testator, where the allegations were made on information and belief. The court says: "The property is in gremio legis; the jurisdiction of the parish court has

Remedies in cases in which fraud is charged being particularly within the protection of courts of equity, a receiver will be appointed where an executor or administrator is charged with such fraud and danger of loss to the estate is imminent.[2]

But if fraud is charged against an administrator for the purpose of displacing him with a receiver, such charges must be alleged with certainty and specifically set forth.[3]

In such cases the rule was stated by the New York court[4] in the following language:

"The court looks to the security and preservation of the property, and ought not to interfere pending the litigation when the plaintiff's right is not perfectly clear and the property itself, or the income arising from it, is not shown to be in danger; and it is acknowledged to be the rule in several of the English cases that there must be some evil actually existing, or some evidence of danger to the property or a strong special case of fraud in the

attached to the assets; they are in the hands of a trustee who is required to account only to the court which appointed him, and this court has no power to take the assets from the possession of that trustee and compel him to account here." In Wanneker v. Hitchcock, 38 Fed. 383, it was held that where the probate court had full power to protect the interests of all parties a receiver would not be appointed.

2 Rutherford v. Douglas, 1 Sim. & St. 11n; Watkins v. Brent, 1 M. & C. 102; Dimes v. Steinberg, 2 Sm. & G. 75; Vernon v. Kinzie, 2 U. C. Jur. 40.

3 Powell v. Quinn, 49 Ga. 523.

4 Willis v. Corlies, 2 Edw. Ch. (N. Y.) 281. This was a case against trustees, but the principle is applicable to executors and administrators as well. See, also, Hugonin v. Basely, 13 Ves. Jr. 105; Middleton v. Dodswell, 18 Ves. Jr. 286; Lloyd v. Passingham, 16 Ves. Jr. 69. In another case in the Irish chancery court it has been observed that such an interference is, to a certain extent, giving relief—in fact, depriving defendants of a present use and enjoyment of the estate and, so far, a decision pro tempore against them; and, therefore, without some strong necessity, the court ought not to do any act to disturb the existing possession until, from a view of the whole case and by a regular adjudication, it can pass upon the right. Houlditch v. Lord Donegal, 1 Beatty 402, 16 Ves. Jr. 59.

defendant clearly proved to induce the court in this stage of the cause to take the property under its care."

And speaking upon the general subject of the appointment of receivers in cases where fraud is alleged as the ground for such appointment Lord Eldon in Lloyd v. Passingham[5] said the court must not only be satisfied of the existence of the fraud but must be morally sure that upon the hearing of the cause the party would, under those circumstances, be turned out of possession, but it must see some danger to the intermediate rents and profits.

Where it appears that the conduct of an administrator is such as to hinder and delay the collection of the assets of an estate, a court of chancery has power, and it is its duty, to appoint an administrator to collect and hold the assets, and, having acquired jurisdiction for that purpose, it may retain it for the purpose of finally settling the estate.[6]

And likewise where the executor or administrator is guilty of such misconduct as jeopardizes the safety of the estate, receivers have been appointed over the estate for the purpose of preserving and safeguarding it.[7]

5 In this respect see, also: Clark v. Ridgely, 1 Md. Ch. 70; Randle v. Carter, 62 Ala. 95; Ex parte Walker, 25 Ala. 81; Hitchen v. Birks, L. R. 10 Eq. 471.

6 Du Val v. Marshall, 30 Ark. 230.

Where it is shown that the executor is guilty of misconduct, and was not a safe custodian and was insolvent and the estate is insolvent, a receiver will be appointed. In such case it is not necessary to establish an exhaustion of legal remedies. Harmon v. Wagener, 33 S. C. 487, 12 S. E. 98.

7 To justify the appointment of a receiver to take the custody of assets in the hands of an executor or administrator there must be actual misconduct or fraud, and immediate danger of loss. Randle v. Carter, 62 Ala. 95, and Ex parte Walker, 25 Ala. 81.

A receiver should not be appointed to take the assets out of the hands of legally appointed representatives of a decedent, except in cases of manifest danger of loss or destruction to the assets. West v. Mercer, 130 Ga. 357, 60 S. E. 859.

Where, in an action to establish an equitable claim against an estate, it did not appear that the administrators were guilty of

waste or mismanagement, a receiver should not be appointed over the estate. Crawford v. Wilson, 139 Ga. 654, 44 L. R. A. (N. S.) 773, 78 S. E. 30.

The advance by the executors to the widow of less than half of the cash on hand, which was prima facie a community fund, does not authorize the appointment of a receiver pending an action by the heirs to recover their alleged interest in the estate, and for partition, upon the ground of misapplication of the funds and refusal to allow the plaintiffs free access to the books of deceased, where the widow's interest in the estate is apparently largely in excess of the amount paid her, and she was otherwise without means of support. Harris v. Hicks, 13 Tex. Civ. 134, 34 S. W. 983.

Where decedent's real property, worth $100,000, was claimed by the state as having escheated and also claimed by defendant under an alleged will and by another claiming to be decedent's only heir at law, and the lands having been sold for municipal taxes, the rents were being collected by the purchasers at the tax sale, a mortgagor having also filed foreclosure proceedings, defendant as administratrix having in no way attempted to protect the property, and it appearing that the conflicting claims will produce prolonged litigation, a receiver was properly appointed to protect the property. McCarter v. Clavin, 72 N. J. Eq. 642, 66 Atl. 599.

In Harmon v. Wagener, 33 S. C. 487, 12 S. E. 98, a suit was instituted by the executor for the sale of land and to marshal assets and to enjoin creditors from suing at law, in which general creditors intervened, and asked to have a receiver appointed on the ground that the executor was guilty of misconduct in his management of the estate, and was not a safe custodian thereof, and was insolvent. It was also held that the judgment and execution returned in such case was unnecessary, for the reason that the principle has no application in a suit to marshal assets, or in a suit to compel an administrator or executor to account. Cf. Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781; Austin v. Morris, 23 S. C. 393, 408. In Middleton v. Dodswell, 13 Ves. Jr. 266, Lord Erskine said: "But if a manifest abuse of the trust by wasting the property appears, which does appear in this instance, not from a single act but an habitual and prospective course of dealing, bringing the property into danger, can it be said that this court is not to treat an executor as any other trustee? And an executor may say that unless he is proved to be insolvent, the court is to overlook the misapplication and refuse a receiver." In this case the application was before answer. The marriage of an executrix to a second husband in necessitous circumstances where there were infant children by the first marriage was held sufficient ground for the appointment of a receiver in Dillon v. Lady Mount Cashell, 4 Bro. P. C. 306; Lake v. De Lambert, 4 Ves. Jr. 593. In Stairley v. Rabe, McMul. Eq. (S. C.) 22, it appeared that the executrix had managed the estate judiciously, but subsequently married a second husband possessing no qualifications for the management of such an estate, but

The charges of mismanagement and misconduct which form the basis of the ground for the appointment of a receiver in lieu of an executor or administrator must not be made merely upon information and belief.[8]

Where, however, the executor admits that he has wasted and misappropriated the trust funds but refuses to give the details thereof and has also allowed his co-executor to do the same, the court very properly appoints a receiver.[9]

was young, of limited means, and without experience and with little aptitude for any occupation. Cf. Jenkins v. Jenkins, 1 Paige (N. Y.) 243; Gildersleeve v. Lester, 68 Hun (N. Y.) 532, 22 N. Y. Supp. 1026.

Where there is a waste and misappropriation of the funds of an estate, a receiver will be appointed. In re Wells, L. R. 45 Ch. Div. 569.

In re Fowler, L. R. 16 Ch. Div. 723. "It is made the duty," says the chancellor, "of trustees of leasehold property to keep it free from forfeiture out of the rents, if no other fund is applicable."

A receiver was appointed because of the misconduct of one of three executors and devisees in trust, the other two consenting to the appointment. Middleton v. Dodswell, 13 Ves. 268.

The will of a testator was probated in Chicago as his place of domicile, and a general executor was appointed. Decedent owned property in New York City of the value of some $3,000,000, including a valuable residence and art collection, but the executor took no steps for ancillary administration there for three years, and in the meantime the property was in possession of the widow, who asserted an adverse claim to a large part of the estate. The art collection was not only given no care, but taxes amounting to $200,000 were left unpaid, and a mortgage on a part of the real estate was allowed to be foreclosed for non-payment of interest. When the executor applied for appointment as ancillary administrator, his application was contested by the widow, who procured an injunction in Chicago restraining him from proceeding therewith. The estate was largely indebted, and a foreign creditor whose claim for a large amount had been allowed filed a bill in equity in the federal court in New York on behalf of itself and all other creditors, praying the appointment of a receiver, that the court administer the property there, and for general relief. The court held that the fact that a part of the property was in the possession of the widow under an adverse claim thereto was not ground for denying a receiver. Underground Electric Rys. Co. v. Owsley, 176 Fed. 26, 99 C. C. A. 500.

8 Haines v. Carpenter, 1 Woods 262, Fed. Cas. No. 5905.

9 Price's Executrix v. Price's Executors, 23 N. J. Eq. 428.

But where the charges in respect to misconduct and insolvency on the part of the executor are fully denied, it has been held that a receiver should not be appointed.[10]

The charges of misconduct must be of a serious character and tend to endanger the safety of the estate.[11] A receiver will not be appointed where the alleged cause of complaint occurred during the lifetime of the intestate, and where there is no allegation of mismanagement against the administrator.[12]

§ 85. Effect Where Mismanagement Based on Account Approved by Probate Court.

Where an executor has rendered his accounts to the probate court and that court has passed upon them, a court of equity will not re-examine them in order to sustain a charge of waste and mismanagement against the executor. In such a case the probate court has jurisdiction of the examination of the accuracy of such accounts

10 Fairbairn v. Fisher, 57 N. C. 390.

11 That one of three executors of an estate without bond has been seen a few times playing cards for money is not sufficient cause for the appointment of a receiver pending an action by the heirs to recover their alleged interest in the estate, and for partition, where a large number of business and professional men in the community where such executor lives affirm his integrity of character and his entire fitness for the trust. Harris v. Hicks, 13 Tex. Civ. 134, 34 S. W. 983.

Orphan Asylum Society v. McCartee, 1 Hopk. Ch. (N. Y.) 429. In this case a bill was filed by a legatee under a will against trustees to obtain the benefit of the devise, and also for the appointment of a receiver. The court held that the question of the legality of the devise was resting in equilibrio, and could not be considered in the motion; that the mixing of the trust funds with his own was of itself no ground for the appointment; that in the absence of danger this was no breach of duty; and that there was no case in which the court appointed a receiver merely because the measure could do no harm, and still less where the trustee was such under the appointment of a testator.

12 Perrin v. Lepper, 56 Mich. 351, 23 N. W. 39. There was no showing whatever that the property was being wasted by the complainant administrator, or that the estate was unsafe in his hands, and a receiver was refused.

and another court will not base its action upon alleged errors therein.[1]

§ 86. Mere Disagreement Between Several Executors as to Management.

A mere disagreement between two executors in respect to the proper management of the estate is not sufficient ground for the appointment of a receiver of the property of the estate.[1]

§ 87. Receivership on Failure to Obey Orders of Court or Directions in the Will.

A receiver may be appointed where a trustee fails to pay money due from him pursuant to an order of court.[1]

In one case a receiver was appointed on account of laches of the heirs who had been substituted as trustees to execute a devise to charity.[2]

Where a will empowers and authorizes a devisee to take any and all proper and necessary steps to enforce payment of an annuity to her, the appointment of a receiver to collect the rents, issues, and profits and apply them to the payment of the annuity, is a matter within the discretion of the court.[3]

To authorize the court to appoint a receiver, it is sufficient that the executor has not done what he could to get in the personal estate of the testator, that he has left a considerable portion of it outstanding on improper securities, and that he has not raised a certain sum, as directed

1 Simmons v. Henderson, Freem. Ch. (Miss.) 493.

1 Fairbairn v. Fisher, 57 N. C. 390.

1 In re Coney, L. R. 29 Ch. Div. 993. In this case the trustee had absconded; and it was decided upon the authority of Leathes v. Leathes, Weekly Notes, 1882, p. 71, and based as to general power under the Judicature Act of 1873, § 25, sub. 8. See, also, Whiteley v. Learoyd, 56 L. T. 846.

2 Attorney General v. Bowyer, 3 Ves. Jr. 714.

3 Gee v. Gee, 107 Ill. App. 313 (judgment affirmed, 204 Ill. 588, 68 N. E. 515).

by the testator's will, for the maintenance and education of an infant legatee.[4]

But where trustees have a discretion in regard to the doing or not doing of a particular thing, as in the payment of interest, it is improper for the court to make an order which will take from the trustees this discretion. Thus, where trustees under a will were directed to set apart and invest a sum of money, and were authorized in their absolute discretion from time to time, and at such time or times as they should think proper, to pay or apply the whole or any part of the income to or for the benefit of the judgment debtor, in such a manner and in all respects as they should think proper, the money will not be ordered paid to the receiver.[5]

§ 88. Effect of Insolvent Character of Executor or Administrator.

The court will not appoint a receiver in lieu of an executor or administrator where the only ground of complaint alleged is the poverty or financial irresponsibility of the person acting in this relationship. There must be some danger of loss to the estate from some acts on the part of such executor or administrator for which he will not be able to answer by reason of his insolvency.[1] In

4 Richards v. Perkins, 3 Y. & C. 307.

5 Queen v. Lincolnshire & Dixon County Judge, L. R. 20 Q. B. Div. 167.

1 In North Carolina R. Co. v. Wilson, 81 N. C. 223, the trustee loaned part of the funds to a firm of which he was a member, which subsequently failed; and it was held that the trustee's insolvency and unsuccessful management of his own business might be considered in passing upon the question.

In Fairbairn v. Fisher, 57 N. C. 390, the court says: "There does not appear to be any change for the worse, at least in the property or credit of the executor, since the death of the testator or even the making of his will; the mere poverty of the executor does not authorize the court against the will of the testator to remove him by placing a receiver in his place. There must be in addition some maladministration, or some danger of loss from the misconduct or negligence of the executor, for which he will not be able to answer by reason of his insolvency." Howard v. Papera, 1 Madd. 142;

other words, even if the estate be in danger it must be also shown that the party in possession is irresponsible

Gladdon v. Stoneman, 1 Madd. 143, note; Johns v. Johns, 23 Ga. 31; Anonymous, 12 Ves. Jr. 4.

Where the executor who is insolvent and carrying on the business of the testator pursuant to his directions, and there is sufficient property to pay the debts of the estate, refuses to pay debts or use the assets for that purpose, a receiver will be appointed on the application of a creditor. Willis v. Sharp, 46 Hun (N. Y.) 540.

Nor will the fact that it appears that the executrix is a person of little or no fortune be sufficient in the absence of proof of mismanagement; nor is the fact of a dispute in another court concerning the probate sufficient. Knight v. Duplessis, 1 Ves. Sr. 324. In Howard v. Papera, 1 Madd. 142 (Am. ed., p. 86), the vice chancellor says: "No misapplication or abuse of trust is made out against this executrix, and it would be too much to take the administration of this testator's property out of her hands merely because she is poor, a circumstance known to her husband, the testator, when he appointed her executrix." Cf. Gladdon v. Stoneman, note to last case cited; Jenkins v. Jenkins, 1 Paige (N. Y.) 243; Price's Ex'x v. Price's Ex'rs, 23 N. J. Eq. 428.

In Anonymous, 12 Ves. Jr. 4, the question before the court was upon the sole ground that the executrix had no property other than an annuity of £20 given her by the testator, and that therefore a receiver should be appointed, and Sir William Grant says: "There is no doubt that in several instances, as, if the executor has wasted the effects, or in other respects has misconducted himself, this court will interfere. But has the court ever taken the disposition out of the hands of the executor on account of his mean circumstances—for it comes to that? You must prove the unfitness of the person. In this case the only ground is that she is not a person of property. . . . If any misconduct, waste, or improper disposition of the assets were shown the court would instantly interfere." Cf. Gray v. Gaither, 74 N. C. 237.

In a bill by a ward charging waste and insolvency on the part of an administrator, a receiver may be appointed. Ware v. Ware, 42 Ga. 408. In Gray v. Gaither, 74 N. C. 237, an executor converted his land and personal estate into notes and money, and the court held the estate to be insecure. It was also held that though the trustee was insolvent, if the testator knew of that fact it would not be ground for removal.

Where it does not appear that real and personal property of the decedent will be insufficient to pay the decedent's debts, the court will not appoint a receiver of the rents and profits of the real estate. McKaig v. James, 66 Md. 583, 8 Atl. 663.

If a sole executor or trustee becomes bankrupt, there is a case for the appointment of a receiver. In re Johnson, L. R. 1 Ch. 325; In re Hopkins, 19 Ch. D. 61.

If a testator has selected an insolvent debtor as his executor,

or that his bond is insufficient.[2] Although it is not ordinarily deemed sufficient ground for the appointment of a receiver in lieu of an executor that he is in poor or mean circumstances, still the court will do so where in addition to such circumstances it is shown that he is of bad character and intoxicated habits.[3] And a receiver was appointed in one case where the executor who was insolvent had not only mismanaged the estate but was about to leave the country.[4]

It is held that an actual adjudication of bankruptcy of the executor or administrator presents a strong circumstance for his displacement by the appointment of a receiver, although such an appointment will be made without prejudice to an application by the heirs or next of kin.[5]

with full knowledge of his insolvency, the court will not on the mere fact of such insolvency interfere by appointing a receiver. Gladdon v. Stoneman, 1 Madd. 143n; Stainton v. Carron, Co., 18 Beav. 146, 161.

But in such a case, the court may interfere on behalf of creditors if the estate is not more than sufficient to cover their claims. Oldfield v. Cobbett, 4 L. J. Ch. N. S. 272.

In such circumstances it will not be inferred from the circumstances of the will having been made some time before the insolvency, and not altered afterwards, that the testator had a deliberate intention to intrust the management of his estate to an insolvent executor. Langley v. Hawke, 5 Madd. 46.

In Smith v. Smith, 2 Y. & C. 361, the fact that the administrator was an uncertificated bankrupt, and was not appointed to his office by the testator, but had taken out administration, was held not a sufficient reason to induce the court to appoint a receiver before answer, where several of the parties interested declined to join in the application.

2 Haines v. Carpenter, 1 Woods 262, Fed. Cas. No. 5905.

3 Everett v. Prytheigh, 12 Sim. 365.

4 Chappell v. Akin, 39 Ga. 177. The allegations of the bill in this case were that the executor was insolvent, unmarried, extravagant, engaged in no settled business, intending soon to move to Honduras, and was badly managing his own business, and threatened to sell the trust property.

5 Gladdon v. Stoneman, 1 Madd. 142 (Am. ed., p. 86); Steele v. Cobham, L. R. 1 Ch. App. 325.

But a receiver will not be appointed of a decedent's estate because an executor has become bankrupt since the death of the testator where there is a co-executor who is willing to act.[6]

A receivership is proper when the testamentary trustee, although exempted by the will from giving security, is a man of limited means, and engaged in a hazardous business, and an injunction has been obtained by the next friend of an infant beneficiary restraining the trustee from disposing of the assets.[7]

Where there were several executors and all but one were insolvent, it was suggested as proper practice to appoint a receiver to act in conjunction with the solvent executor provided he would so act, but in the event of his not consenting to do so to order the receiver to act generally in lieu of all the executors,[8] but it has also been held that part of the estate can not be taken from one executor and given to a receiver so as to allow him to co-operate with the other receiver.[9]

§ 89. Receiver in Lieu of Executor Conditioned on Failure of Executor to File Security Bond.

The appointment of a receiver being within the discretion of the court, it is proper for the court to make the appointment of a receiver contingent upon the alternative of the executor or administrator in possession furnishing

6 Bowen v. Phillips (1897), 1 Ch. 174, 66 L. J. Ch. N. S. 165.

7 Bowling v. Scales, 2 Tenn. Ch. 63.

8 In Jenkins v. Jenkins, 1 Paige (N. Y.) 243, three out of four executors were insolvent and the actions of the executors in the handling of the estate were such that the settling of the estate was unduly delayed. The court suggested that it would appoint a receiver to act in conjunction with the solvent executor if he would consent to act with the receiver, but otherwise would appoint the receiver to act generally in lieu of all the executors.

9 A receiver must be of the whole estate. Hence it is improper for a court of equity to take part of an estate from one executor and give it to a receiver so as to allow him to co-operate with the other executor. Fairbairn v. Fisher, 57 N. C. 390.

a bond to secure the safety of the estate.[1] And following the principle that the security of the estate from loss or undue depreciation is the main purpose of a receivership in connection with estates of decedents, the court will refuse to appoint a receiver where the bond furnished by

1 In this connection see § 15, supra, for a discussion of the principles involved in such action by the court.

While it is undoubtedly the law that the probability that a complainant will ultimately be entitled to relief is a material element for consideration by the court in the appointment of a receiver, mere defects of pleading or parties, curable by amendment, will not prevent such action, if there are genuine rights to be protected and preserved; and where an answer and cross-bill in an administration suit by an executor alleges that the testator gave defendant certain personal property, that the executor took the property into his custody, that a devastavit has been committed by him, that he has converted much of the estate to his own use and is insolvent, that a large quantity of personal property belonging to the estate is in his hands, in which the defendants are interested, and that the defendants' interest in the estate will be jeopardized for want of security, and asks that the executor be required to give bond, or that the assets be placed in the hands of a receiver, and the executor fails to give bond when required, it is proper to appoint a receiver. Hurt v. Hurt, 157 Ala. 126, 47 So. 260.

In an administration suit by an executor for a discovery and accounting, a cross-bill alleged certain shortcomings of the executor, as well as his insolvency, and asked that he be required to give bond, or for a receiver for the assets of the estate. An order requiring the executor to give bond by a date fixed directed that the question of a receiver be postponed, to be thereafter considered on motion of either party to the cause. The executor failed to give the required bond, and a receiver was thereupon appointed without further notice to the executor. It appeared from the showing that the executor was insolvent, had given no security, had made no inventory of the assets of the estate, and there was evidence that he had converted assets to his own use. The appellate court held that the chancellor was justified in appointing the receiver without further notice. And where the order required the executor to give bond to keep and perform and pay all decrees rendered against him in the cause, the condition prescribed is in legal effect no more than the requirement of Code 1896, 66, that an executor's bond be conditioned to perform all the duties which may be or are required of him as such executor or administrator, and the order appointing a receiver for failure of the executor to give the required bond is not erroneous on account of the required conditions of the bond. Hurt v. Hurt, 157 Ala. 126, 47 So. 260.

the executor or administrator is ample to protect the estate in every way.[2] And likewise where the executor is not only solvent but willing to secure the plaintiff in whatever rights he may be entitled to on final hearing, the appointment of a receiver is properly refused.[3]

But where an executor without an order of court is converting all of the assets of the estate into money and there are circumstances indicating that the estate is not properly secured, the court may direct that the executor furnish a bond sufficient to protect the estate or in default of doing so that a receiver be appointed.[4]

§ 90. Consent or Acquiescence in the Appointment.

There are cases in which a receiver will be appointed to take the place of trustees appointed under a will, as where some of the trustees refuse to act and all the parties are before the court consenting to the appointment.[1]

Where a receiver is appointed on account of the misconduct of one of two executors and the one not charged with misconduct had not qualified until after the commission of the misconduct but did so prior to the appointment of the receiver, the management of the estate will

2 On an application to appoint a receiver of assets in the hands of executors, where both of the executors are solvent and one of them worth many times the value of the interests of the plaintiffs in the estate, and the court has enjoined any disposition of the realty which one of the defendants in the proceeding had purchased from the directors, and a bond was exacted from the executors sufficient to protect petitioners, a refusal to appoint a receiver was proper. West v. Mercer, 130 Ga. 357, 60 S. E. 859.

3 A receiver of a decedent's estate should not be appointed without giving a defendant, who is shown to be entitled to at least half the estate and to be perfectly solvent, an opportunity to give a sufficient bond to protect the petitioner in whatever rights he may be able to establish at the final hearing. Bivins v. Marvin, 96 Ga. 268, 22 S. E. 923.

4 Gray v. Gaither, 74 N. C. 237.

1 Brodie v. Barry, 3 Meriv. 695, citing Beaumont v. Beaumont, not reported.

not be turned over to the newly qualified executor where he acquiesced in the appointment and took no appeal therefrom.[2]

§ 91. Right of Surety to Have Receiver Appointed.

The court will not appoint a receiver in lieu of an administrator on the application of a surety on the bond of the administrator, where the purpose is to require the administrator to secure the bondsman on account of his liability for his principal.[1]

But it has been held that a receiver will be appointed at the instance of heirs or sureties upon the administrator's bond if there is danger of loss or other injury to their interests.[2]

The proper rule in such circumstances should be that if the misconduct of the executor or loss to the estate has already occurred, the surety merely has his right of action against his principal for moneys paid out by reason of his suretyship, and if the danger is merely anticipatory, he has a right to withdraw from the bond. Of course he may, if the facts and circumstances will warrant it, have a receiver appointed over the property of his principal in his individual capacity.

§ 92. Rights of Personal Receiver or Administrator.

The fact that a judgment is rendered against an administrator in his personal capacity and a receiver is ap-

2 Fraser v. City Council of Charleston, 19 S. C. 384.

1 Delaney v. Tipton, 3 Hayw. (4 Tenn.) 14. In this case Delaney, the surety on the administrator's bond, filed a bill and asked for an order on the administrator to give security to him, and in default of so doing that a receiver be appointed to take possession of the assets. Held, that the plaintiff was not entitled to the relief. Cf. Walker v. Drew, 20 Fla. 908, as to a surety of a deceased debtor and his right to have a receiver; and Stenhouse v. Davis, 82 N. C. 432, as to the right of a surety of a purchaser at an administrator's sale.

2 Thompson v. Orser, 105 Ga. 482, 30 S. E. 626.

pointed over his property in aid of the judgment creditor, does not entitle such receiver to collect the rents due the administrator in his official capacity. And in the event that such receiver has collected such rents, they may be recovered back by the tenants who have paid them and they may assign their right of recovery to the administrator who may thereupon sue on behalf of the estate.[1]

§ 93. Effect of Receivership Over Testator at Time of His Death.

Although as a general rule an administrator is entitled to the possession of the property of the intestate held by him at the time of his death, still where, prior to administration, the property had been placed in the hands of a receiver on the application of an adverse claimant, the receiver will hold possession.[1] In such circumstances the administrator may be made a party to the pending receivership proceedings and in that proceeding assert his right to the property which he claims.

§ 94. Receivership Where the Administration Is of Property Claimed by Third Persons.

While courts are slow to appoint receivers to take property of an estate from the hands of an administrator who has been legally appointed, yet where the administrator is attempting to administer property the title to which appears to be in another, then in such case a receiver should be appointed if the circumstances indicate that the rights of all the parties would thereby be more effectually and expeditiously protected and enforced.[1]

1 Barker v. Clark, 12 Abb. Pr. N. S. (N. Y.) 106.

1 Johnson v. Stewart, 41 Ga. 549.

1 Hill v. Arnold, 79 Ga. 367, 4 S. E. 751.

In Fuggle v. Bland, L. R. 11 Q. B. Div. 711, a receiver was appointed in respect to a wife's reversionary interest under a will.

A receiver can not be appointed in an action against a foreign executor as an individual to apply securities of the estate to redeem securities of a third person pledged for the testator's debt, as the ex-

The rule that a receiver will not be appointed to take property from an administrator duly appointed and in possession does not extend to a case where the property was fraudulently conveyed to the deceased in his lifetime.[2]

And where an administratrix is carrying on the business of her deceased husband, on the filing of a bill by the heirs of such deceased person alleging that the administratrix was not the widow of the deceased it is proper to appoint a receiver.[3]

But even though a suit be instituted by a person who claims to have an interest in the estate, it does not follow that the trust created by the testator will be set aside. A

ecutor in his individual capacity could not be compelled so to do. Collins v. Steuart, 2 App. Div. 271, 37 N. Y. Supp. 891.

In Marvine v. Drexel's Exrs., 68 Pa. 362, one Drexel, the trustee, died, ordering his executors to sell his real estate whenever they thought proper. There was an agreement as to the purchase of lands between Drexel in his lifetime and Marvine, and the former's executors and Marvine disagreeing in regard to the mode of selling, a receiver was appointed. This case was based upon the idea that a receiver would be disinterested and the executors were representatives of the estate only, and that the court, having obtained jurisdiction, would direct the sale in the interest of all parties.

In a suit to carry into execution the trusts of a will a receiver will not be appointed over the lands in possession of the heir at law, unless he admits the will or until it is proved against him. Dobbin v. Adams, 8 Ir. Eq. Rep. 157.

Where heirs representing one-third of an estate sued to set aside conveyances of stock, land, etc., as having been obtained from decedent through undue influence, but did not allege defendant's insolvency, and defendant alleged under oath that he paid par for the stock, and there was no evidence to the contrary, and he asserted his ability to meet any liability that might be established against him, while heirs representing two-thirds of the estate also adopted his answer and maintained the validity of the conveyances, a receiver was improperly appointed to take charge of the land, etc. Horner v. Bell, 105 Md. 113, 66 Atl. 39.

A receiver may be appointed over a life estate. McCraith v. Quin, Ir. Rep. 7 Eq. 324.

2 Werborn's Admr. v. Kahn, 93 Ala. 201, 9 So. 729.

3 Graham v. Graham, 2 Vict. Rep. 145.

strong case must be made out in order to induce the court of equity to dispossess a trustee or executor who is willing to act.[4]

Where land has been devised to two persons under a will, and subsequent to the execution of the will, the testator conveyed part of the land to one of the legatees, who entered upon such land and operated the same as mining property, and it appears that there is danger of waste of the property, and the solvency of the legatee and grantee was doubtful, the court may appoint a receiver, it also appearing that the land was charged by the testator with the payment of debts. In such case, it appearing that the property over which a receiver was asked to be appointed was mining property and machinery for operating such mines, every beneficial and legitimate object will be attained by leaving the operations to go on as before, and requiring returns to be made to the appointee from time to time, and securing the same by bond, conditioned for the payment of the proceeds as ordered by the court.[5]

Where a ward has been decreed a specific interest in certain lands of the estate, a receiver may be appointed to take charge of the land where the administrator of the estate is committing waste and his sureties are insolvent. In such a case the appointment of the receiver will not only prevent a multiplicity of suits but preserve the property pending its division among the persons entitled to it.[6]

§ 95. Receivership Over Foreign Executor or Estate.

The power of a court ordinarily is limited by its territorial jurisdiction. The questions involved in the exer-

4 Haines v. Carpenter, 1 Woods 262, Fed. Cas. No. 5905.

5 Stith v. Jones, 101 N. C. 360, 8 S. E. 151. This requirement is peculiarly applicable where the party in possession is a legatee under the will and also claims the property under a deed from the testator.

6 Ware v. Ware, 42 Ga. 408.

cise of extra-territorial jurisdiction will be considered under the topic of courts. But occasions happen when a foreign executor brings property within the limits of another state and there is danger of such property being removed from the jurisdiction.

Thus a receiver may be appointed pending litigation as to who was entitled to administer the estate of a person who had died in one of the British Colonies even though there were no charges of misconduct where part of the assets were brought within the jurisdiction of the court and there was a danger of their removal from the jurisdiction.[1]

And in another case where the estate was situated in India and there had been two executors, one in India and one in England, and the co-executor in India having died, a receiver was appointed.[2] And in another case where the executors resided outside of the jurisdiction of the court but the estate was within its jurisdiction, a receiver was appointed.[3]

It must, however, be observed that the practice of the English courts has not been followed in this country, although the same results are often obtained through the appointment of ancillary receivers.

It has been a very frequent practice of the courts of chancery of England to appoint receivers for the purpose of collecting the assets of persons and estates of decedents situated in foreign countries. Sometimes the practice was to appoint a receiver who was residing in the foreign country where the assets were situated and sometimes to appoint a resident of England with power

1 Hervey v. Fitzpatrick, Kay 421.

2 Cockburn v. Raphael, 2 Sim. & S. 453.

3 Smith v. Smith, 10 Hare, appendix lxxi.

See, also, Transatlantic Co. v. Pietroni, John 604, 6 Jur. N. S. 532, where a receiver was appointed pending proceedings in a foreign country to ascertain who were the next of kin.

to appoint a foreign agent for the purpose of transacting the business.[4]

§ 96. Right of Creditors of Estate to Have Receiver.

As soon as a person dies, a trust arises in his property for the benefit of his creditors and the executor is in the position of a trustee whose duty is to collect his assets for that purpose.[1]

Hence where judgment creditors allege fraud and misapplication of funds by an executor together with insolvency on his part, it is proper to appoint a receiver.[2]

A creditor may file a creditor's bill against the executor of a deceased debtor to make him account for the estate in his hands, without first having obtained a judgment at law and procured a return of execution *nulla bona*.[3]

If an executor of a will and legatee thereunder files a bill in the nature of a creditor's bill, enjoining creditors of the testate from suing him at law, such executor is a *quasi* trustee for the creditors, and on proper application a receiver may be appointed, where there is a misuse or misapplication or waste of the property, and there is danger of loss, and in such case, on the application of

4 Hinton v. Galli, 2 Eq. 479, 24 L. J. Ch. 121; Cockburn v. Raphael, 2 Sim. & Stu. 453; ——— v. Lindsey, 15 Ves. Jr. 91.

1 Rider v. Kidder, 1 Vesey 360 (opinion by Lord Eldon).

2 Chappell v. Akin, 39 Ga. 177; Ex parte Walker, 25 Ala. 81; Scott v. Becher, 4 Price Exch. Rep. 346.

3 Harmon v. Wagener, 33 S. C. 487, 12 S. E. 98.

On a creditor's bill, a decree was rendered establishing the claims of creditors and directing their payment out of such assets as may be applicable to them, by the administrator, and ordering the receiver to pay the claims out of the moneys and securities at their nominal amount which should come into his hands. Held, that the direction to the receiver to pay was subordinate to the right of the administrator to determine the applicability of the assets, and the receiver having paid out money to the agent of a creditor without the direction of the administrator, the court granted an injunction to restrain the moneys paid to such agent within the control of the court. Green v. Hanberry, 2 Brock. 403, Fed. Cas. No. 5759.

creditors, it is not incumbent to show that they have exhausted their legal remedies, the basis of their application being mismanagement. Where the application is based upon waste committed by the executor or administrator, the charge must be specific and designate the thing done which constitutes the waste complained of.[4]

But the appointment of a receiver was refused in a creditor's proceeding where the bill was filed against the intestate debtor in his lifetime, and after his death revived against his administrator.[5]

The appointment of a receiver is proper in a creditor's bill against an estate where the administrator has been removed and an administrator *de bonis non* appointed over the assets which are insufficient to cover the claims against the estate.[6] Likewise where decedent who died intestate and insolvent had sold a stock of goods without complying with a bulk sale law, requiring certain formalities in selling a stock of merchandise, a creditor may secure the appointment of a receiver to recover the stock of goods.[7]

A receiver in supplementary proceedings of the property of decedent's husband can not contest her will al-

4 Sanders v. Christie, 1 Grant Ch. (Ont.) 137.

5 Mathews v. Neilson, 3 Edw. Ch. (N. Y.) 346; Sylvester v. Reed, 3 Edw. Ch. (N. Y.) 296. In these two cases it was held that a creditor's bill could not be revived against the debtor's administrator where the purpose is to obtain the appointment of a receiver.

6 On a creditor's bill against a decedent's estate, where the administrator had been removed and the sheriff appointed administrator d. b. n.; and the unadministered assets were not sufficient to pay the debts of the estate, such administrator d. b. n. is not entitled to receive and hold the remaining assets, because they had once been administered, a receiver should be appointed, as he is the only one with ample power in such a case. Harman v. McMullin, 85 Va. 187, 7 S. E. 349.

7 Where a debtor sells a stock of implements without complying with the Bulk Sales Law (Rev. St. 1913, § 2651), and dies intestate and insolvent, a creditor may secure the appointment of a receiver to impound the stock and have same sold and the proceeds applied to his claim. Scheve v. Vanderkolk, 97 Neb. 204, 149 N. W. 401.

though she has thereby cut off the judgment debtor from any share of her estate.[8]

A receiver in supplementary proceedings of a legatee stands in relation to the estate in the place of the judgment debtor and is entitled to be made a party to a petition for an accounting,[9] while a receiver in supplementary proceedings of one of the executors has been held to be a creditor, but only to the extent of debtor's interest in the estate.[10]

Where a testator devises a life estate in certain land to one who is also nominated the executor, and such person offers the will for probate, and a *caveat* is filed by the heirs of the decedent, pending the determination in the court of ordinary of the issue of *devisavit vel non*, judgment creditors of the devisees of the life estate have no right to have the land impounded in the hands of a receiver for the purpose of collecting the rents to be applied to the life tenant's debt in the event the will is probated, even though such debtor be insolvent.[11]

8 Matter of Brown, 47 Hun (N. Y.) 360.

9 Monahan v. Fitzpatrick, 16 Misc. Rep. 508, 39 N. Y. Supp. 857; Matter of Beyea's Estate, 10 Misc. Rep. 198, 31 N. Y. Supp. 200; Matter of Gilligan's Estate, 1 Connoly Sur. 137, 3 N. Y. Supp. 17.

A complaint in an action by a receiver against the executors of such testator which does not state that the defendants, at the time of the plaintiff's appointment as receiver had money, property or effects in their hands belonging to the legatee, is bad on demurrer. Graff v. Bonnett, 2 Rob. (N. Y.) 54.

10 Matter of Kennedy's Estate, 143 App. Div. 839, 128 N. Y. Supp. 626.

11 Colclough v. Palmetto Nat. Bank, 143 Ga. 336, 85 S. E. 107.

In the above case the court, in answer to the argument that the creditors were entitled to equitable remedies to reach a devise or legacy of their debtor and subject it to the payment of their claims where the condition of the estate is such that the devisee or legatee may demand that his devise or legacy be turned over to him, said:

"But the facts of the instant case do not bring it within the operation of this equitable remedy of a creditor. The judgment debtor was nominated as executor in his sister's will, and filed an application to have it probated in the court of ordinary. A caveat to the probate of this will was filed by certain heirs of the deceased, and the issue formed by the caveat is

§ 97. Receivership Upon Death or Departure from Jurisdiction of Executor or Administrator.

Inasmuch as the death of an executor or administrator may leave the estate in a condition where its safety is endangered, receivers have been appointed upon the death of an executor or upon the death of one and the refusal of a co-executor to act. Such a receivership is merely in the nature of an interim protection.[1] The same

still pending. In the paper offered for probate as the last will of Miss Sallie Colclough, a life estate in three tracts of land is devised to the judgment debtor. If the will is probated, the debtor will be entitled to receive his devise; but, if the caveators prevail, the estate of Miss Colclough will be distributed among her heirs at law. Although nominated as executor, the debtor is without power to assent to any devise to himself until the will is admitted to probate. The theory of subjecting the interest of a legatee to the judgment of his creditor is based on the right of the legatee to demand his legacy of the executor. Manifestly a legatee has no such right pending the proceeding to probate the will. Suppose this judgment be allowed to stand, and the will be refused probate; we would have the anomalous situation of a court of equity taking possession of property belonging to the legal heirs of Miss Colclough, to subject it to a life interest in another person, which has been judicially determined never to have existed. The plaintiffs prayed process and relief against the defendant, both individually and as executor. There is no allegation of the probate of the will in common form, nor do we think that would make any difference, as an executor of a will probated in common form is but a temporary administrator pending the issue of devisavit vel non on application to probate the will in solemn form. Civil Code, 1910, § 3883."

1 McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329. This was a bill for partition, alleging the invalidity of a will, where one trustee died and the other two refused to act. Cf. King v. Donnelly, 5 Paige (N. Y.) 46.

In this case it would seem that the power of the probate court to appoint a successor would afford ample relief. The master of rolls says: "Nothing, I think, can be more clear than when there are two trustees and executors, and one dies and the survivor refuses to act, the persons beneficially interested in the estate are entitled to the protection of the court and to a receiver." Palmer v. Wright, 10 Beav. 234.

The court, on the application of the plaintiff, who was entitled to take out letters of administration, appointed an interim receiver for the protection of the property. Cash v. Parker, 12 Ch. D. 293; Re Shepherd, 43 Ch. D. 131; Mullane v. Ahern, 28 L. R. Ir. 105.

Where a testator had bequeathed the residue of his real

condition of affairs may result from the executor or administrator removing from the jurisdiction. Consequently, it is cause for the appointment of a receiver where the executor or administrator has removed to another state or country.[2] In such circumstances the court acts upon the theory that by such removal the executor has signified his abandonment of the trust imposed by the will or by his appointment since the court is not in a position to compel him to account to it concerning his trusteeship.

The court, however, will not interfere by the appointment of a receiver where there are several executors or trustees and merely one has removed from the juris-

and personal estate to his widow, stating in his will that he had done so "in perfect confidence that she will act up to those wishes which I have communicated to her in the ultimate disposal of my property after my decease," and the court, being satisfied from the evidence that the bequest had been on the faith of a promise made by her that she would dispose of the property in favor of the plaintiffs, the natural children of the testator, and that an implied trust was accordingly raised in their favor, appointed a receiver of the rents of the real estates, and of the personal estate, on the death of the widow, against the testator's heir-at-law and the second husband of the widow. Podmore v. Gunning, 7 Sim. 644.

2 Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095 (affirming 68 Ill. App. 204); Westby v. Westby, 2 Coop. C. C. 210; Jones v. Smith, 10 Hare 71 (no appearance of defendant and no written opinion).

A receiver was appointed where the executrix was a married woman, and the husband, in addition to being in indifferent circumstances, was out of the jurisdiction, for in such a case, said the court, if the executrix wastes the assets or refuses payment, the party aggrieved had no remedy, since the husband must be joined in the action. Taylor v. Allen, 2 Atk. 213.

The reason assigned by the court in the above case would not be applicable under the statutes prevailing in most of the states in respect to the independent rights of married women in regard to their separate property and rights of suing and being sued.

Ex parte Galluchat, 1 Hill Eq. (S. C.) 148. In this case the executor had removed to another state and the application was made by the beneficiary.

Where it is shown that the executor has absconded and that there is danger to the estate a receiver will be appointed. Pitcher v. Hellier, Dick. 580.

diction,[3] although a receiver may be appointed where the remaining executors are inactive or refuse to render an account of the affairs of the estate to the beneficiaries.[4]

Where a non-resident executor denied the right of testator's wife to any part of the estate, removed a part thereof, and was about to dispose of the balance and divide the proceeds, to the exclusion of the wife, the court, on the application of the wife, may appoint a receiver of the community property, under the statute providing therefor, in an action between joint owners of property, where it is in danger of removal.[5]

§ 98. Powers of a Receiver Over the Estate.

The administration of an estate by a receiver is not purely *in rem,* and the acts of the receiver and orders of court are not binding on persons not parties.[1]

A receiver has no right to interfere in a suit brought by an executor before the appointment of such receiver, and then pending, without an order of court.[2]

Inasmuch as the sole power to remove an executor or administrator lies in the probate court or court exercising probate jurisdiction, the appointment of a receiver over the estate does not have the effect of removing the executor or administrator from his office, although it must necessarily deprive him of the power of exercising his functions over the estate.[3] In proceedings for the ap-

3 Browell v. Reed, 1 Hare 434.

4 Dickens v. Harris, W. N., 1866, 93, 14 L. T. 98.

5 Merrell v. Moore, 47 Tex. Civ. 200, 104 S. W. 514.

1 J. W. Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347.

2 Tracy v. First Nat. Bank, 37 N. Y. 523; Gadsden v. Whaley, 14 S. C. 210.

3 Leddel's Exr. v. Starr, 19 N. J. Eq. 159.

The probate court will appoint an administrator pendente lite, if it is just and proper to do so, although a receiver has been appointed by the chancery court in an action pending between the same parties, and affecting the same parties and property as the testamentary action. Tichborne v. Tichborne, L. R. 1 P. & M. 730.

Under the old statutes of New York State relative to the probate of wills, it was held that the power of the surrogate to appoint an ad-

pointment of a receiver over a decedent's estate, the executor or administrator should be made a party to the proceedings.[4]

§ 99. Effect of Removal of the Receiver from the Jurisdiction.

If the receiver appointed in lieu of a receiver because of the refusal of such executor to act subsequently removes from the jurisdiction and the executor is willing to act, the court instead of appointing a new receiver may simply direct the executor to resume his duties as executor.[1]

§ 100. Subsequent Receiver Upon Death of Receiver of the Estate.

Upon the death of a receiver of a decedent a second receiver may be appointed upon the application of the executor or administrator of the deceased receiver for the purpose of turning over the property held by such former receiver and making an accounting.[1]

§ 101. Receivership Over Escheated Property.

An escheat signifies a reversion of property to the state in consequence of a want of an individual competent

ministrator with the will annexed was not superseded merely because a receiver had been appointed over the estate. De Pau's Estate, 1 Tuck. (N. Y.) 290.

4 Appointment of a receiver for the estate of a deceased debtor, without making decedent's administrator a party, held error, though a security deed given by decedent to the creditor authorized the appointment of a receiver without a rule nisi and a sale of the property by the receiver. Johonson v. Fulton County Home Builders, 142 Ga. 702, 83 S. E. 656.

1 Davy v. Gronow, 14 L. J. N. S. Ch. 134.

1 Williamson v. Wilson, 1 Bland. Ch. (N. Y.) 418, 435. In this connection see, also, Coombs v. Jordan, 3 Bland's Ch. (Md.) 284, 22 Am. Dec. 236, and Jenkins v. Briant, 7 Sim. 171.

Where a receiver appointed to wind up a corporation dies with the personal property in his possession, the receiver's title thereto passes to his administrator, who should be substituted to prosecute a pending suit in respect to such property. State v. German Exchange Bank, 114 Wis. 436, 90 N. W. 570.

to inherit it. The state is deemed to occupy the place and hold the rights of the feudal lord.[1]

In some states, however, the term "escheat" is used in the sense of a mere forfeiture of land to the state and not in the common law sense.[2]

Where the state sues to have property escheated to the state and it is shown that if the rents and profits are not collected they will be lost, a receiver is properly appointed.[3] Undoubtedly a case in which the claim is made that the property in controversy has been escheated to the state would furnish a case with facts which would clearly bring it within all of the cardinal principles of jurisprudence pertaining to the law of receivers. This was very clearly shown by Vice Chancellor Bergen in a case[4] before the Chancery Court of New Jersey, in which he said:

1 In re Miner's Estate, 143 Cal. 194, 76 Pac. 968; Commonwealth v. Blanton's Exrs., 2 B. Mon. (41 Ky.) 393; Commonwealth v. Chicago etc. R. Co., 124 Ky. 497, 99 S. W. 596; Matthews v. Ward, 10 Gill & J. (Md.) 443, 450; Crane v. Reeder, 21 Mich. 24, 70, 4 Am. Rep. 430; Montgomery v. Dorion, 7 N. H. 475; Smith v. Doe, 111 N. Y. Supp. 525; Hughes v. State, 41 Tex. 10, 17; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691.

2 See Commonwealth v. New York etc. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634.

3 People v. Norton, 1 Paige (N. Y.) 16, 17.

4 In McCarter v. Clavin, 72 N. J. Eq. 642, 66 Atl. 599, the suit was instituted by the attorney-general to escheat to the state property worth about $100,000 on the ground that the decedent left no heirs, and alleged that a certain instrument offered for probate was not the last will and testament of the decedent. A receiver was allowed on the ground that the litigation would be likely to cover a considerable period. The property had been sold for taxes for want of an owner or person representing an owner. The court held that equity required that a receiver should be appointed to protect the property from loss and hold it for the benefit of those to whom it may be finally determined to belong. In concluding the observations set forth in the text, the learned chancellor said: "The course which I am adopting is justified, in my judgment, by Flagler v. Blunt, 32 N. J. Eq. 518, in which the learned chancellor, on page 523, speaking of this very question, quoted from High on Receivers, §§ 9, 11, as follows: 'The principal ground upon which courts of equity grant their ex-

"During the litigation concerning the admission of a will to probate and during the interval before an executor or administrator is appointed a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate when there is any danger of their loss, misuse, or misapplication. In the present instance, there is a controversy over the admission of the alleged will to probate. There is a contest over the question whether the party claiming to be the only heir is such. The property is in great danger of loss owing to tax sales and threatened foreclosure. It is clear that, in the absence of an heir, in the absence of an executor or of any lawful appointee entitled to hold the property together, it will be lost, and in any event the rents and profits will be misapplied. It appears to me that if there ever was a case in which the rule I have referred to ought to be applied, it is this case, otherwise a vast amount of property that may belong to the state will, for want of protection, be swept away and pass, without practical consideration, into the hands of strangers to the decedent."

3. Estates of Insane Persons.

§ 102. The General Rule.

A receiver may be appointed over the estate of a person pending a judicial proceeding in respect to his sanity in order to prevent waste or mismanagement of his property.[1] Such a receiver is an *ad interim* one and is ap-

traordinary aid by the appointment of receivers pendente lite are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed.'"

1 In re Misselwitz, 177 Pa. St. 359, 35 Atl. 722; Lowe v. Lowe, 1 Tenn. Ch. 515; In re Pountain, 37 Ch. Div. 609.

A receiver may be appointed over the estate of a lunatic pending the return of the inquisition. In re Kenton, 5 Bin. (Pa.) 613.

Where a person is of weak mind, a receiver may be appointed over his estate in a proceeding by his next friend in his behalf. Edwards v. Edwards, 14 Tex. Civ. 87, 36 S. W. 1080.

Under Act of May 28, 1907 (P. L.

pointed with power to take possession of the estate and also with leave to be appointed *ad litem* in actions pending against the alleged insane person.[2] But a receiver should not be appointed in such case where the applicant for the appointment of the receiver has no lien upon the property of the defendant or interest therein.[3] Where

292), providing for the appointment of a guardian for insane or feeble-minded persons unable to care for their property, and authorizing the court to make an allowance for the support of the ward and his family, it is within the sound discretion of the court of common pleas to appoint a temporary receiver of the estate of an insane or feeble-minded person. In re Parke's Case, 41 Pa. Sup. Ct. 531.

In re Hybart, 119 N. C. 359, 25 S. E. 963, it was held, under the Act of 1889, a receiver might be appointed for an insane person on motion, after due and proper notice.

2 Re Pountain, L. R. 37 Ch. Div. 609. In this case the order was made ex parte.

3 The harsh remedy of appointing a receiver and of granting an injunction before trial on the merits of the case should not be exercised, where the applicant for such remedies has no lien upon the property of the defendant, and no interest therein or claim thereto. Atlanta etc. Ry. Co. v. Carolina Portland Cement Co., 140 Ga. 650, 79 S. E. 555, and cases cited.

Therefore, where two adult and married daughters instituted a proceeding in the court of ordinary, in accordance with Civ. Code 1910, §§ 3089 et seq., seeking to have their father adjudged to be an imbecile and incapable of managing his property and to have a guardian appointed for him, and he, not having been notified of such proceeding, and without appearing in the court of ordinary or in anywise becoming a party to such proceeding, filed a verified petition against such daughters in the superior court, wherein he alleged that he was perfectly sane and fully capable of managing and caring for his property, that he was not committing any waste, and that the defendants had no interest in or claim to any of his property, that he did not owe a cent to either of them, or to any one else, and that the defendants had not instituted the proceeding in the court of ordinary in good faith, but were influenced in bringing such proceeding solely on account of their enmity against the present wife of petitioner, the stepmother of the defendants, on which petition an interlocutory injunction was granted, and where the defendants answered such petition, denying its material allegations, and filed a cross-petition against their father, averring his imbecility, and in consequence thereof his inability to manage and care for his property, and praying that a receiver be appointed to take charge of all of his property, and that an injunction be granted, en-

the estate of an insane person has been managed by a trustee or committee, upon the death of the insane person, it was held proper for the court to appoint a receiver to take charge of the estate until proper probate proceedings may be instituted, and thereupon the receiver will be directed to turn the property over to the probate administrator,[4] although in a subsequent case in the same state it was held that where such a committee had been appointed prior to the death of the insane person the appointment of a receiver pending a contest of the decedent's will was unnecessary.[5] The appointment of a receiver in cases of this character, as in other receivership cases, is within the discretion of the court, and the court may refuse to make the appointment.[6]

Where a receiver is appointed merely pending proceedings to determine whether the person is insane and the person is adjudged sane in such proceedings, the receiver will be discharged and his compensation and expenses allowed.[7]

A receiver of the property of an insane person is under the same duty to account to the court as in other cases,

joining him from interfering with the property in the hands of the receiver, the judge of the superior court upon an interlocutory hearing, where both sides submitted evidence tending to substantiate their respective contentions, erred in appointing a receiver for all the property of the father, except his farm upon which he resided, and "other properties" which the judge found to be "ample and more than sufficient to support him and his immediate family," and in granting an injunction against any interference with the property in the hands of the receiver. Gartrell v. McCravey, 144 Ga. 249, 86 S. E. 932.

4 In re Colvin's Estate, 3 Md. Ch. 278, 288.

In this connection see King v. King, 6 Ves. Jr. 172; Edmunds v. Bird, 1 Ves. & B. 88; Bull v. Oliver, 2 Ves. & B. 96; Atkinson v. Henshaw, 2 Ves. & B. 85, and Richards v. Chave, 12 Ves. Jr. 462.

5 Curtis' Estate v. Piersol, 117 Md. 170, 83 Atl. 87.

6 In re Ferror, L. R. 3 Ch. App. 175.

7 In re Sulk, 74 N. J. Eq. 736, 70 Atl. 661.

The receiver of an insane person will not be discharged without grounds for the same being presented. In re Lytle, 3 Paige (N. Y.) 251.

and if deemed proper a reference may be ordered to ascertain the exact condition of the estate.[8]

§ 103. Who May Be Appointed Receiver.

The same principles apply in the selection of the receiver of an insane person as in other circumstances; namely, that the person selected should not occupy such a relation toward the insane person that he will be placed in a position where he will be obliged to pass upon the propriety of his own actions. Hence the court in making such appointment should not select the solicitor of the insane person,[1] even where it is stated that no one else is willing to accept, nor a Master in Chancery if his accounts are to be passed upon by another master.[2]

4. Estates of Infants.

§ 104. General Rule Applicable.

The same general principles apply in respect to the appointment of a receiver over the estate of an infant as apply to that of the estate of a decedent or of a trust estate. And similarly to the practice as shown by the decisions, relief by the appointment of a receiver has been more frequent in the English practice than in the American practice. In all these classes of cases the large protective features of the statutes and the broad jurisdiction which has been assumed by the courts for the protection of wrongs of every conceivable sort have made the necessity for receiverships in estates which are already under the protection of the courts very infrequent. However, there are occasions when the remedy of a receivership

8 Lowe v. Lowe, 1 Tenn. Ch. 515.

1 Ex parte Pincke, 2 Meriv. 452.

2 Ex parte Fletcher, 6 Ves. Jr. 427. This was a case for the appointment of a committee of a lunatic's estate, but the principle is the same as in cases of receivership. The theory of the case may be sound, but evidently its application in many cases would be a matter of discretion. Cf. Re Ferrior, L. R. 3 Ch. App. 175.

for the protection of an infant's estate will be found to be the most effective for its safety and preservation. Such circumstances would doubtless arise where great speed would be necessary in order to prevent a threatened loss or damage. The older cases on the subject are illustrative of the general principles applicable.

As early as 1727, the Parliament of England, sitting as a Court of Appeals, held that where a testator by will named his widow as guardian of his minor children it was beyond the power of the Court of Chancery to change the will of the testator in this regard, in the absence of proof of misbehavior on the part of such testamentary guardian.[1] It has remained the law, supported by reason and authority, from that time to this, that where a trustee has been appointed by a testator as executor or as guardian, the court, in the absence of strong proof, will not interfere with such selection by the appointment of a receiver.[2]

Thus a receiver may be appointed for the estate of an infant if his father is insolvent or of bad character or there is danger of his rents being lost.[3]

So also where the mother was dead and the father was a man of irregular habits and the minors inherited by way of their mother.[4]

1 Dillon v. Lady Mount Cashell, 4 Bro. C. P. 306.

2 Even though a guardian is appointed by will under the statute, the court may appoint a receiver. Gardner v. Blane, 1 Ha. 381.

Guardians appointed by will under the statute have no more power than guardians in socage, and are but trustees. If it be made to appear that the estate of an infant is likely to suffer by the conduct of his guardian, the court will interpose and appoint a receiver, upon the principles upon which it interposes in the trustees and executors. Duke of Beaufort v. Berty, 1 P. W. 704.

Middleton v. Dodswell, 18 Ves. Jr. 268. In this case Lord Erskine said: "It is for the testator, not the court, to say in whom the trust for administration of the effects shall be reposed." Cf. Stairley v. Rabe, McMul. Eq. (S. C.) 22.

3 Ex parte Mountfort, 15 Ves. 449, n.

4 Re Connicks, 2 Ir. Eq. 264.

Likewise where the mother of infant children, who had been appointed by her husband executrix and guardian of the children, married a man in necessitous circumstances, a receiver was appointed.[5]

A receiver was appointed upon the application of minor heirs where the executrix of the estate intrusted the management of the estate to her husband, who was not managing it properly and involving it in debt.[6]

§ 105. On Refusal of a Trustee or Executor to Act.

A receiver will be appointed to protect the interests of an infant where trustees or others appointed to protect his rights refuse or fail to act in that behalf.[1] The appointment in such circumstances is made on the ground that the estate is endangered by the failure of having a person in charge or control of it.

§ 106. In Actions on Behalf of Infants to Disaffirm Contracts.

In an action to disaffirm contracts or other transactions made by infants it is proper to appoint a receiver where

5 Willon v. Lord Mountcashell, 4 Bro. P. C. 306.

6 Stairley v. Rabe, McMul. Eq. (S. C.) 22.

Where the income of property belongs to a mother and the property itself to her children, and the husband and trustee with the consent of the wife so manage property that debts are incurred which become a charge upon the future income of the property, a receiver may be appointed. Robert v. Tift, 60 Ga. 566.

The homestead allowance to minors, inuring to their benefit, under Code, 1904, § 3635, till they are of age, or marry, after which the creditors are entitled to the principal, consisting of money, should, instead of being paid to the infant's guardian, be administered by the court, through a receiver. Edgewood Distilling Co. v. Rosser's Admr., 116 Va. 624, 82 S. E. 716.

1 Where two are appointed and one declines to act, the court will appoint a receiver on behalf of an infant cestui que trust, with liberty to either of the trustees to offer himself. Tait v. Jenkins, 1 Younge & C. Ch. 491.

Where there had been several trustees, one of whom was dead, one abroad, and the business fell exclusively on one, and application was made for a receiver, the acting trustee consenting, a receiver was appointed. Tidd v. Lister, 5 Madd. 433.

there are circumstances showing danger to the property involved.[1]

Thus where an infant bought property and mortgaged it to secure the purchase price and upon default the mortgagee took possession of the property and also other property belonging to the infant which he was about to sell, the court in an action to disaffirm the transaction appointed a receiver.[2]

§ 107. Who Is Eligible for Appointment.

Following the principles which we have already discussed, one whose duties are such that he would be placed in the position of acting as a judge of his own acts on behalf of the interests of others if he were appointed receiver, should not be appointed receiver over the estate of an infant.

Thus the next friend of an infant should not be appointed receiver of its property, since it is his duty to watch the accounts and acts of the receiver.[1]

And for the same reason it is not proper to appoint a trustee or executor for such a purpose.[2]

But, on the other hand, it was held that a person who has acted as receiver of the property and is for that reason familiar with it and who was appointed as trustee and executor of the will under which the infant

1 Where the facts and circumstances warrant an action for rescission of contract entered into during minority and for cancellation of notes, chattel mortgage, etc., the plaintiff had a right to apply for the appointment of a receiver. Moser v. Renner, (Mo. App.) 179 S. W. 970.

2 Skinner v. Maxwell, 66 N. C. 45, 68 N. C. 400.

1 Stone v. Wishart, 2 Madd. 63.

2 ——— v. Jolland, 8 Ves. Jr. 72. Cf. Sykes v. Hastings, 11 Ves. Jr. 363; Sutton v. Jones, 15 Ves. Jr. 584. Lord Eldon, in Sykes v. Hastings, supra, says: "The appointment of a trustee as receiver is extremely rare; and only where he will act without emolument. . . . The principle of the court is that the trustee shall not be receiver if any other can be procured."

tenant takes as a life tenant, is properly appointed to act as receiver on behalf of the interests of the infant.[3]

§ 108. Effect of the Appointment and Duties Thereunder.

The appointment of a receiver for the estate of an infant, it has been held, does not put the infant out of possession.[1] And where a receiver is appointed in lieu of a guardian removed, he is not invested with the powers of a guardian, but acts under the control of the court until another guardian is appointed.[2]

A receiver for the estate of an infant will be liable to the infant for interest if he fails to invest the funds when they are sufficient for such a purpose.[3]

But a receiver ought not to invest the funds of the receivership without an order of court. And where he is directed to invest funds belonging to the receivership and report from time to time to the court in respect to the matter but invests it without making such reports and the fund is lost, he may be held liable for its loss even though he acted in good faith.[4]

The general opinion, however, is that the receiver will not be liable if he manages the funds of the infant in the same manner as a reasonably prudent man would do. Thus it was held that he would not be liable to the infant for funds paid to relieve tenants who had been impoverished by the failure of crops.[5]

3 Newport v. Bury, 23 Beav. 30.

1 Sharp v. Carter, 3 P. Wms. 379.

2 Temple v. Williams, 91 N. C. 82.

3 Hicks v. Hicks, 3 Atk. 274.

4 Where a receiver was appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed, he was liable for the loss, as he had failed to report to the court the manner in which he had invested the infant's estate, although he had acted in the best faith. State v. Gooch, 97 N. C. 186, 2 Am. St. Rep. 284, 1 S. E. 653.

5 Jackson v. Jackson, 2 Hogan 238.

The infant should be allowed a reasonable time after coming of age within which to examine the accounts of the receiver.[6] But where a receiver has accounted to a guardian of an infant he will not be required to account again to the infant.[7]

§ 109. When Such a Receiver Will Be Discharged.

A receiver of an infant is naturally subject to discharge or removal as in any other case and for like reasons. We will discuss the grounds for such discharge or removal in the chapter devoted to that subject.

Where a receiver has been appointed over the estate of several infants it has been held that he will not be discharged until all have reached their majority.[1]

And he should not be discharged until the infant has had an opportunity to examine his account.[2]

6 Matter of Van Horne, 7 Paige (N. Y.) 46; Wildridge v. McKane, 2 Moll. 547.

7 Palmer v. Truby, 136 Pa. 556, 20 Atl. 516.

1 Smith v. Lyster, 4 Beav. 227.

2 Wildridge v. McKane, 2 Moll. 547.

CHAPTER VI.

CONTROVERSIES AND RELATIONS ARISING OUT OF MARRIAGE.

1. Separate Property of Wife.

§ 110. In General.

Receivers have been appointed in numerous cases over the estates of married women in the English practice.[1]

But a receiver will not be appointed of separate estate of a married woman which has restraints on anticipation where the plaintiff obtained leave to enter final judgment for a debt against her but delayed entering it for three months when he knew that arrears had just become due and then entered judgment and applied for a receiver.[2]

And where the separate property of a married woman has restraints from anticipation by her such restraints are not removed by the death of the husband, and the court will not appoint a receiver over it on behalf of her creditor.[3]

§ 111. In Action Against Married Woman Doing Business as Sole Trader.

In an action by creditors to charge the separate property of a married woman doing business as a sole trader with the payment of debts contracted by her, a receiver may be appointed over her property where it is shown that there is danger of the property being wasted or

1 Bryant v. Bull, 10 Ch. D. 153; Re Peace and Waller, 24 Ch. D. 405; Hill v. Cooper (1893), 2 Q. B. 85; Hood Barro v. Heriot (1896), N. C. 174; Cummins v. Perkins (1899), 1 Ch. 16.

2 Colyer v. Isaacs, 77 L. T. N. S. 198.

3 Pelton v. Harrison (1891), 2 Q. B. 422.

placed beyond the reach of her creditors. Such a suit would be in the nature of a sequestration of her property as in the case of a creditor's bill, and it is customary in such cases to appoint a receiver.[1]

§ 112. In Action by Wife to Establish Her Separate Interest.

In an action by a married woman against her husband to establish her separate interest in property in his possession, the remedies of sequestration and attachment are not so adequate and complete as to prevent the appointment of a receiver. Consequently, under a statute which authorizes the appointment of a receiver in an action "between partners or others jointly owning or interested in any property or fund on the application of the plaintiff or any party whose right to or interest in the fund or the proceeds thereof is probable and where it is shown that the property or fund is in danger of being lost, removed, or materially injured," a receiver may be appointed in such an action and thus prevent him from disposing of her interest therein and converting the proceeds to his own use where the character and condition of the property are such that the interest of the plaintiff can be best protected by the appointment of a receiver.[1]

§ 113. Controversies Arising Out of Marriage Settlements.

Where by the marriage settlement the husband and wife were to mutually enjoy certain premises but the wife having procured a divorce, the husband who was in-

1 Todd v. Lee, 15 Wis. 365.

1 Shaw v. Shaw, 50 Tex. Civ. 363, 111 S. W. 223.

In an action by a wife against her husband to establish her separate interest in property in his possession, and to prevent his disposing of her interest therein, and converting the proceeds to his own use, and for a divorce, a receiver of the property could be appointed solely upon plaintiff's affidavit therefor, notwithstanding defendant's denial, by affidavit, of all the allegations of the petition. Shaw v. Shaw, 51 Tex. Civ. 55, 112 S. W. 124.

solvent remained in possession, a receiver was appointed over the property on the application of the wife.[1]

And in a suit by a husband against his wife to enforce the terms of an ante-nuptial agreement, the execution of which is admitted by the wife but claimed to have been procured by fraud, a receiver was appointed to collect the rents of real property which the wife had covenanted to convey to a trustee for the purpose of carrying out the settlement, the person named in the contract as trustee refusing to act.[2]

So also where a husband after having made a marriage settlement which, however, was made after marriage, sold the property for value, the court appointed a receiver in a suit by the purchaser for specific performance and in which it was claimed that the marriage settlement was invalid as against the purchaser.[3]

But a receiver will not be appointed where property is in the hands of a trustee for husband and wife, under the terms of a marriage settlement.[4]

And where by a marriage settlement certain moneys were settled upon the wife for her separate use and benefit but vested in certain trustees who permitted the husband to receive rent belonging to his wife, and the trustees afterward insisted on receiving it themselves, it was held that the husband was not entitled to a receiver.[5]

So also where under a marriage settlement the interest of the wife is a charge upon the fee of the property, a receiver will not be appointed merely because the fee owner has neglected to pay interest, since in such circumstances the wife has an adequate remedy at law.[6]

1 Boggs v. Boggs, 55 Ga. 590.

2 De Rustafjaell v. De Rustafjaell, 43 W. N. C. 56.

3 Metcalfe v. Pulvertoft, 1 Ves. & Bea. 180.

4 Whitaker v. Cohen, 69 L. T. 451.

5 Wiles v. Cooper, 9 Beav. 294.

6 Drought v. Percival, 2 Mol. 502.

§ 114. In Matters Affecting Dower and Curtesy.

Owing to the inchoate character of the dower right, its protection is a matter which is favored by courts of equity. Where a receiver of the property of a husband's estate, appointed on behalf of his creditors, seeks to sell the property he will be required to do so subject to the dower interest of the wife.[1] And in a proceeding by the widow to have her dower interest fixed and set aside, where the property is in the possession of a person who is insolvent and there is danger of loss of the rents and profits, the court will appoint a receiver.[2] But in such a proceeding by an heir or devisee it should not only be shown that the rents and profits are in danger of being lost, but the manner in which they will be lost so that the court can readily see that there is no adequate remedy at law.[3] And in the event that a widow entitled to dower fraudulently releases her dower right to her children in order to defraud her creditors, the court may in a creditor's suit appoint a receiver pending the termination of the suit.[4] Likewise, in a suit to admeasure the dower by decreeing that in lieu of a designated parcel, the widow shall receive a specified part of the fixed annual rental value of each parcel, a receiver may be appointed to enforce the decree.[5]

The estate by curtesy, where such estates still exist, upon the death of the wife after issue born, passes to the receiver of the husband appointed in proceedings against him by a judgment creditor.[6]

1 Lowry v. Smith, 9 Hun (N. Y.) 514.

2 Chase's Case, 1 Bland. (Md.) 206, 17 Am. Dec. 277.

3 Knighton v. Young, 22 Md. 359.

4 Tenbrook v. Jessup, 60 N. J. Eq. 234, 46 Atl. 516.

5 Conlon v. Kelly, 199 N. Y. 43, 92 N. E. 109 (reversing 136 App. Div. 940, 122 N. Y. Supp. 1125).

6 Beamish v. Hoyt, 2 Rob. (N. Y.) 307.

§ 115. Receivers in Actions for Divorce or Maintenance.

The practice is well settled that the court may appoint a receiver to take charge of the defendant's property in a suit for divorce where a decree for alimony is sought. In some cases the receiver is appointed under the authority of statutes making special provisions for the appointment of receivers in divorce actions and in other cases under a showing of danger to the fund from which the alimony is sought to be collected.[1]

In some states the statute authorizes the court to require the husband in a divorce action to give reasonable security for alimony, and upon his failure to do so appoint a receiver.[2] Where the appointment is made pursu-

1 Court may appoint a receiver to take charge of husband's property to enforce a decree for alimony. Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582; Anderson v. Anderson, 124 Cal. 48, 56 Pac. 630, 57 Pac. 81, 71 **Am. St. Rep.** 17; Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61; Petaluma Sav. Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177; Stallings v. Stallings, 127 Ga. 464, 9 **L. R. A.** (N. S.) 593, 56 S. E. 469; Harding v. Harding, 120 Ill. App. 389; Holmes v. Holmes, 29 N. J. Eq. 9; Carey v. Carey, 2 Daly (N. Y.) 424; Drake v. Drake, 27 S. D. 329, 131 N. W. 294.

Receiver is to be appointed to collect alimony particularly where sequestration has been ordered. Seibly v. Ingham, Cir. Judge, 105 Mich. 584, 63 N. W. 528; Cizek v. Cizek, 69 Neb. 797, 5 **Ann. Cas.** 464, 96 N. W. 657, 99 N. W. 28; Swansen v. Swansen, 12 Neb. 210, 10 N. W. 713; Foster v. Townshend, 68 N. Y. 203.

In Kirby v. Kirby, 1 Paige (N. Y.) 261, the court says: "The injunction, receiver, and ne exeat may all properly be made use of to aid the court in doing justice between the parties." So, also, in Questel v. Questel, Wright (Ohio) 492, where a husband conveyed his property to his son to prevent a recovery for alimony on a bill pending for such purpose, it was held that a court of chancery may properly enjoin the parties from further changing the property, and appoint a receiver to secure the income to satisfy the alimony.

Receiver may be appointed of rents and profits pending the litigation. Vincent v. Parker, 7 Paige (N. Y.) 65.

Receivers have also been appointed in divorce cases in the English practice. See Waddell v. Waddell (1892), P. 226; Campbell v. Campbell (1895), 72 L. T. 294.

2 White v. White, 130 Cal. 597, 80 **Am. St. Rep.** 150, 62 Pac. 1062; see, also, Petaluma Sav. Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177 (see § 30, supra, for quotations from this case); Murray v. Murray, 115 Cal. 266, 56 **Am.**

ant to such a statute, the powers of the court must be exercised only in accordance with the terms of the stat-

St. Rep. 97, 37 L. R. A. 626, 47 Pac. 37; McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020.

Under statute, receiver will not be appointed unless husband fails to comply with decree for alimony. Logan v. Logan, 125 App. Div. 724, 110 N. Y. Supp. 174.

Evidence that the husband has failed to pay alimony pursuant to orders of the court, and that he has attempted to dispose of his property for the purpose of preventing the wife from getting any part of it, authorizes the appointment of a receiver on her application, and after notice to him, under Civ. Code, § 140, which provides that the court may enforce the payment of alimony by the appointment of a receiver. Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

Under Code Civ. Proc., § 1772, providing that, where a judgment requires a husband to provide for the support of his wife, the court may require reasonable security, etc., and on failure to do so the court may appoint a receiver thereof, but the power to appoint a receiver is expressly contingent upon failure to comply with the requirements of the judgment, and, where it affirmatively appears that there has been no such failure on the part of the defendant, the application for a receiver should be denied. Logan v. Logan, 125 App. Div. 724, 110 N. Y. Supp. 174.

Under Code Civ. Proc., § 1772, which provides that, when an action is brought upon a foreign judgment of divorce for adultery, the court may direct the husband to give reasonable security for the payment of alimony under the judgment, and, if he fails to give the security or defaults, the court may appoint a receiver for his personal property, in an action to enforce a foreign judgment for alimony, defendant can be required to give security only under section 1772, and, on his failure to give security, the court is confined to the remedy of sequestration provided in said section, and can not commit defendant for contempt for failure to give the security. Moore v. Moore, 142 App. Div. 459, 126 N. Y. Supp. 936.

Under Gen. Laws, 1909, ch. 247, 5, 16, and ch. 289, 1, the superior court in a divorce action has jurisdiction to appoint a receiver to conserve the property during the pendency of a proceeding for alimony. Warren v. Warren, 36 R. I. 167, 89 Atl. 651.

Rev. St. 1895, art. 1465, authorizes the appointment of a receiver in an action between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or any party whose right to or interest in the fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured. Article 2985 provides that, pending a suit for divorce, the court or the judge thereof may make such temporary orders respecting the property and parties as may be deemed necessary and equitable. Under these provisions it was held that a re-

ute, although such statutes are generally framed on the theory of giving protection to the wife from the property under the control of the husband and necessarily from the nature of the case must leave many matters to the discretion of the trial court.[3]

ceiver may be appointed in an action by a wife against her husband to establish her separate interest in property in his possession, and to prevent his disposing of her interest therein, and converting the proceeds to his own use, and for a divorce, where the character and condition of the property are such that the interest of plaintiff can be best protected by the appointment of a receiver. Shaw v. Shaw, 51 Tex. Civ. 55, 112 S. W. 124.

[3] In an action by a wife against her husband for a divorce where it appears that he is a resident of another state, to which he is attached by large holdings of property therein, and that, by reason of his non-residence he can not give personal attention to his property in this state, but leaves it to the management of agents, and it is admitted by the pleadings that he has endeavored, and is endeavoring, to sell or encumber his property so as to deprive his wife of a support, the court is justified in appointing a receiver to enforce its decree of maintenance. Anderson v. Anderson, 124 Cal. 48, 71 Am. St. Rep. 17, 56 Pac. 630, 57 Pac. 81.

In the above case the court said: "A more serious question is the necessity of the appointment of a receiver in the case. Section 140 of the Civil Code provides that the court may require the husband to give reasonable security for making any payments required, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case. It is charged in the complaint and not denied in the answer, that the husband endeavored and is endeavoring to sell and transfer or encumber his property and thereby deprive his wife of support. The defendant is a resident of the State of New York. Where so much is necessarily committed to the discretion of the trial court, depending in each case upon its estimate of the character of the parties, as exhibited in matters too numerous or too trivial to go into the record, we can not say that there was an abuse of discretion in this case in the appointment of a receiver. That the defendant was a non-resident of this state, attached to his residence in New York by large holdings of property, is a strong circumstance tending to make a receivership the most natural, as well as the most effective, method of enforcing compliance with the order for maintenance. And the severity of the method devised is mitigated by the fact that he did not, as from his non-residence he could not, give personal attention to his properties in this state, and left them to the management of agents. Under the management of a receiver, judiciously appointed, and subject to the control of the court, the properties may be well man-

The power given by the statute to appoint a receiver "after judgment to carry the judgment into effect" is to be construed as applying only to cases where the judgment affects specific property and to a case of an ordinary judgment for money which may be enforced by an execution. The judgment for a specific sum for alimony is regarded as an ordinary judgment.[4]

But aside from the statutory authority to be found in some of the states for the appointment of a receiver in divorce suits, a chancery court would have an undoubted right to appoint a receiver pending the determination of the question of alimony where there is danger of the alimony fund being wasted, depreciated or removed, since the property of the husband is charged with the liability of an alimony decree being rendered against him.[5] The

aged and the rights of both parties protected. These considerations probably tended to influence the judgment of the court below."

Under Acts May 23, 1907 (P. L. 227), and April 27, 1909 (P. L. 182), where service is upon husband by publication only, court held to have no power to appoint receiver to take all of deserting husband's property and sell it for the benefit of creditors and support of the wife. Erdner v. Erdner, 234 Pa. 500, 83 Atl. 420.

[4] White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

[5] A court in chancery granting a decree for alimony has ample power to enforce that decree when enforcement is possible; and this by the appointment of a receiver in a proper case. Harding v. Harding, 120 Ill. App. 389.

Where, in a divorce suit by the wife, it appears that the husband is a resident of another state with large property holdings in such state and leaves the management of his property in the state of the suit to agents and it is shown that he is endeavoring to encumber the property so as to deprive the wife of support, it is proper for the court to appoint a receiver. Anderson v. Anderson, 124 Cal. 48, 71 Am. St. Rep. 17, 56 Pac. 630, 57 Pac. 81.

Although statutes exist upon the subject in California, still the rule announced by the court in the above case would undoubtedly be the same in the absence of statutes on the subject.

The fact that the petition may show upon its face that defendant has an interest in the real property involved in the suit, and that he has been enjoined from disposing of sufficient of it to protect plaintiff against any damage that she might sustain by his mismanagement or fraudulent disposition of the personal property, would not defeat plaintiff's right to have

necessity for the appointment of a receiver may be obviated by the defendant giving a bond to secure the payment of any alimony to be awarded to the plaintiff.[6] Where the object to be attained by the appointment of a receiver has been attained by an order restraining the defendant from disposing of his property, the appointment of a receiver will be refused.[7] Likewise where the wife has

a receiver to take charge of the personal property. Shaw v. Shaw, 51 Tex. Civ. 55, 112 S. W. 124.

Where an attachment was issued against defendant for disobedience to an order for the payment of alimony, pending a divorce suit, and the defendant was about to dispose of his property and leave the state, held, that it was proper to interfere by injunction, and appoint a receiver of his property, if necessary to enable the court to apply the statute remedy Carey v. Carey, 2 Daly (N. Y.) 424.

A receiver will not be appointed unless the husband is about to remove the property. Spiller v. Spiller, 2 N. C. 482.

In an action for an absolute divorce, where it is impossible to serve the defendant personally because of his indefinite absence from the state, and there is property belonging to him in the state, which is in imminent danger of being lost, destroyed, depreciated by waste, or removed, so as to defeat the right of the wife to alimony, a receiver may, on a proper showing, be appointed to preserve the property. Stallings v. Stallings, 127 Ga. 464, 9 L. R. A. (N. S.) 593, 56 S. E. 469.

Independently of any statutory provision, a suit in equity may be maintained to compel the payment of alimony decreed to a wife. Barber v. Barber, 62 U. S. (21 How.) 582, 16 L. Ed. 226.

Receivers may be appointed in these classes of cases under the equitable rules under the authority of a statutory provision which allows a receiver to be appointed in all cases "where receivers have been heretofore appointed by the usages of the courts of equity." Murray v. Murray, 115 Cal. 266, 56 Am. St. Rep. 97, 37 L. R. A. 626, 47 Pac. 37.

6 After giving of bond by husband, receiver could not be appointed to take charge of community property. Williams v. Williams, 60 Tex. Civ. 179, 125 S. W. 937, 1199.

In Holmes v. Holmes, 29 N. J. Eq. 9, a receiver is said to be justifiable if the defendant will not give bond, with satisfactory security for the payments. Cf. Stillman v. Stillman, 7 Baxt. (66 Tenn.) 169.

7 Where, in a suit for divorce, it is shown that defendant is worth $75,000 to $80,000, composed largely of real estate, and defendant has been enjoined from disposing of it, the appointment of a special receiver to take charge of the personal property of the defendant is an abuse of judicial discretion. Goff v. Goff, 54 W. Va. 364, 46 S. E. 177.

been awarded a money judgment which is made a lien upon the husband's property, a receiver should not be appointed, since the plaintiff ordinarily has an adequate remedy by means of the lien.[8]

But a receiver is sometimes appointed under the statute in supplementary proceedings on the alimony judgment. In such a case the case is governed by the same rules applicable to similar proceedings on ordinary judgments.[9]

The same general rules as are applicable to divorce cases in respect to receiverships therein also apply to suits for maintenance.[10]

8 In a suit for divorce, the appointment of a receiver to collect and dispose of the defendant husband's property held improper; the wife being protected by a money judgment made a lien thereon. Gust v. Gust, 78 Wash. 414, 139 Pac. 228.

9 Barker v. Dayton, 28 Wis. 367.

Where, on failure of a husband to comply with an order to pay his wife alimony, all his personal property has been sequestered, and a receiver appointed, a separate action to restrain the executors of a will from paying the husband a legacy in their hands may also be maintained by the wife, and the proceeds thereof directed to be paid to the receiver. Garden v. Garden, 34 Misc. Rep. 97, 69 N. Y. Supp. 481.

Where defendant failed to pay plaintiff alimony due her, she can not complain of an order to sequester the personal property of defendant and appoint a receiver therefor for her benefit, even though an issue may arise between herself and such receiver respecting the title to certain insurance policies on defendant's life which are in her possession. Conklin v. Conklin, 125 App. Div. 278, 109 N. Y. Supp. 187.

Order appointing receiver and sequestrating certain moneys for purposes of payment of alimony will not be set aside on defendant's motion. Radloski v. Radloski, 72 Misc. Rep. 101, 129 N. Y. Supp. 818.

A decree for alimony is similar to a judgment and the party in whose favor it is rendered is in the position of a judgment creditor in respect to having a receiver appointed to aid in its enforcement. Oliver v. Lowther, 28 W. R. 381.

Also appointed where alimony has been decreed and husband attempts to fraudulently dispose of his property. Kirby v. Kirby, 1 Paige (N. Y.) 261; Barker v. Dayton, 28 Wis. 367.

10 Under 2 Rev. Stats., p. 147, 55, which provides that the court may make an order for the support and maintenance of the wife and her children, though separation is not decreed her, it was not intended to authorize the court to

§ 116. Procedure Requisites to the Appointment.

The general requisites in the matter of procedure also apply to the appointment of receivers in divorce actions. Thus the receiver will not be appointed if by reason of being dismissed, there is no pending suit for divorce before the court.[1] Likewise there should be a prayer asking for the appointment of a receiver.[2] And where the

seize, in the first instance, out of the bulk of the husband's property, through means of a receiver, a sum sufficient to produce the income deemed proper, but only to require him to secure its payment. Davis v. Davis, 1 Hun (N. Y.) 444.

A receiver may be appointed of the husband's property in the state, where a decree for separate maintenance has been rendered in favor of the wife, and the husband is a non-resident, and allegations in the bill that he is about to dispose of the property are not denied. Anderson v. Anderson, 124 Cal. 48, 71 Am. St. Rep. 17, 56 Pac. 630, 57 Pac. 81.

In an action for separation, a receiver in sequestration proceedings will not be discharged, nor will directions be given to him to withdraw all claim to certain funds on deposit in a bank necessary for the payment of alimony awarded plaintiff, where it is manifest that the money in question was the property of the defendant, who has sought to thwart the plaintiff's rights to recover the same and disobeyed the order of the court. Radloski v. Radloski, 72 Misc. Rep. 101, 129 N. Y. Supp. 818.

An action by a wife for maintenance without divorce, in which it is also sought to set aside transfers made by a husband to defeat plaintiff's rights to maintenance out of his property, is by reason of the inadequacy of purely legal remedies so much a subject of equitable cognizance that it carries with it the right to have a receiver appointed under the general provision of Cal. Code Civ. Proc., sec. 5641, for the appointment of receivers in all cases "where the receivers have been heretofore appointed by the usages of the courts of equity." Murray v. Murray, 115 Cal. 266, 56 Am. St. Rep. 97, 37 L. R. A. 626, 47 Pac. 37.

1 Where plaintiff's petition in divorce had been dismissed when the court appointed a receiver, and the defendant had withdrawn his answer, in so far as it prayed for a divorce, only leaving that part which prayed for a division of the property, but plaintiff's reply to the answer, in which she renewed her prayer for a divorce, was before the court, so that there was a suit pending when the receiver was appointed. Crawford v. Crawford (Tex. Civ.), 163 S. W. 115.

Receiver to collect alimony may be appointed on wife's affidavit alone. Shaw v. Shaw, 51 Tex. Civ. 55, 112 S. W. 124.

2 Where in an action for divorce in which a corporation was joined as defendant in order to seek relief as to certain property alleged

statute requires the receiver to furnish a bond before entering upon his duties, such a bond must be furnished.[3]

The court has no jurisdiction, after the entry of a money judgment in a divorce action, to continue the receiver for the purpose of enforcing the judgment. Any new duties conferred upon him by the judgment are in excess of the jurisdiction of the court, where the power to appoint a receiver exists only in the cases prescribed by the code. Hence the functions of a receiver appointed pending an action for divorce who takes possession of no property before the judgment, terminates with the entry of the judgment, since the object of his original appointment and the functions originally vested in him terminate with the entry of the judgment.[4] Likewise where defendant has taken an appeal from an order appointing a receiver to enforce payment or security for the payment of temporary alimony and furnished a bond to stay further proceedings under the order, the court has no authority to appoint a receiver to secure the ultimate payment of the temporary alimony.[5] And a receiver ap-

to have been conveyed to it in fraud of plaintiff's rights, the only relief asked against it was that it be enjoined from disposing of the property alleged to have been conveyed to it, and the corporation made default and failed to answer, a direction that the corporation convey the property to a receiver is in excess of the relief asked and under the section of the statute prohibiting such relief, is improper. Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122.

3 Code Civ. Proc., § 715, providing that if a receiver be appointed in an action or a special proceeding, before entering on his duties, shall file with the proper clerk a bond conditioned, etc., is applicable to a receiver appointed to take charge of the personal property of a husband against whom a judgment for alimony had been recovered, and who has failed to pay the sum decreed, as authorized by section 1772. In re Spies, 92 App. Div. 175, 86 N. Y. Supp. 1043.

4 White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062.

5 Though, under Civ. Code, § 137, a Superior Court may require the husband, in an action for divorce, to pay temporary alimony, suit expenses, etc., and, under section 140, may enforce payment or security therefor by the appointment of a receiver or by other appropriate remedy, where defendant filed a bond to stay proceedings pending an appeal from orders re-

pointed in such a case can not sue without leave of court as in other receivership cases.[6]

§ 117. What Property May Be Placed Under Receivership.

There is no doubt that any property which may be considered in connection with the making of an award of alimony may be placed under a receiver appointed in a divorce suit if the same is within the jurisdiction of the court.

Thus where a husband conveyed certain real estate, including a large number of contracts for the sale thereof, to a foreign corporation in order to prevent its seizure, an order appointing a receiver to take control of such contracts, collect, and conserve the proceeds, etc., was not objectionable on the ground that they were mere choses in action, and not "assets" and that prior to the award of alimony complainant was not a creditor.[1]

Where in a suit for divorce a receiver has been appointed over the property of the defendant which is claimed by the wife as belonging to her, and a third person claims an interest in the property, the receiver will be directed to pay the rents and profits of the portion claimed by the third person in court to await the final determination of the title.[2]

Where in a divorce action the defendant, who is a partner in a business, absconds and a receiver is appointed

quiring him to pay temporary alimony, the Superior Court had no jurisdiction to appoint a receiver to provide security for the ultimate payment of temporary alimony, since Code Civ. Proc., § 946, provides that the perfecting of an appeal shall stay further proceedings in the court below on orders appealed from and matters embraced therein. McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020.

6 A receiver appointed in sequestration proceedings against a husband on his failure to pay alimony to the wife as directed can not sue without leave of court. Garden v. Garden, 34 Misc. Rep. 97, 69 N. Y. Supp. 481.

1 Warren v. Warren, 36 R. I. 167, 89 Atl. 651.

2 Vincent v. Parker, 7 Paige (N. Y.) 65.

over his property, the receiver so appointed has no right to dispossess the other partner.[3]

A receiver in such a case takes the property subject to all the liens and equities existing against it.[4] Where the receiver is merely appointed to collect the rents and profits, he takes no title to the land itself[5] and, of course, he obtains no rights in respect to property not belonging to the defendant.[6]

3 Hamill v. Hamill, 27 Md. 679.

4 Although Civ. Code, § 140, provides that the court may require the husband in a divorce case to give reasonable security for alimony, and may enforce the same by the appointment of a receiver, a receiver appointed in such case takes the property of the husband subject to all prior liens, and the holders of such liens may take such proceedings elsewhere as the law exacts for preserving and enforcing the liens, according to their priority, without regard to the mere volition of the court or judge making the appointment. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177.

In a suit for divorce, plaintiff averred that certain creditors of the husband had caused his property to be sequestrated, their claims being fraudulent towards her, she obtained an order appointing her custodian of the property pending the determination of the question. The creditors filed pleas setting up good faith, alleging that the property delivered to the wife had been converted into money, and praying that she be directed to pay the same into court, and that their claims be satisfied therefrom. The court held that the pleas should not be stricken out as foreign to the issues in the suit. Bradley v. Ramsey (Tex. Civ.), 65 S. W. 1112.

In a suit for divorce, where plaintiff obtained an order whereby she was appointed custodian pending investigation of seizure of her husband's property by creditors, jurisdiction to enforce such claims against the property so delivered to plaintiff attached as incidental to the main suit, regardless of amount or value. Bradley v. Ramsey (Tex. Civ.), 65 S. W. 1112.

5 A receiver appointed in an action for divorce, pursuant to 1 Rev. Stats., p. 148, 60, authorizing sequestration of rents and profits of husband's real property to enforce payment of alimony, does not take title to the land. Foster v. Townshend, 68 N. Y. 203.

6 A receiver appointed for defendant's property in a divorce action could not move for an examination of defendant as to property now or theretofore held by him belonging to his wife; the receivership not extending to the wife's property, whoever may have it. Bradley v. Bradley, 137 App. Div. 751, 122 N. Y. Supp. 626.

CHAPTER VII.

MATTERS ARISING FROM PARTNERSHIP RELATIONS.

1. General Rules Applicable.

§ 118. General Principles.

The inability of partners to sue each other in a court of law has always resulted in the equity branch of the courts assuming a broad jurisdiction in matters relating to partnership affairs. A court of equity has always been regarded as the proper forum in which to adjust partnership difficulties and take charge of suits for the dissolution of the partnership relation. The jurisdiction to appoint receivers over partnership property has been unquestioned by not only the early authorities in our country[1] but by even the early authorities of England,[2] although the difficult position in which the court is often placed in deciding upon the propriety of appointing a receiver was early recognized and the power to appoint receivers over partnership property was exercised with great caution.[3] It is realized by the courts that if the receiver is appointed, its effect is to terminate the partnership relation without the consent of one of the parties, and if it refuses to make the appointment it allows the defendant to continue the business at the risk and probably to the loss of the plaintiff. It must, however, weigh

1 Tomlinson v. Ward, 2 Conn. 396; Allen v. Hawley, 6 Fla. 142, 164, 63 Am. Dec. 198; Saylor v. Mockbie, 9 Iowa 209; Gridley v. Conner, 2 La. Ann. 87; Williamson v. Wilson, 1 Bland's Ch. (Md.) 418; Wolbert v. Harris, 7 N. J. Eq. 605; Crane v. Ford, 1 Hopk. Ch. (N. Y.) 114; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Jordan v. Miller, 75 Va. 442.

2 Const. v. Harris, Turn. & R. 517; Goodman v. Whitcomb, 1 J. & W. 589; Smith v. Jeyes, 4 Beav. 503; Wilson v. Greenwood, 1 Sw. 471.

3 New v. Wright, 44 Miss. 202; Madgwick v. Wimble, 6 Beav. 495.

these difficulties and in the circumstances presented before it determine what is for the best interests of both parties.[4] The right to appoint a receiver over a partnership property is, as in other cases, a matter within the judicial discretion of the court, having in view all of the circumstances of the case.[5] The appointment will not be made merely because no one will be injured by it.[6]

And where the injury from the appointment of a receiver over the partnership will exceed the advantages, the appointment will be refused.[7]

4 Lord Langsdale in Madgwick v. Wimble, 6 Beav. 495, said: "It must be admitted that when an application is made for a receiver in partnership cases the court is always placed in a position of very great difficulty. On the one hand, if it grants the motion the effect of it is to put an end to the partnership which one of the parties claims a right to have continued; and on the other hand, if it refuses the motion it leaves the defendant at liberty to go on with the partnership business at the risk and probably at the great loss and prejudice of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken, but the court is under the necessity of adopting some mode of proceeding to protect according to the best view it can take of the matter, the interests of both parties, and it has accordingly interfered in many such cases."

5 Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537; New v. Wright, 44 Miss. 202; Madgwick v. Wimble, 6 Beav. 495.

The refusal of a receiver in a suit for dissolution of a partnership lies in the discretion of the court. Silveira v. Reese, 7 Cal. Unrep. 112, 71 Pac. 515; Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596.

In Slemmer's Appeal, 58 Pa. 168, 98 Am. Dec. 255, it is said: "A partnership will not be dissolved on slight grounds." "In making such a decree the court will consider not merely the terms of the express contract between the partners, but also the duties and obligations implied in every partnership contract. Smith v. Jeyes, 4 Beav. 503. Where a valuable business has grown up, by the joint labors and contributions of all, the court should be careful to preserve it, if possible, and put all parties upon a fair and equal footing in competing for it. To appoint a receiver, to direct a sale of the whole and a winding-up of the business would destroy its value without benefiting either party."

6 Morey v. Grant, 48 Mich. 326, 12 N. W. 202.

7 Philips v. Von Raven, 26 Misc. Rep. 552, 57 N. Y. Supp. 701.

In passing upon the question whether a receiver should be appointed over the property of a partnership the court is not governed by the same principles of law as are applicable to a case where it is determining whether to issue an injunctional order against one or more members of the partnership. In appointing a receiver a much stronger case should be shown, since the effect of the appointment is to take the control and management of the property entirely out of the hands of all the members of the partnership, whereas in issuing an injunctional order it merely modifies the control of the property. Consequently the court will often grant an injunction as against a defendant partner in a case where it will refuse to appoint a receiver.[8] For these reasons it is often said that courts are reluctant in the exercise of their power to appoint receivers over partnership property.[9] The general principles applicable to partnership cases were in an early Maryland case[10] stated as follows:

"It is true, as it has been strenuously urged, that it must be a strong case that will justify this ultimate resort of a court of equity. It is a high power never exercised where it is likely to produce irreparable injustice or injury to private rights or where there exists any other safe or expedient remedy. Still in a variety of instances,

8 Hall v. Hall, 3 Mac. & G. 79; Hartz v. Schrader, 8 Ves. 317.

9 Bard v. Bingham, 54 Ala. 463; Loomis v. McKenzie, 31 Iowa 425; Goldman v. Manistee Circuit Judge, 155 Mich. 47, 118 N. W. 600; Morey v. Grant, 48 Mich. 326, 12 N. W. 202; Albrecht v. Diamon, 125 Minn. 283, 146 N. W. 1101; Nathan v. Bacon, 75 N. J. Eq. 401, 72 Atl. 359; Hard v. Klaus, 9 N. J. Law J. 370; Moies v. O'Neill, 23 N. J. Eq. 207; Cox v. Peters, 13 N. J. Eq. 39; Birdsall v. Colie, 10 N. J. Eq. 63; Cohn v. Wahn, 132 App. Div. 849, 117 N. Y. Supp. 633; Buchanan v. Comstock, 57 Barb. (N. Y.) 568; Webb v. Allen, 15 Tex. Civ. 605, 40 S. W. 342; Smith v. Brown, 50 Wash. 240, 96 Pac. 1077; Wales v. Dennis, 9 Wash. 308, 37 Pac. 450; Cary Bros. v. Dalhoff Const. Co., 126 Fed. 584; Devereux v. Fleming, 47 Fed. 177; Baxter v. West, 28 L. J. Ch. 169; Waters v. Taylor, 2 Ves. & B. 299, 15 Ves. 10; Carlen v. Drury, 1 Ves. & B. 154, 12 R. R. 203; Burden v. Howard, 2 N. Brunsw. Eq. 461.

10 Speights v. Peters, 9 Gill (Md.) 472.

especially in partnership transactions where the parties after dissolution of their connection, can not agree upon the adjustment, and the property or funds in dispute are in the hands of one partner alone, each having an equal right to the control of the property, cases must necessarily arise where the interest of both can only be properly secured by the intervention and appointment of a receiver. . . . It is assumed by the appellant that the court, as preliminary to the appointment of a receiver, must also further be satisfied that the property is in imminent peril. This, however, is not always a necessary condition to the action of the court. Against the legal title, or a strong presumptive title in the defendant, the court would interfere with great reluctance; and only where the property was in danger of being materially injured or lost. But in respect to a fund which is claimed, and is *prima facie* the proceeds of a partnership, it is but a provident exercise of equity power to place the property under the care of the court."

The appointment of a receiver being the exercise of a power incidental to equity jurisdiction and proceedings for the winding up of partnership affairs being an equity proceeding, it is obvious that the court has an inherent right to appoint a receiver in such cases where necessary to give effect to a decree to be rendered in the main action.[11]

But the court will not appoint a receiver in a suit involving a controversy among partners where the issue involves merely legal rights as distinguished from equitable rights.[12] And in accord with the general rule appli-

11 Martin v. Hurley, 84 Mo. App. 670; Cox v. Volkert, 86 Mo. 505, 511.

12 A receiver should not be appointed merely to determine conflicting rights to property where there is no danger of loss of the property. McIntosh v. Perkins, 13 Mont. 143, 32 Pac. 653.

A receiver will not be appointed over a question of damage. There must be an account to be adjusted. Morrison v. Van Benthuysen, 103 N. Y. 675, 9 N. E. 180.

cable to all receivership cases, a receiver will not be appointed where no ultimate relief other than the appointment of a receiver is sought.[13] Where all of the partners join in the request for the appointment of the receiver, the court will not generally refuse to make the appointment,[14] although if the court has no jurisdiction to appoint a receiver, jurisdiction to do so can not be conferred by the consent or stipulation of the parties.[15]

§ 119. Statutory Provisions for Appointment.

Frequently statutes exist which cover the appointment of receivers including the circumstances in which one will be appointed in relation to partnerships. Such statutes, though having many features in common, in some instances have changed the general rules which would otherwise apply, but in most instances such statutes are merely codifications of the general principles formulated by the chancery courts.[1]

Under Code Civ. Proc., § 564, subd. 6, which, after setting forth certain specific cases, provides that receivers may be appointed in all other cases "where receivers have heretofore been appointed by the usages of courts of equity," a receiver may not be appointed for a partnership in an action involving merely legal, as distinguished from equitable, rights, on a showing that the defendants were largely indebted, that their property was subject to labor liens, and that their affairs would be better conserved by the appointment of receivers, etc. First Nat. Bank v. Superior Court, 12 Cal. App. 335, 107 Pac. 322.

13 Style v. Lantrip (Tex. Civ.), 171 S. W. 786.

14 A partner of a solvent partnership who has agreed to the appointment of a receiver over it can not thereafter object to such appointment. Southwell v. Church, 51 Tex. Civ. 547, 111 S. W. 969; Saylor v. Mockbie, 9 Iowa 209; Fitzner v. Noullet, 114 La. 167, 38 So. 94; Newman v. Schminke, 50 La. Ann. 516, 23 So. 714; Todd v. Rich, 2 Tenn. Ch. 107; Taylor v. Neute, 39 Ch. D. 538, 57 L. J. Ch. 1044, 60 L. T. 179, 37 W. R. 190.

15 First Nat. Bank v. Superior Court, 12 Cal. App. 335, 107 Pac. 322.

1 The power to appoint receivers in actions between partners, conferred by the Rev. Stats., 1895, art. 1465, is to be exercised only in accord with the general practice and principles of equity, in cases where some good reason or necessity is shown for the appointment. The power of appointment should not be exercised without notice except in a case of emergency.

§ 120. Defendant Partner Furnishing a Bond in Lieu of a Receiver.

As we have seen in the fore part of this work, the court may make the appointment of a receiver dependent upon the failure of the defendant to furnish a bond to secure the plaintiff in any recovery which the court may find that he is entitled on the final outcome of the litigation,[1] and likewise where the defendant offers voluntarily to furnish such a bond the court will be very reluctant at appointing a receiver.[2] These same principles are applicable to suits involving controversies between partners. Undoubtedly there are cases in which the furnishing of a bond by the defendant would not be ample protection to the plaintiff, but perhaps in the majority of cases the rights of the plaintiff partner could be sufficiently protected by the furnishing of such a bond, together with an injunctional order.

Webb v. Allen, 15 Tex. Civ. 605, 40 S. W. 342.

Under Rev. Stats., 1895, art. 1465, authorizing the appointment of a receiver in an action between partners on the application of one of the partners, and article 1492, which provides that nothing shall prevent a member of a partnership from having a receiver appointed whenever a cause of action arises between the copartners, a partner applying for the appointment of a receiver of the partnership property need not prove that the property is in danger of being lost, but is entitled to the appointment of a receiver on a showing that he has been wrongfully excluded from the management of the partnership business. Rische v. Rische, 46 Tex. Civ. 23, 101 S. W. 849.

Under a statute which authorizes a partner in a suit to dissolve the partnership and settle its affairs to apply to a judge of the proper court, in case they can not agree upon a distribution, for a receiver to hold the partnership property and distribute in accord with the orders of the court, and which also authorizes the judge to appoint a receiver forthwith in case he should deem it just and reasonable to do so, the action of the judge must be based on a preliminary hearing and finding that he deems the appointment just and reasonable. Bostwick v. Isbell, 41 Conn. 305.

For a general discussion of the effect of statutory provisions on the appointment of a receiver, see section 21, supra.

1 See section 15, supra.

2 See section 25, supra.

If the appointment of the receiver would cause great inconvenience to all of the parties, the court may make an appointment to be effective if the defendant fails to furnish a bond to indemnify the plaintiff partner.[3] In other words, under such circumstances the court will allow the defendant to furnish a bond to secure the plaintiff in lieu of the appointment of a receiver.[4] And the court may in its discretion refuse to appoint a receiver when the defendant offers to furnish an indemnity bond.[5] And, of course, where the statute allows a defendant partner to prevent the appointment of a receiver in a partnership action by the furnishing of a bond to indemnify the plaintiff, no receiver will be appointed upon compliance with the statute in that respect.[6]

The question whether the rights of the complaining partner can be sufficiently protected by the furnishing of a bond to account to the plaintiff is one which rests within the discretion of the court, having in view the particular

3 Cary Bros. v. Dalhoff Const. Co., 126 Fed. 584; Mann v. Gaddie, 158 Fed. 42, 88 C. C. A. 1.

4 In Saverios v. Levy, 40 Hun 639, 1 N. Y. St. Rep. 758, the defendant offered to execute a bond in such sum and with such sureties as the court might require, conditioned to obey all orders of court; a receiver was refused. In Popper v. Scheider, 7 Abb. Prac. N. S. (N. Y.) 56, 38 How. Pr. 34, the partnership was denied and but a small portion of the capital was controlled by the plaintiff and the defendants were willing to give security, a receiver was refused. McDonald v. Trojan Button F. Co., 56 Hun (N. Y.) 648 (mem.), 10 N. Y. Supp. 91.

Where, in a suit for an accounting of a partnership engaged in the brokerage business, the appointment of a receiver will destroy the use by defendant of his stock exchange seat, the court may permit him to give bond in lieu of a receiver being appointed. Valentine v. Muir, 121 N. Y. Supp. 704.

5 In Buchanan v. Comstock, 57 Barb. (N. Y.) 568, a receiver was refused before it was determined how much of the partnership effects belonged to each partner, where no insolvency was alleged, and the defendant denied the entire equity of the complaint but offered to convey one-half of the stock to the plaintiff to indemnify him.

6 Roberts v. Pipkin, 63 S. C. 252, 41 S. E. 300.

circumstances of the case at bar. An appellate court will not disturb the action of the trial court in appointing a receiver, notwithstanding that the defendant offered to give a bond to satisfy any decree rendered in favor of the plaintiff.[7]

§ 121. Necessity for a Showing of Danger of Loss.

It is one of the fundamental rules in respect to the appointment of a receiver that as a prerequisite to such an appointment there must be a danger of loss of the property or fund constituting the receivership. Hence in the case of a partnership litigation in order to have a receiver appointed there must be a showing of danger to the partnership property.[1]

7 Where, in a suit for the dissolution of a partnership, the defendant, being in possession, in order to defeat an application for a receiver, offered to give bond to satisfy any decree in favor of plaintiff, but the court made the appointment, the action will not be disturbed on appeal, the record not showing the proofs on which the court's judgment was based. Fleming v. Carson, 37 Ore. 252, 62 Pac. 374. The court said: "It is further insisted that, as the defendant proffered a bond to meet the approval of the court for the satisfaction of any decree that might be rendered in favor of the plaintiff, the court ought not to have made the appointment. In some instances such an undertaking will obviate and relieve the necessity for a receiver (Buchanan v. Comstock, 57 Barb. (N. Y.) 568; Saverios v. Levy, 40 Hun 639, 1 N. Y. St. Rep. 758; Popper v. Scheider, 7 Abb. Prac. [N. S.] (N. Y.) 56, 38 How. Pr. 34); but in the present instance the defendant is in possession of the property, while the plaintiff has an equal right thereto pending adjustment, and, the court having passed upon the propriety of the appointment, we can not assume to disturb its action in the absence of the proofs upon which its judgment was based."

Where plaintiff obtained an injunction restraining defendant from interfering with his mercantile business on the ground of being a discharged employee and gave an injunction bond in that action, such bond will not preclude the defendant from obtaining the appointment of a receiver in another action against the plaintiff seeking a dissolution of an alleged partnership in the business based on the ground that the business was being mismanaged and dissipated, since the bond was not an adequate remedy. Robbins v. Reed, 174 Ind. 291, 91 N. E. 921.

1 A receiver will not be appointed where the defendant is responsible and danger of loss is

A receiver will not be appointed in relation to rights arising from joint transactions where such transactions have been consummated, in the absence of proof of insolvency or danger of loss.[2]

And the mere fact that the partnership business has not been profitable is not ground for the appointment of a receiver.[3]

§ 122. Effect Where Plaintiff Partner Is in Possession.

A plaintiff who is in the possession of the partnership is not in a position to ask for the appointment of a receiver over it, since he can as a partner sell the prop-

not alleged and shown. Loomis v. McKenzie, 31 Iowa 425; Heflebower v. Buck, 64 Md. 15, 20 Atl. 991; Simon v. Schloss, 48 Mich. 233, 12 N. W. 196; Quinlivan v. English, 44 Mo. 46; Renton v. Chaplain, 9 N. J. Eq. 62; Buchanan v. Comstock, 57 Barb. (N. Y.) 568; Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485; Wellman v. Harker, 3 Ore. 253; Kilbreth v. Root's Adm'r, 33 W. Va. 600, 11 S. E. 21; Ex parte Owen, L. R. 13 Q. B. Div. 113.

A receiver will not be appointed over partnership property where there is no danger that it will be ultimately lost. Perrin v. Lepper, 56 Mich. 351, 23 N. W. 39; Wellman v. Harker, 3 Ore. 253.

On an application for appointment of a receiver between partners in transactions concerning land and other deals, the plaintiff must make a showing that the property or funds were in danger of being lost, removed, or materially injured, as required by Rev. Stats. 1895, art. 1465. Sanborn v. Nelson (Tex. Civ.), 134 S. W. 855.

The fact that defendant, in an action for an accounting of a partnership, had the legal title to the partnership property, is no objection to the appointment of a receiver, where the plaintiff had paid money into the firm, and the profits had been converted by defendant to his own use. Brooke v. Tucker, 149 Ala. 96, 43 So. 141.

If danger to the property be shown, a receiver may be appointed even though the existence of the partnership be denied by the defendant. Longbottom v. Woodhead, 83 L. T. 423, 31 Sol. J. 796.

2 In McIntosh v. Perkins, 13 Mont. 143, 32 Pac. 653, it is said that where it appears from the complaint that all the joint operations had been consummated except the collection of the debts and there remains simply a dispute as to the proper apportionment of the fund arising from the business, no averment being made as to insolvency or danger of loss, a receiver should not be appointed.

3 Shoemaker v. Smith, 74 Ind. 71; Moies v. O'Neill, 23 N. J. Eq. 207.

erty, the only liability attaching to him being that of the duty of accounting to his copartner for the latter's share in it. If the copartner does not complain of the property being left in his possession, he who has the possession of it certainly ought not to complain.[1]

So also where the partnership has expired by the terms of the partnership agreement and in a suit for a final accounting the defendant partner offers to turn over the partnership property to the plaintiff for settlement of the partnership affairs, the court will refuse to appoint a receiver.[2]

§ 123. Effect of Insolvency of Defendant Partner.

Inasmuch as a loss of the partnership property may result from allowing an insolvent member to wind up the partnership, the fact of the partner in possession being insolvent is ground for the appointment of a receiver.[1]

1 Smith v. Lowe, 1 Edw. Ch. (N. Y.) 33. See Hoffman v. Duncan, 17 Jur. 825; Roberts v. Eberhardt or Everhardt, 1 Kay 148; Buchanan v. Comstock, 57 Barb. (N. Y.) 568.

2 Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615.

1 In Randall v. Morrell, 17 N. J. Eq. 343, the court said: "But with the circumstance of the insolvency of one of the partners in addition to the fact of the dissolution of the firm would under ordinary circumstances induce this court to assume the administration of the partnership affairs, I think, admits of no doubt. . . . It is only by the united efficacy of these two safeguards (injunction and receivership) that when insolvency supervenes the estate of the copartnership can be secured and preserved for the benefit of those to whom they equitably belong."

On insolvency of a firm one who has supplied goods may have a receiver when the property sold is about to be turned over to a new concern. Hite Natural Gas Co.'s Appeal, 118 Pa. 436, 12 Atl. 267.

In an action between partners for an accounting and recovery of the amount due them, where no claim was made that defendant partner was not financially responsible or able to respond to any decree which might be rendered, and no dissolution of the partnership was prayed, the appointment of a receiver pending the action to take charge of the partnership property was unauthorized. Greenwald v. Gotham-Attucks Music Co., 118 App. Div. 29, 103 N. Y. Supp. 123.

A member of a partnership may maintain an action to place the affairs of the concern in the hands

So also where there are any state of facts, such as mismanagement, waste, exclusion of one partner from the partnership affairs, and the like, together with insolvency on the part of the member in possession of the partnership property, the appointment of a receiver is very appropriate.[2] The insolvency of one of the copartners has really the effect of terminating the partnership. By reason of his financial death the insolvent can not perform either the express or implied duties of the partnership agreement. Nor can he perform his ultimate duty toward the creditors of the partnership. If the partnership becomes insolvent the partners become trustees for the benefit of the partnership creditors and it would be eminently proper in such circumstances to have a receiver handle its affairs.[3]

of a receiver, when the partnership has become insolvent and other members of the firm are charged with fraudulent misapplication and improper conversion and waste of assets of the partnership. Watson v. Bettman, 88 Fed. 825.

2 In Boyce v. Burchard, 21 Ga. 74, where one partner in violation of his duty mismanages the partnership business to the great detriment of the partnership and is insolvent, it was held the other partner was entitled to a distribution and a receiver.

In Pini v. Roncoroni (1892), 1 Ch. Div. 633, one partner withdrew from the partnership a large sum of money and this brought about its insolvency; a receiver was appointed although the partnership agreement provided for referring the matters in dispute to arbitration.

In White v. Colfax, 1 Jones & S. (N. Y.) 297, it is held that although the articles of distribution vest the right of winding up the partnership in some one or more of the partners, yet when they violate the terms of the dissolution agreement, such as refusing access to the books, and when the feeling is such that the right of supervision can not be exercised without great embarrassment or unpleasantness, a receiver should be appointed.

In Smith v. Jeyes, 4 Beav. 503, it is held that the specific contract of partnership can not and does not cover all the implied duties of the partners to each other.

3 In Williamson v. Wilson, 1 Bland Ch. (Md.) 418, it is said that after a firm has become insolvent the partners are to be considered as trustees for the benefit of their creditors and therefore a suit between such partners might be considered as a creditor's suit and the partnership estate collected and distributed accordingly. The allegation in this case was that the trading had ceased, the firm

Bankruptcy of one partner is also a sufficient ground for the appointment of a receiver, since under such cir-

utterly insolvent, and a receiver was asked as the only means of saving the partner plaintiff and the creditors from the fraudulent practices of the copartner. The court say: "So long as a man carries on his business and has a prospect of gain he is not considered as insolvent; but if in addition to such deficiency of property his business so far declines as to leave him no prospects of paying his debts he is then, according to the universal sense of mankind, insolvent." "Insolvency is the total destruction of the pecuniary capacity of the partner to fulfil his contract of co-partnership. But his pecuniary capacity was the basis on which it rested. The contract itself must therefore be considered as effectually annulled as if the party were dead. If both be insolvent, or dead, there is no efficient or living capacity left to execute the contract. If only one be dead, or insolvent, the terms can not be complied with; and, where personal confidence was the principal inducement for making an agreement, as in contracts of this nature, it would be unreasonable; and therefore the other party should not have the executor, administrator, trustee, or assignee of the deceased or of the insolvent intruded upon him. Consequently, the partnership between these parties must be considered as having been virtually and effectually terminated by their insolvency. It can not be extended over new business transactions nor be allowed to expand any more. It must be wound up and brought to a close; and except for such purposes must be deemed to have totally ceased to exist." See Ex parte Williams, 11 Ves. Jr. 5; Harding v. Glover, 18 Ves. Jr. 281; Vulliamy v. Noble, 3 Meriv. 614; Crawshay v. Maule, 1 Swanst. 506.

"While a man continues solvent the order in which he pays his creditors is a matter of indifference, since none can suffer; and therefore no creditor has the right to complain of the rights given to another. But as soon as he becomes insolvent that privilege ceases; and equity requires that he should make an equal distribution among them all. The giving of undue and improper preference in such circumstances is denounced by the express provisions of our insolvent laws as a fraud. And in all cases where the court of chancery can be called upon and does interpose for the purpose of administrating the assets of an insolvent debtor it is governed by the rule of equality; because equality is equity. The assets, if insufficient to pay all, are always distributed proportionately. . . . These parties admit themselves to be insolvent debtors. The plaintiff charges his copartners, the defendants, with a design to waste the joint property and apply it to their own use. The defendants deny this allegation and charge the plaintiff with a design to misapply the funds and give some of the creditors undue preference. Taking the charges of the plaintiff and of the defendants, or either of them, to be true or allow that each or either party was about to

cumstances the partnership is practically terminated and the proper thing to do is to close its affairs as speedily as possible.[4]

§ 124. Over What Property a Partnership Receiver Will Be Appointed.

It is self evident that a receiver of a partnership is only entitled to take possession of property belonging to the partnership. Hence a receiver of the property of a partnership appointed after the death of one of the partners should not be authorized in the order to take possession of the individual property of the surviving partner.[1]

waste the property, or has his favorite creditors to whom it is his design to give an undue preference, and it is clear that one or the other or both of them have formed a fixed resolution to violate one of the great principles of equity which it is the province of this court to prevent. None of the creditors of these insolvent debtors, so far as it appears, have as yet obtained any legal advantage. It is proper, therefore, that this court should now lay its hands upon the joint property of this partnership and let all its creditors come in pari passu and according to their respective priorities, if any should appear."

[4] Fraser v. Kershaw, 2 Kay & J. 496. The bankruptcy of one partner puts an end to the partnership, but the solvent partner can not transfer his right to another by assignment or otherwise to wind up the concern, or permit the same to be sold on an execution. In Wilson v. Greenwood, 1 Swanst. 471, it is held that on the bankruptcy of one partner the partnership in one sense is determined, but is continued until all the partnership affairs are settled. In Freeland v. Stansfeld, 2 Smale & G. 479, on the bankruptcy of one partner the solvent partner is entitled to a receiver and the assignee has no right to interfere with the partnership matters and with the collection of the partnership debts.

A firm whose articles provide that if any partner becomes bankrupt he shall cease to be a partner, and his share in the capital shall remain as a loan during the remainder of the partnership term, the solvent partner is entitled to be appointed receiver and manager of the business, but he must give security, pass his accounts, furnish proper accounts to trustees, allow them all reasonable access to the books, and pay the balances in his hands into court, or into a joint banking account of such trustees and himself. Collins v. Barker, (1893) 1 Ch. Div. 578.

[1] Adams v. Hannah, 97 Ga. 515, 25 S. E. 330.

A conditional interest in a partnership is sufficient cause for appointing a receiver.[2]

And a receiver may be appointed notwithstanding that the only assets of the partnership are proceeds from the sale of the partnership property.[3] But where the assets of the partnership have been sold under foreclosure proceedings and there is apparently nothing belonging to the partnership, the court will not appoint a receiver.[4] Where the showing for the appointment of the receiver as to the real property which comprises the larger part of the partnership assets is insufficient to warrant the appointment, the court should refuse to make the appointment.[5]

§ 125. Receivership in Case of Non-Resident Partners.

If the property is situated within the state, doubtless a receiver would be appointed over it in an otherwise proper case even though the partners resided in another state, but in case the partners resided within the state but the property was situated elsewhere a more difficult question arises. Doubtless the court could maintain a certain amount of control over the property by means of compelling the persons within its control to comply with its orders. This was done in an English case[1] which involved a trust organization analogous to a partnership which was dealing with mines and plantations in a for-

2 Taylor v. Bliley, 86 Ga. 154, 12 S. E. 210.

3 Taylor v. Wells, 113 Iowa 326, 85 N. W. 30.

4 A receiver of partnership property can not be appointed where all the partnership property has been sold under a chattel mortgage, on an agreement that upon any sale by the mortgagee, who was the purchaser, the residue above the mortgage debt should belong to the partners, and such mortgagee sells the property to one of the partners for not more than the amount of the debt, even though the latter may sell it for an amount in excess of the debt. Davis v. Niswonger, 145 Ind. 426, 44 N. E. 542.

5 Sanborn v. Nelson, (Tex. Civ.) 134 S. W. 855.

1 Sheppard v. Oxenford, 1 Kay & J. 491. In this connection see the sections dealing with the extra-territorial power of courts.

eign country. In that case jurisdiction was had over the person of the trustee who held the title to the property and who had threatened to sell the property, and the suit in which the receiver was appointed was one for an accounting. The courts of Massachusetts and New York have refused to appoint receivers as against non-resident partners on the ground of having no jurisdiction over them.[2] But where the partnership business is conducted within the state the court may appoint a receiver over it without notice to a non-resident partner.[3]

§ 126. Receiverships Over Limited or Special Partnerships.

Limited or special partnerships are governed in their general relations toward the partners and creditors by the statutes of the particular state. In many of their aspects they are similar to corporations and on account of this similarity the courts have applied to them the equitable principles which have been applied to corporations in disputes between their members or insolvency in respect to creditors. A receiver may be appointed over the property of such a partnership under the same general conditions and circumstances as against a general partnership, and especially will one be appointed in a creditors' suit when the partnership is insolvent or in imminent danger of becoming so.[1] This rule is based

2 Harvey v. Varney, 104 Mass. 436; Evans v. Evans, 9 Paige (N. Y.) 178.

3 Alford v. Berkele, 29 Hun (N. Y.) 633, 634.

1 Jackson v. Sheldon, 9 Abb. Pr. (N. Y.) 127; Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183.

In Mills etc. v. Argall, 6 Paige (N. Y.) 577, it was held that the assignment by a limited partnership to a trustee for the benefit of creditors after the firm had become insolvent, or was in contemplation of insolvency, was void as against the creditors of the firm if preferences were made to one creditor, or class of creditors; and also if the assignment provides for the payment of a debt of the special partner ratably with other creditors of the firm. This case was based upon the provisions of the statutes regarding limited partnership and prohibiting preferences. In Innes v. Lansing, 7 Paige (N. Y.) 583, it was held that in a case of limited partnership the effects of the firm, upon its becoming insolvent, become a spe-

upon the doctrine that upon the insolvency of the partnership the assets become a trust fund to be divided equally between all creditors, and that in such case it becomes the duty of the general partners to place the firm property in the hands of a trustee for such distribution, and in default of doing so court will appoint a receiver for such purpose. The underlying principle upon which these cases rest is that of securing an equal distribution among all general creditors, and the inequitable principle of preferences sometimes recognized. The principle of placing the effects of a limited partnership

cial trust fund for the payment of the partnership debts ratably except debts due special partners, and that the filing of a bill by one creditor in behalf of himself and of others is a bar to the filing of another similar bill. In Jackson v. Sheldon, 9 Abb. Pr. (N. Y.) 127, the same doctrine was held as in the case last cited, and that where the firm becomes insolvent it is the duty of the partners to place in the hands of a trustee the partnership effects for the benefit of all creditors without preference. It was also held that where certain creditors obtained judgment upon a failure of the parties to answer and levied executions upon the partnership effects, after which the partners made a general assignment for the benefit of creditors without preference, that the court should enjoin the levy and sale on the execution and appoint a receiver to take charge of the effects as they existed at the time of the insolvency. The decision is based upon the ground that the failure of the parties to answer and thereby suffering a default of the firm was in effect giving a preference to the judgment creditors. The motion to set aside the sale in such case for irregularity must be made in the action in which the sale was had, but the order on the sheriff to retain the property unsold is properly made in the creditor's suit. Cf. Whitewright v. Stimpson, 2 Barb. (N. Y.) 379.

Where a limited partnership becomes insolvent, one of its members may sue to wind up its business and have a receiver appointed to preserve its assets and distribute them to its creditors. Bell v. Merrifield, 28 Hun (N. Y.) 219; Continental Nat. Bank v. Strauss, 60 N. Y. Sup. Ct. 151, 17 N. Y. Supp. 188. But see Snyder v. Leland, 127 Mass. 291.

In this connection see, also, American Box Mach. Co. v. Crosman, 61 Fed. 888, 10 C. C. A. 146; Batchelder v. Altheimer, 10 Mo. App. 181; Whitewright v. Stimpson, 2 Barb. (N. Y.) 379; Whitcomb v. Fowle, 10 Daly (N. Y.) 23, 7 Abb. N. Cas. 295, 56 How. Pr. 365; Blaylock's Appeal, 73 Pa. St. 146. See, also, LaChaise v. Lord, 1 Abb. Pr. (N. Y.) 213, 10 How. Pr. 461.

in the position of trust funds, and applying to the general partners the relationship of trustees has its analogy, of course, in the rules applied to private corporations in cases of insolvency and is founded upon justice and fair dealing.

But the liabilities of the partners toward each other and toward the creditors of the partnership are the same as otherwise, notwithstanding the appointment of a receiver over the partnership assets.[2]

§ 127. Necessity to Show the Existence of a Partnership.

The appointment of a receiver in matters of partnership is in all cases dependent upon certain facts, the ex-

[2] A creditor of a limited partnership association over which a receiver has been appointed is not thereafter entitled to issue execution in his judgment against subscribers to stock of the association whose subscriptions are not paid up. Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251, 38 L. R. A. 794, 69 N. W. 511.

In Hogg v. Ellis, 8 How. Pr. (N. Y.) 473, an accounting was allowed between general and special partners as in other cases, and this either after or before dissolution. Cf. Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183.

In Van Alstyne v. Cook, 25 N. Y. 489, it is held that the members of a limited partnership before or after insolvency are just as liable to suit for their debts as other natural persons. Their creditors are entitled to recover judgment against them with a view of reaching the individual property as well as partnership property. The property of a limited partnership does not constitute a trust fund in the hands of partners any more than in ordinary partnerships. No rule of equity exists which makes them trust funds in any other sense or which gives a court of equity any control over them, or which forbids creditors of the copartnership, or an individual from obtaining a lien on them by due process of law.

In Hayes v. Heyer, 3 Sandf. Ch. (N. Y.) 293, the court say in relation to general and limited copartnerships that the rule is the same in both cases regarding the distribution made by the court, but when the order of distribution is made by the partners themselves in ordinary copartnerships they may give preference to one creditor or a class of creditors over others, while in limited partnerships the statute reserves that power and directs the mode of distribution. It was also held that a single member of a failing firm can not appoint a trustee without the consent or knowledge of the other partners and thus transfer to such trustee the entire partnership effects. See, also, Deming v. Colt, 3 Sandf. Ch. (N. Y.) 284.

istence of which is necessary to be alleged and shown as preliminary to the relief prayed for and as preliminary to the jurisdiction of the court in granting such relief.

The existence of a partnership, or at least such relationship *inter se* as practically amounts to a partnership, which is usually determined by a participation in the profits of the concern, must be shown. Such partnership must exist in fact and not merely in name, for an employee though nominally a partner, is not entitled to invoke the aid of the court in the appointment of a receiver, nor is the existence of an agreement between the parties which may ripen into a partnership sufficient.[1]

1 Where it does not clearly appear that the relation between the parties constitutes a partnership, a receiver will not be appointed. Irwin v. Everson, 95 Ala. 64, 10 So. 320; Hobart v. Ballard, 31 Iowa 521; Kerr v. Potter, 6 Gill (Md.) 404; Nutting v. Colt, 7 N. J. Eq. 539; Goulding v. Bain, 4 Sandf. Ch. (N. Y.) 716; Popper v. Scheider, 7 Abb. Pr. N. S. (N. Y.) 56, 38 How. Pr. 34. See Katsch v. Schenck, 18 L. J. Ch. N. S. 386; Peacock v. Peacock, 16 Ves. Jr. 49.

In Kerr v. Potter, 6 Gill (Md.) 404, one of the parties was to have one-fourth of the net profits of the business, but under a provision of the contract it was provided that they were not to be partners by reason of the division of the profits; it was held not to be a partnership and there was error in appointing a receiver. And so where a person was employed at a salary of $500 and one-fourth the net profits. Nutting v. Colt, 7 N. J. Eq. 539.

Contra: Where the salary was £100 and one-fifth of the net profits on all new business. Katsch v. Schenck, 18 L. J. Ch. N. S. 386. An agreement of partnership which has not been executed is not sufficient. Hobart v. Ballard, 31 Iowa 521. In the absence of proof of danger the court will not appoint a receiver where the partnership is denied. Goulding v. Bain, 4 Sandf. Ch. (N. Y.) 716, citing Peacock v. Peacock, 16 Ves. Jr. 49.

In an action for dissolution of a partnership and appointment of a receiver, it is necessary to determine before the appointment of the receiver, the existence of the alleged partnership and the facts necessary to vest in the court jurisdiction of the controversy. Norton v. Sperry, 113 Minn. 447, 129 N. W. 843.

Where the existence of the partnership is doubtful and the business was one conducted under a license which could not be assigned, a receiver will be denied although an injunctional order restraining a disposition of the property may be granted. Semple v. Flynn, (N. J.) 10 Atl. 177.

It is, of course, obvious that great damage would be done a defendant if a receiver were appointed over a business which was in fact owned by him individually and not as a member of a copartnership.

§ 128. Effect of the Existence of the Partnership Being Denied.

As shown in the last section, it is essential in order to give the court jurisdiction to appoint a receiver in a partnership litigation that there must be a partnership in existence but, on the other hand, the appointment of a receiver might be defeated by the mere denial of such existence if such a denial would be deemed sufficient. Some of the decisions state in broad terms that the appointment of a receiver will be refused where the existence of the partnership is denied,[1] but we do

In any suit for an accounting, the existence of the partnership must be shown before the court will determine the respective interests of the partners. Loftus v. Fischer, 117 Cal. 128, 133, 48 Pac. 1030.

Where a petition in a suit for an accounting and the appointment of a receiver of partnership property alleged that plaintiff and defendant entered into a partnership to conduct a certain business, and continued to conduct the business until a specified date, sufficiently alleges the existence of a partnership, without giving further details, to warrant the appointment of a receiver on a proper ground. Rische v. Rische, 46 Tex. Civ. 23, 101 S. W. 849.

But the court in a suit to establish a joint interest of the parties in alleged partnership property will not in determining appointment of a receiver determine property rights of plaintiff based on the insufficiency of his pleading a tender, since that is a question for the trial on the merits. Ramsey v. Bird, (Tex. Civ.) 147 S. W. 671.

Where the existence of the partnership is in doubt and there is no proof of fraud or mismanagement, and the appointment of a receiver will, according to the evidence of the defendant, irreparably damage the business, that of a theatrical business, the court properly refuses to appoint a receiver. Bimberg v. Wagenhals, 53 Misc. Rep. 13, 102 N. Y. Supp. 925.

1 In Irwin v. Everson, 95 Ala. 64, 10 So. 320, where the defendant denied the partnership, a receiver was refused.

In Irwin v. Everson, 95 Ala. 64, 10 So. 320, which was a suit for settlement between partners, a receiver was denied on the ground that the defendant in possession denied the partnership and was

not believe that the rule should be stated in such broad terms. On the other hand, much trouble could be caused to the owner of a business by appointing a receiver in a case in which the plaintiff wrongfully claims to be a partner in the business. The proper rule in this respect is that if the existence of the partnership is denied, the court must be satisfied of its existence and that the partnership property is in danger, before it will appoint a receiver over it.[2] In other words, if the court is satisfied

solvent and able to respond for all damages, upon the authority of Peacock v. Peacock, 16 Ves. Jr. 49; Fairburn v. Pearson, 2 Macn. & G. 144; Goulding v. Bain, 4 Sandf. Ch. (N. Y.) 716; Hobart v. Ballard, 31 Iowa 521; Williamson v. Monroe, 3 Cal. 383; Popper v. Scheider, 7 Abb. Pr. N. S. (N. Y.) 56, 38 How. Pr. 34.

And where it is distinctly denied that certain property is partnership property the court will decline a receivership. Gregory v. Gregory, 1 Sweeny (N. Y.) 613.

2 Rowland v. Auto Car Co., 133 Fed. 835; Irwin v. Everson, 95 Ala. 64, 10 So. 320; Williamson v. Monroe, 3 Cal. 383; Leeds v. Townsend, 74 Ill. App. 444; Hobart v. Ballard, 31 Iowa 521; Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537; Albrecht v. Diamon, 125 Minn. 283, 146 N. W. 1101; Bimberg v. Wagenhals, 53 Misc. Rep. 13, 102 N. Y. Supp. 925; Kirkwood v. Smith, 64 App. Div. 615, 72 N. Y. Supp. 291; Day v. Dow, 46 App. Div. 148, 61 N. Y. Supp. 793; McCarty v. Stanwix, 16 Misc. Rep. 132, 38 N. Y. Supp. 820; Goulding v. Bain, 4 Sandf. Ch. (N. Y.) 716; Moyn v. Rose, 245 Pa. 601, 92 Atl. 39; Baxter v. Buchanan, 3 Brewst. (Pa.) 435; McGlensey v. Cox, 1 Phila. (Pa.) 387; Smith v. Brown, 50 Wash. 240, 96 Pac. 1077; Ballard v. Callison, 4 W. Va. 326; Wood v. Wood, 50 W. Va. 570, 40 S. E. 416; Rische v. Rische, 46 Tex. Civ. 23, 101 S. W. 849. But see: Hackett v. Multnomah Ry. Co., 12 Ore. 124, 53 Am. Rep. 327, 6 Pac. 659.

A receiver will not be appointed nor an injunction granted in proceedings to dissolve an alleged partnership where the partnership is denied, unless it clearly appears that a partnership exists or that the fund is in danger. McCarty v. Stanwix, 16 Misc. Rep. 132, 38 N. Y. Supp. 820.

A receiver of the property of an alleged partnership will be appointed, although the existence of the partnership is denied by the defendant, when the court is satisfied from the evidence in support of the application that a partnership really existed. Leeds v. Townsend, 74 Ill. App. 444.

The court will not as a rule appoint a receiver of a partnership, the existence of which is denied, until the question of such existence is determined. Guild v. Meyer, 56 N. J. Eq. 183, 38 Atl. 959.

Receiver will not be appointed

of the existence of the partnership it will in an otherwise proper case appoint a receiver, notwithstanding that such existence is denied by the defendant partner.[3] Where one of the alleged partners in possession of the property denies the existence of the partnership relation, such denial constitutes an exclusion of the complaining party from the partnership if it in fact does exist, and on that ground the plaintiff is entitled to a receiver, since exclusion from the partnership constitutes a breach of one of the necessary privileges of every partner.[4]

Thus where one of the partners claims certain property as belonging to himself as his individual property and the copartner claims that it was the result of a partnership transaction, it is proper to appoint a receiver over it.[5]

And where in an action to subject certain property to the payment of plaintiff's claim, it was claimed that the defendant had purchased the property but taken title in the name of his wife to defraud creditors, but it appeared that the property was partnership property of the wife and another person and that the partner of the wife was solvent, the appointment of a receiver was refused.[6]

The refusal of the alleged partner to join in a deed of assignment for the benefit of creditors and his denial

in a proceeding to dissolve a partnership where the existence of the partnership is denied unless the court is satisfied as a matter of fact that there is a partnership between the parties and the property is in danger. Williamson v. Monroe, 3 Cal. 383.

3 Rische v. Rische, 46 Tex. Civ. 23, 101 S. W. 849.

4 Peacock v. Peacock, 16 Ves. 49; Blakeney v. Dufour, 15 Beav. 40; Wilson v. Greenwood, 1 Sw. 471.

5 Saylor v. Mockbie, 9 Iowa 209.

In an action for an accounting between alleged former partners, the court properly refused to authorize a receiver to take charge of property claimed by each as individual property. Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537.

6 Venable v. Smith, 98 N. C. 523, 4 S. E. 514.

of being a member of the partnership has been held to be insufficient ground for the appointment of a receiver.[7]

Where the existence of the partnership is denied the court, as has been stated above, must settle that question to its satisfaction before considering whether it will appoint the receiver,[8] but we do not believe that a court would refuse to appoint a temporary receiver pending such a determination in a case of great emergency. The court may, if it desires, direct the issue of whether a partnership exists to be tried as an issue at law by a jury.[9] Sometimes, however, the denial of the existence of a partnership may raise an issue of law as to whether under undisputed facts the circumstances constitute a partnership. Thus the question arose in one case whether two corporations which had formed a partnership had in law the power to enter into a partnership. The right to appoint a receiver was questioned on the ground that the alleged partnership was not one in fact, but the court held that in view of the authority given each of the corporations to become a member of a partnership there was no prohibition in the statute against such an act and sustained the receivership.[10] And other instances

7 Wilson v. Hawker Lumber Co., 74 W. Va. 65, 81 S. E. 568.

8 In a suit in aid of an execution against a partnership, a receiver will not be appointed where the existence of the partnership is denied until the question of such existence is settled. Guild v. Meyer, 56 N. J. Eq. 183, 38 Atl. 959.

Where the complaint, though uncertain in its allegations that certain property belonged to the partnership over which the receiver was appointed, was not demurred to for uncertainty in that respect, the court may direct the receiver to take the property in his possession. Title Ins. etc. Co. v. Grider, 152 Cal. 746, 94 Pac. 601.

9 Peacock v. Peacock, 16 Ves. 49; Fairburn v. Pearson, 2 Macn. & G. 144.

10 In News-Register Co. v. Rockingham Pub. Co., 118 Va. 140, 86 S. E. 874, the validity of the appointment of a receiver was dependent upon the question whether the two corporations which had entered into the partnership had the right under the law to do so. In holding that there was nothing essentially illegal in the formation of a partnership by two corporations where their char-

may also occur in which it is a question whether the litigants are partners such as various arrangements whereby one person is not to furnish capital toward the business but merely services and receive a portion of the profits. In such class of cases the real question before the court is whether under the particular facts the relation between the parties is that of partners. If they are partners and the circumstances alleged as grounds for the appointment are sufficient otherwise, a receiver will be appointed.[11]

ters authorized such action, the court, speaking through Mr. Justice Kelly, said:

"We come, then, to the real question in the case, which relates to the power of the two corporations to form a partnership. The appellants' contention, as stated in their brief, 'that corporations, unless expressly authorized, have no power to enter into a partnership, either with each other or with individuals,' is perfectly sound, subject to the slight qualification by some respectable authorities that the power may be impliedly, as well as expressly, given. The law to this effect is old and well settled, but not more so than the converse proposition that, when the authority is given, the exercise of such power is entirely competent and valid. This is so because when the power is given in the charter, the reason underlying the rule against its exercise no longer exists. This underlying reason is that the stockholders are entitled, in the absence of notice to the contrary in the charter, to assume that their directors will conduct the corporate business without sharing that duty and responsibility with others. The clear result of the authorities, including those cited by appellants, is that the rule against corporate partnerships is limited to cases in which the power in question does not appear in the charter, and that the reason for the rule is as we have here stated it. See Fechteler v. Palm Bros. & Co., 133 Fed. 462, 66 C. C. A. 336; Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681; 2 Cook on Corp. (6th ed.), § 678; 7 Am. & Eng. Enc. L. (2d ed.) 794, 795; Hackett v. Multnomah Ry. Co., 12 Ore. 124, 53 Am. Rep. 327, 6 Pac. 659; 1 Min. Inst. 560; 1 Elliott on Contracts, § 483; 10 Cyc. 1143."

11 Where the plaintiff is entitled to participate in the profits of the business and there is danger of loss, as a general rule the court will appoint a receiver. Hobart v. Ballard, 31 Iowa 521; Katz v. Brewington, 71 Md. 79, 20 Atl. 139; Katsch v. Schenck, 18 L. J. N. S. Ch. 386.

But, of course, in such circumstances, in order to have a receiver appointed, there must be some facts shown, such as insolvency or fraud, which endanger the rights of the plaintiff partner. Cox v. Peters, 13 N. J. Eq. 39.

2. Violations of Partnership Duties and Obligations.

§ 129. General Rule as to Breach of Duties and Obligations.

There are two general classes of cases arising out of partnership relations in which a receiver may be appointed; namely, those arising in the ordinary partnership dissolution proceeding, and those arising by reason of a breach of the duties and obligations existing between the partners prior to the termination of the partnership relation in the ordinary way. In the circumstances last stated the breach of duty must generally be one of such a nature that it will be cause for the termination of the partnership.

Inasmuch as the existence of mutual confidence is of the essence of a partnership, where it appears that the defendant partner has done acts which are of a character to destroy such confidence, it is proper to appoint a receiver,[1] but such lack of confidence must be based upon acts of misconduct and not mere suspicion. In order to warrant the appointment of a receiver the breaches of the partnership agreement or the duties implied from the relationship must be serious ones and go to the essence of the successful conduct of the partnership business.[2] Where all the partners have an equal right, not

A plaintiff is not entitled to have a receiver appointed for a partnership of which he is not a member or creditor, nor to an account based on its receipts and expenditures. Gwinn v. Lee, 6 Pa. Super. Ct. 646.

1 Smith v. Jeyes, 1 Beav. 505; Chapman v. Beach, 1 J. & W. 594 n; Ex parte Broome, 1 Rose 69.

2 Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596; West v. Chasten, 12 Fla. 315; Haight v. Burr, 19 Md. 130; Sutro v. Wagner, 23 N. J. Eq. 388 (affirmed in Wagner v. Sutro, 24 N. J. Eq. 589); Wolbert v. Harris, 7 N. J. Eq. 605; Sloan v. Moore, 37 Pa. St. 217; Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Redding v. Anderson, 37 Wash. 209, 79 Pac. 628; Einstein v. Schnebly, 89 Fed. 540; Hale v. Hale, 4 Beav. 369; Lawson v. Morgan, 1 Price 303; Harding v. Glover, 18 Ves. 281; Blakeney v. Dufaur, 15 Beav. 40, 51 Eng. Reprint 451; Steele v. Grossmith, 19 Grant Ch. (U. C.) 141; Doupe v. Stewart, 13 Grant Ch. (U. C.) 637; Prentiss v Brennan, 1 Grant Ch. (U. C.) 371.

There must be some violation of

only in the conduct of the business but also in its settlement after dissolution, a failure to agree among themselves or the refusal of one partner to allow the other to participate either in the conducting of or the settlement of the business, obviously presents a case for the appointment of a receiver. When the conduct of one partner is incompatible with the relations of the copartnership and is likely to result in loss or injury to any of his copartners, it is the practice of courts of equity upon application to dissolve the partnership and appoint a receiver.[3]

In a general way, it may be stated that a receiver may be appointed where there has been a violation of the partnership agreement or a breach of partnership duty.[4]

the rights of a copartner. Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129.

In a suit by a partner against the partnership, where it appears from the answer of the defendant partners that the plaintiff has been guilty of waste, mismanagement, and a refusal to furnish statements concerning the condition of the partnership affairs, together with collusion with others in respect to the litigation against the partnership, a receiver may be appointed. Whilden v. Chapman, 80 S. C. 84, 61 S. E. 249.

In Harding v. Glover, 18 Ves. 284, the chancellor said: "I have frequently disavowed, as a principle of this court, that a receiver is to be appointed merely on the ground of a dissolution of partnership. There must be some breach of the duty of a partner or of the contract of partnership."

Waste on the part of a defendant partner, combined with a condition of insolvency on the part of the partnership furnishes a condition of affairs in which the court will appoint a receiver. Williamson v. Wilson, 1 Bland's Ch. 418; Todd v. Rich, 2 Tenn. Ch. 107.

3 Maynard v. Railey, 2 Nev. 313.

4 Allen v. Hawley, 6 Fla. 142, 164, 63 Am. Dec. 198; New v. Wright, 44 Miss. 202; Sutro v. Wagner, 23 N. J. Eq. 388; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Heathcot v. Ravenscroft, 6 N. J. Eq. 113; Jackson v. Sheldon, 9 Abb. Pr. (N. Y.) 127; Crawshay v. Maule, 1 Swanst. 50; Gowan v. Jeffries, 2 Ashm. 296; Estwick v. Conningsby, 1 Vern. 118; Const. v. Harris, Turn. & R. 496; Harding v. Glover, 18 Ves. Jr. 281.

Where the plaintiff partner shows that defendant has refused to contribute his part of the capital nor to account for the moneys furnished by plaintiff toward the expenses nor to co-operate in the prosecution of the business, and it is also shown that no division of the partnership assets or good will can be mutually agreed upon and that a sale of the property will be necessary in order to di-

§ 130. Dissensions and Quarrels Between the Partners.

One of the common difficulties encountered in partnership affairs is dissensions of greater or lesser magnitude.

Where the dissensions are of such a nature that the partnership can no longer be continued or carried on with comfort and advantage to all concerned, equity will decree a dissolution, and in making such a decree the court will consider not merely the terms of the partnership agreement, but also the duties and obligations implied in every partnership contract.[1]

vide it, a cause for the dissolution of the partnership is shown and the court may appoint a receiver to wind it up. Smith v. Lamon (Tex. Civ.), 143 S. W. 304.

Where two partners, who owned timber land and a saw mill, formed a partnership with a third party, who had no capital, but who was to operate the mill and share in the net profits and account with the owners, and such third member purchased timber without the consent of the others, operated a store without their consent and at a loss, caused the expenses to be largely in excess of the gross income from the mill, improperly used money furnished by his partners, failed to produce proper accounts or pay rolls as a basis for a settlement with the employees, and refused to deliver up the possession of the mill to his partners, on a bill for dissolution of the partnership, a receiver is properly appointed to manage the business and settle the rights of the parties. Reid v. Freed, 100 Miss. 48, 56 So. 278.

Plaintiffs and defendant entered into a verbal agreement of partnership, whereby it was agreed that each should contribute $1500 in cash. Each plaintiff deposited $1500 in cash but defendant refused to carry out the terms of the agreement, and misapplied the money contributed. In a suit to restrain defendant from misapplication of the joint property, for a receiver, and for an accounting, it was held that the court properly appointed a receiver and granted a preliminary injunction. Fitzgerald v. Flynn, (R. I.) 69 Atl. 921.

Chancellor Walworth, in Marten v. Van Schaick, 4 Paige Ch. (N. Y.) 479, said: "Each partner has an equal right in this case to the possession and control of the partnership effects and business, and if they can not agree among themselves, it is a matter of course to appoint a receiver upon a bill filed to close the partnership concerns on the application of either party."

In respect to the above case and the rules set forth, see, also, § 144, infra.

[1] Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255.

In News-Register Co. v. Rock-

Mere temporary quarrels or dissensions are not sufficient. It must, however, appear in an action for dissolution based upon disagreements and dissensions that no reconciliation nor adjustment is probable.[2] In such cir-

ingham Pub. Co., 118 Va. 140, 86 S. E. 874, the court appointed a receiver for a partnership engaged in the newspaper publishing business on account of dissensions among the parties controlling the business.

In Allen v. Hawley, 6 Fla. 142, 164, 63 Am. Dec. 198, the court said: "From the examination which we have made of the authorities on this subject, we think the law may be considered as settled, that whenever the intervention of a court of equity becomes necessary, in consequence of dissensions or disagreements between the partners, to effect a settlement and closing of the partnership concerns, upon bill filed by any of the partners showing either a breach of duty on the part of the other partners, or a violation of the agreement of partnership, a receiver will be appointed as a matter of course."

[2] A receiver will not be appointed on the application of one partner against his copartner where it appears that there is a mere disagreement between the partners. Loomis v. McKenzie, 31 Iowa 425; New v. Wright, 44 Miss. 202; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Law v. Ford, 2 Paige (N. Y.) 310; Marten v. Van Schaick, 4 Paige (N. Y.) 479; Slemmer's Appeal, 58 Pa. 168, 98 Am. Dec. 255.

Where there is a disagreement in respect to the control and disposition of a fund and as to the rights of the copartners to it, a receiver may be appointed. Whitman v. Robinson, 21 Md. 30.

In Loomis v. McKenzie, 31 Iowa 425, it was held that ill-feeling or differences between the partners which are not shown to have resulted from the fault of the defendant will not justify the appointment. Cf. McCrackan v. Ware, 3 Sandf. (N. Y.) 688.

In Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385, it is held that the court will not interfere by appointing a receiver of a subsisting partnership unless it satisfactorily appears that the plaintiff will be entitled to have the partnership dissolved and wound up, but a receiver will not necessarily be appointed because an injunction is granted. See, also, Jackson v. De Forest, 14 How. Pr. (N. Y.) 81.

In Williamson v. Wilson, 1 Bland Ch. (Md.) 418, there were mutual charges made by the partners against each other any one of which it was held being sufficient to warrant a dissolution of the partnership a receiver was appointed, insolvency being admitted on both sides.

In Harding v. Glover, 18 Ves. Jr. 281, it is held that a receiver would not be appointed merely upon the ground of a dissolution of the partnership, but that there must be a breach of duty by one partner or a breach of the contract.

In Henn v. Walsh, 2 Edw. Ch.

cumstances where the dissensions and lack of harmony and understanding between the partners are irreconcilable the court appoints a receiver upon the theory that if the partners will not trust each other equity will not trust either of them to settle an affair in which each of them, but for their differences, would be entitled to share in equal degree.[3] Likewise where serious disa-

(N. Y.) 129, the vice chancellor said: "A partnership agreement, like any other, is binding upon the parties; and they must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other, without a sufficient cause. Mere dissatisfaction by one party will not justify him in filing a bill for a dissolution where, by the express agreement, it is to continue for a definite term; and this court will not interfere to dissolve the contract upon such ground. . . . The same rules apply in respect to the appointment of a receiver. It must appear to be such a case as would authorize a decree for a dissolution. Goodman v. Whitcomb, 1 Jac. & W. 569; Coll. 195, 196. In thus interposing, the court generally looks to the winding up of the affairs, and not to the continuation of a trade under its authority. Where a dissolution has already taken place, or it is apparent that it will be decreed on the ground of some breach of duty or contract by one of the partners, then a receiver will be appointed. But if partners quarrel, a receiver will not be appointed merely on such an account, because it may not, of itself, be a sufficient ground for severing the connection between them."

Under a statute providing that a receiver may be appointed in any action between partners, on application of the plaintiff or any party whose right to an interest in the property or fund or the proceeds thereof is probable, where it is shown that the property of a solvent firm is in danger of being lost, removed, or materially injured, because of disagreement between the partners, a receiver may be appointed to manage the business. Southwell v. Church, 51 Tex. Civ. 547, 111 S. W. 969.

But the existence of mere dissatisfaction is not sufficient to warrant the appointment of a receiver over the partnership. Webb v. Allen, 15 Tex. Civ. 605, 40 S. W. 342.

[3] Martin v. Wilson, 84 Wash. 625, 147 Pac. 404.

In the above case the court said: "Affidavits signed by each of the parties clearly indicate that the parties are so hostile to each other that it is not likely that there will be any reconciliation between them, or that the affairs of the partnership can be settled in a harmonious way. We think it is also clear that the books and a knowledge of their contents and the business of the firm is within the knowledge and keeping of the appellant, and that in a sense respondent is excluded from a participation in the affairs of the con-

greements exist between the partners in respect to the management or disposition of the partnership property, the appointment of a receiver is proper.[4] Indeed, the most frequent causes for the appointment of a receiver for a partnership are disagreements between the partners during the period of settling its affairs respecting

cern; such exclusion resting upon a lack of understanding of the state of the accounts and business of the firm. Furthermore, an accounting is prayed for.

"The rule is well established that where a partnership has been dissolved, or a suit for dissolution and an accounting is pending, and there is a serious lack of understanding and harmony between partners, and one partner is excluded from any voice in the management and control of the affairs of the partnership, a receiver will be appointed. Cole v. Price, 22 Wash. 18, 60 Pac. 153; Redding v. Anderson, 37 Wash. 209, 79 Pac. 628; 30 Cyc. 726 et seq. The rule may be epitomized: If the parties to a partnership will not trust each other, equity will not trust either of them to settle an affair in which each of them, but for their differences, would be entitled to share in equal degree.

"We think the case fairly falls within the principle laid down by this court in the case of Boothe v. Summit Coal Min. Co., 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207, where a like situation, in so far as the relation of the parties is concerned, was before the court. It was held that notwithstanding the rule that courts would hesitate to appoint a receiver in aid of minority stockholders of a corporation, where the two who were contending were the sole and equal owners of the stock of the corporation, they would be treated as partners. . . .

"While all of the circumstances which we found to exist in that case do not exist in this one, we do find enough in the disharmony of the parties and the right to an accounting to bring this case within the rule there announced. This disharmony and the need of an accounting is as clearly shown by the affidavit of the appellant as it is by that of the respondent. Whipple v. Lee, 46 Wash. 266, 89 Pac. 712. See, also, Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 153, 131 Pac. 485. In the Whipple case a receiver was appointed to take over a partnership pending a settlement of its affairs."

4 Terrell v. Goddard, 18 Ga. 664; Loomis v. McKenzie, 31 Iowa 425; Whitman v. Robinson, 21 Md. 30; Speights v. Peters, 9 Gill 472; Williamson v. Wilson, 1 Bland Ch. (Md.) 418; Walker v. House, 4 Md. Ch. 39; Marten v. Van Shaick, 4 Paige (N. Y.) 479; Law v. Ford, 2 Paige (N. Y.) 310; McCracken v. Ware, 3 Sandf. (N. Y.) 688; Dunham v. Jarvis, 8 Barb. (N. Y.) 88; Goodman v. Whitcomb, 1 Jac. & W. 589; Roberts v. Eberhardt or Everhardt, 1 Kay 148; Const v. Harris, Turn. & R. 518.

the proper management of its affairs.[5] But the court will not appoint a receiver because of dissensions among the partners where it appears no manifest benefit will accrue to either of the litigating partners and it does appear as if the appointment will destroy the business itself.[6]

The fact that one partner does not co-operate but leaves the entire management of the business to his copartner is not ground for the appointment of a receiver.[7]

5 Gillett v. Higgins, 142 Ala. 444, 4 Ann. Cas. 459, 38 So. 664; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; Bennett v. Smith, 108 Ga. 466, 34 S. E. 156; Dunn v. McNaught, 38 Ga. 179; Taylor v. Bliley, 86 Ga. 154, 12 S. E. 210; Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682; Wehmeier v. Mercantile Banking Co., 49 Ind. App. 454, 97 N. E. 558; Anderson v. Powell, 44 Iowa 20; Taylor v. Welles, 113 Iowa 326, 85 N. W. 30; Story v. Moon, 3 Dana (Ky.) 331; Whitman v. Robinson, 21 Md. 30; Speights v. Peters, 9 Gill (Md.) 472; Walker v. House, 4 Md. Ch. 39; Kirby v. Ingersoll, 1 Dougl. (Mich.) 477; Martin v. Hurley, 84 Mo. App. 670; Veith v. Ress, 60 Neb. 52, 82 N. W. 116; Birdsall v. Colie, 10 N. J. Eq. 63; McElvey v. Lewis, 76 N. Y. 373; Wilcox v. Pratt, 52 Hun 340, 5 N. Y. Supp. 361 (affd. 125 N. Y. 688, 25 N. E. 1091); Witherbee v. Witherbee, 17 App. Div. 181, 45 N. Y. Supp. 297; Brush v. Jay, 50 Hun 446, 3 N. Y. Supp. 332, 21 N. Y. St. 312 (revd. 113 N. Y. 482, 21 N. E. 184); Richards v. Baurman, 65 N. C. 162; Fleming v. Carson, 37 Ore. 252, 62 Pac. 374; Fox v. Curtis, 176 Pa. St. 52, 34 Atl. 952; Sloan v. Moore, 37 Pa. St. 217; Watson v. McKinnon, 73 Tex. 210, 11 S. W. 197; Southwell v. Church, 51 Tex. Civ. App. 547, 111 S. W. 969; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Jordan v. Miller, 75 Va. 442; Martin v. Wilson, 84 Wash. 625, 147 Pac. 404; Whipple v. Lee, 46 Wash. 266, 89 Pac. 712; McMahon v. McClernan, 10 W. Va. 419; Schmidt v. Mertes, 145 Wis. 468, 130 N. W. 474.

6 Slemmer's App., 58 Pa. St. 168, 98 Am. Dec. 255.

The court will not appoint a receiver of the assets of a firm prior to the expiration of the partnership term, except for the purpose of the preservation of the assets in the face of a real danger of loss, although the disagreements between the partners are such as to justify the court in decreeing a dissolution. Warwick v. Stockton, 55 N. J. Eq. 61, 36 Atl. 488.

7 In Roberts v. Eberhardt, Kay 148, it was held that merely because the partners did not co-operate in the business was no ground for a receiver.

As to lack of co-operation, see, also, Rowe v. Wood, 2 J. & W. 556, where one partner refused to advance more funds with which to conduct mining operations.

§ 131. Mismanagement and Misappropriation as Ground.

Another ground for the appointment of a receiver over a partnership frequently urged is, that one of the partners in control of the business is mismanaging it or misapplying its funds. Such grounds are sufficient for the appointment of a receiver if sufficiently well shown, since they go to the essence of the relations which should exist between partners.

When the partnership relation has been entered into each partner owes a duty to the other to manage the business in such way as to produce the greatest profits consistent with a judicious management, and he has no right to conduct it in such way as to endanger its success, or to result in loss to the firm.

And each partner is required to keep an accurate and strict account of the receipts and disbursements, and owing to the relation of confidence existing between members of a firm the partners are not permitted to conceal from each other the financial transactions which interest all alike.

These grounds are generally the basis of an action for the dissolution of the partnership before the expiration of the time fixed upon in the partnership agreement. Hence a receiver will be appointed where one partner is destroying the firm business,[1] or does not account for the firm receipts,[2] or is violating the terms of the

1 Estwick v. Conningsby, 1 Vern. 118.

In New v. Wright, 44 Miss. 202, it is held where a partnership concern is broken up by controversial suits and it is apparent there can be no agreement between the parties in interest a receiver will be appointed.

In Sutro v. Wagner, 23 N. J. Eq. 388, it was held that where it appears that the defendant has deliberately resolved to break up and ruin the business of the firm and the personal relations between the partners were such that they could never carry on business together to advantage, a receiver was properly appointed.

2 Read v. Bowers, 4 Bro. C. C. 441.

In Smith v. Mules, 9 Hare 556,

partnership agreement,[3] or in case of the insolvency of one member, together with waste on his part,[4] or mismanit was held that a refusal by one partner to enter proper receipts is ground for a receiver.

3 White v. Colfax, 1 Jones & S. 297; Brenan v. Preston, 2 DeG. M. & G. 813.

In Const v. Harris, 1 Turn. & R. 496, it is said that the court will entertain a bill to compel partners to act according to the provisions of the partnership contract; thus, where it was agreed that the profits should be applied for a particular purpose and a subsequent agreement was made by a majority of the partners to apply the profits in a different manner, on the application of the owner of a one-eighth interest a receiver was appointed on the ground that the partnership agreement could not be altered without the sanction of all the parties. The act of a majority of the partners, however, will bind the firm provided all parties have notice and are acting in good faith. It was also held that a bill merely for the purpose of carrying on the business will not be maintained.

See, also, Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379, where the facts charged were, that the defendant had sold goods and failed to account, or refused to account; that the books were incorrect and the defendant irresponsible; and there was also a violation of the partnership agreements. Cf. Estwick v. Conningsby, 1 Vern. 118; Read v. Bowers, 4 Bro. C. C. 441.

4 Boyce v. Burchard, 21 Ga. 74; Speights v. Peters, 9 Gill (Md.) 472; Williamson v. Wilson, 1 Bland Ch. (Md.) 418; Shannon v. Wright, 60 Md. 520; Sutro v. Wagner, 23 N. J. Eq. 388; Phillips v. Trezevant, 67 N. C. 370; White v. Colfax, 1 Jones & S. (N. Y.) 297; Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; Todd v. Rich, 2 Tenn. Ch. 107; Pini v. Roncoroni (1892), 1 Ch. Div. 633; Smith v. Jeyes, 4 Beav. 503.

A receiver will be appointed where the defendant partner is guilty of misconduct which it appears will result in a waste of the assets of the partnership. Brooke v. Tucker, 149 Ala. 96, 43 So. 141; Fischer v. Superior Ct. of Tuolumne County, 98 Cal. 67, 32 Pac. 875; Joselove v. Bohrman, 119 Ga. 204, 45 S. E. 982; Fink v. Montgomery, 162 Ind. 424, 68 N. E. 1010; Barnes v. Jones, 91 Ind. 161; Katz v. Brewington, 71 Md. 79, 20 Atl. 139; Shannon v. Wright, 60 Md. 520; Speights v. Peters, 9 Gill (Md.) 472; Drury v. Roberts, 2 Md. Ch. 157; Williamson v. Wilson, 1 Bland (Md.) 418; Reid v. Freed, 100 Miss. 48, 56 So. 278; Maynard v. Railey, 2 Nev. 313; Coddington v. Tappan, 26 N. J. Eq. 141; Randall v. Morrell, 17 N. J. Eq. 343; Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; Haggerty v. Granger, 15 How. Pr. (N. Y.) 243; Philips v. Trezevant, 67 N. C. 370; Jones v. Weir, 217 Pa. 321, 10 Ann. Cas. 692, 66 Atl. 550. See, also, Warren v. Stagner, 7 Wkly. Notes Cas. (Pa.) 127; Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Whilden v. Chapman, 80 S. C. 84, 61 S. E. 249; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Cole v. Price, 22 Wash. 18, 60 Pac. 153; Wilson v. Hawker

agement,[5] or misappropriation,[6] or in case he absconds

Lumber Co., 74 W. Va. 65, 81 S. E. 568; Ballard v. Callison, 4 W. Va. 326; Watson v. Bettman, 88 Fed. 825; Gaddie v. Mann, 147 Fed. 960 (reversed on other grounds in 158 Fed. 42); Smith v. Jeyes, 4 Beav. 503, 49 Eng. Reprint 433; Butchart v. Dresser, 4 DeG., M. & G. 542, 10 Hare 453; Freeland v. Stansfield, 2 Eq. Rep. 1181, 1 Jur. (N. S.) 8, 2 W. R. 575, 2 Sm. & G. 479, 23 L. J. Ch. 923; Cane v. Macdonald, 9 Brit. Col. 297; Prentiss v. Brennan, 2 Grant Ch. (U. C.) 322.

Where one partner is wasting the partnership property a receiver will be appointed over the property upon the principle that each partner owns an interest in each and every item of the partnership property. Fink v. Montgomery, 162 Ind. 424, 68 N. E. 1010.

5 Mismanagement on part of the partner in charge of the business, together with danger of loss, is ground for the appointment of a receiver of the partnership property. Boyce v. Burchard, 21 Ga. 74; Sutro v. Wagner, 23 N. J. Eq. 388; Williamson v. Wilson, 1 Bland Ch. (Md.) 418; Todd v. Rich, 2 Tenn. Ch. 107; Jeffreys v. Smith, 1 Jac. & W. 298; Bentley v. Bates, 4 Younge & C. 182; Hart v. Clarke, 19 Beav. 349; Roberts v. Eberhardt or Everhardt, 1 Kay 148; Sheppard v. Oxenford, 1 Kay & J. 491; Word v. Word, 90 Ala. 81, 7 So. 412; Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615; Renton v. Chaplain, 9 N. J. Eq. 62; Wilson v. Fitchter, 11 N. J. Eq. 71; Cox v. Peters, 13 N. J. Eq. 39; Randall v. Morrell, 17 N. J. Eq. 343; Birdsall v. Colie, 10 N. J. Eq. 63; Page v. Vankirk, 1 Brewst. (Pa.) 282, 290; Siemmer's Appeal, 58 Pa. 168, 98 Am. Dec. 255; De Tastet v. Bordieu, 2 Bro. C. C. 272, note; Harding v. Glover, 18 Ves. Jr. 281.

6 Evans v. Coventry, 5 DeG. M. & G. 911; Harding v. Glover, 18 Ves. Jr. 281.

In Woodward v. Schatzell, 3 John. Ch. (N. Y.) 415, it was held that the mere apprehension of one partner that the other will misapply the partnership funds is not ground for an injunction, the same rule being applied to a receivership.

Appropriating firm property to individual use is ground for the appointment of a receiver over the partnership. Davis v. Grove, 2 Robt. (N. Y.) 134, 635; Whitesides v. Lafferty, 3 Humph. (Tenn.) 150; Pini v. Roncoroni (1892), 1 Ch. 633; Harding v. Glover, 18 Ves. Jr. 281.

Misappropriation of partnership property justifies the appointment of a receiver. Coddington v. Tappan, 26 N. J. Eq. 141.

The question of appointment is discretionary and appellate court will not review the appointment where made upon conflicting testimony as to the misappropriation of the assets or danger to them.—Whitley v. Bradley, 13 Cal. App. 720, 110 Pac. 596.

To entitle a partner who has left assets with a copartner for the payment of firm debts which the latter assumed, to the appointment of a receiver to prevent waste and misapplication, it need not be shown that some partnership creditor has attempted or is

from the country[7] or enters into collusion with creditors.[8] The mismanagement which is required to be the ground for the appointment of a receiver must be such as results from the acts of one of the partners and not that of an employee who can be discharged at any time.[9]

§ 132. Receivership Where Fraudulent Acts Are Alleged.

Courts of equity are especially astute to give protection against acts of fraud in all cases. And where one of the partners is guilty of fraudulent acts toward his copartner, a receiver will be appointed[1] in order to pre-

about to attempt to subject the plaintiff to liability. Allen v. Cooley, 53 S. C. 414, 31 S. C. 634.

In Prentiss v. Brennan, 1 Grants Ch. App. (Ont.) 484, it appeared that a partner had purchased a house with partnership funds, had withdrawn all partnership books from the jurisdiction of the court; a receiver was appointed.

7 Sheppard v. Oxenford, 1 Kay & J. 491.

8 Speights v. Peters, 9 Gill (Md.) 472; Estwick v. Conningsby, 1 Vern. 118.

In Estwick v. Conningsby, 1 Vern. 118, a surviving partner was carrying on business with debtors of the late firm and forbearing the collection of debts against them; a receiver was appointed.

9 A petition by a partner in a partnership organized to engage in the petroleum oil business, alleged incompetency and mismanagement of the general manager. The contract of employment was not for a definite time, and the partnership could at any time discharge the manager. The petition alleged no disagreement among the partners, no fraud or wrongdoing on the part of any of them. It was not alleged that the partnership or any of its members was insolvent. The court held in these circumstances that the appointment of a receiver was not justified, since Civil Code Prac. 298 authorizes only the appointment of a receiver during the pendency of an action where property or a fund is in danger of being lost. Campbell v. Rich Oil Co., 29 Ky. Law Rep. 716, 96 S. W. 442.

1 In Word v. Word, 90 Ala. 81, 7 So. 412, where a surviving partner neglected to keep an account of the sales it was held that his acts were negligent and faithless and if there was danger of loss a receiver would be appointed, or the surviving partner placed under bonds to account.

In Goodman v. Whitcomb, 1 Jac. & W. 589, where money was received and not entered in the books and the books were not held open to inspection, it was held to be a violation of the duties of partners to each other.

In Barnes v. Jones, 91 Ind. 161, it was held that it is an excep-

vent the threatened damages resulting from such fraudulent acts.[2]

The existence of fraud or imminent danger, if intermediate possession should not be taken by the court, must be clearly proved and unless the necessity be of the most stringent character the court will not appoint a receiver until the defendant is first heard in response to the application.[3]

tional case of partnership that a receiver will be appointed unless a dissolution is about to occur, but where the plaintiff shows acts of fraud on the part of the defendants and an application by them of partnership property to their own use, false entries in the books, and a refusal of access to the books and a concealment of the condition of the partnership business, a receiver should be appointed. Citing Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376.

In Haight v. Burr, 19 Md. 130, one partner controlled the business as if exclusively his own and failed to pay the debts of the firm and fraudulently appropriated the assets, it was held that a receiver should be appointed where the defendant was irresponsible.

In Shannon v. Wright, 60 Md. 520, it was held that a refusal to apply money to the payment of debts and a refusal to allow an examination of the books and threatening to litigate with the firm's money until the plaintiff was ruined thereby, was ground for a dissolution of the firm and the appointment of a receiver.

In Brenan v. Preston, 2 DeG. M. & G. 813, the defendant took possession of part of the machinery of a ship and refused to give it up. A receiver was allowed.

A receiver will be appointed for the property of a partnership where some of its members are guilty of a fraudulent misapplication of revenues and there is inability to discharge heavy claims against the partnership and judgments against its members while irreconcilable differences exist between the members in respect to the management of the property. Watson v. Bettman, 88 Fed. 825.

2 In West v. Chasten, 12 Fla. 315, where the firm was dissolved and the partnership assets assigned to one who assumed the debts, it was held that the property ceased to be joint property, and became the separate property of one, the court holding: "If, however, in a case of this character and rising out of confidential relations the party acts iniquitously and unjustly or fraudulently, and pays no attention to his covenants, disregarding the claims of his surety, and is pursuing such a course as threatens to result in his great damage or injury, the court will interfere. It will not do to wait until the threatened damage or injury occurs to such an extent as to ruin the other. Then the court of equity will be powerless to act."

3 Blondheim v. Moore, 11 Md. 365, 374.

But where fraudulent conduct on the part of the defendant partners is alleged together with wrongful exclusion from participation in the partnership affairs and it is apparent that an ultimate dissolution must result, the court will appoint a receiver regardless of whether the defendants are solvent or not.[4]

If one of the partners fraudulently disposes of his interest in the partnership, such disposition operates as a dissolution of the partnership and if the purchaser had knowledge of it a receiver may be appointed[5] at the instance of his copartner, but a contract or general creditor before judgment has no right to have a receiver appointed to wind up the partnership since he has an adequate remedy at law.[6]

Where the title to property stands in the name of a corporation but the ownership is actually in a partner-

4 Cole v. Price, 22 Wash. 18, 60 Pac. 153, citing: High on Rec. (3d ed.), §§ 522 et seq; Beach on Rec., § 912; Lindl. Partn. (2d ed.), pp. 1198-1200; Randall v. Morrell, 17 N. J. Eq. 343; McElvery v. Lewis, 76 N. Y. 373; Maynard v. Railey, 2 Nev. 313; Sloan v. Moore, 37 Pa. St. 217; Einstein v. Schnebly, 89 Fed. 540.

5 In Renton v. Chaplain, 9 N. J. Eq. 62, one partner's interest was sold under an execution and it was held that this operated as a dissolution of the firm if there was any fraud between the purchaser and the insolvent partner. If the sale is bona fide the purchaser in such case stands in no better condition than the insolvent defendant to whose rights he has succeeded, and the court will not interfere with the remaining partner in winding up the business unless gross misconduct calls for it. Cf. Birdsall v. Colie, 10 N. J. Eq. 63.

In Sutro v. Wagner, 23 N. J. Eq. 388, there was a fraudulent appropriation of the partnership funds and a fraudulent conveyance of the partnership property of one partner in order to place it beyond the reach of the creditors and giving notice of such transfer to a commercial agency to ruin the credit of the firm and it was held a receiver should be appointed. Cf. Shannon v. Wright, 60 Md. 520; Phillips v. Trezevant, 67 N. C. 370.

6 A fraudulent disposition of his interest in a firm by one of the copartners does not authorize the appointment of a receiver to settle up the partnership estate at the instance of a contract or general creditor before judgment, as the remedy at law is adequate. Waples-Platter Co. v. Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200.

ship, in an action by one of the partners for a dissolution on account of fraud of another partner, and the corporation is made a party to the suit, the court may appoint a receiver to take charge of the property.[7]

And where the defendant partner had induced the plaintiff to enter into partnership with him by false and fraudulent representations and plaintiff upon discovering the fraud sought to have the partnership dissolved, it is proper for the court to appoint a receiver.[8]

§ 133. Receivership Where One Partner Is Excluded From the Business.

Courts have frequently been called upon to appoint a receiver in matters of partnership where one or more partners have been excluded from participating in the management of the firm business, or otherwise denied recognition, in violation of the copartnership agreement, or the implied relationship between the members of the firm. This exclusion may be from a participation in the business, or from access to the firm books, and may take place during the existence of the partnership, or after its dissolution, and may apply under some circumstances to the legal representatives of a deceased partner.[1] In

7 Fischer v. Superior Court, 98 Cal. 67, 32 Pac. 875.

8 Ex parte Broome, 1 Rose 69.

1 Gillett v. Higgins, 142 Ala. 444, 4 Ann. Cas. 459, 38 So. 664; Fink v. Montgomery, 162 Ind. 424, 68 N. E. 1010; Redding v. Anderson, 37 Wash. 209, 79 Pac. 628; Whipple v. Lee, 46 Wash. 266, 89 Pac. 712.

Exclusion of one partner from the profits or the management is ground for the appointment of a receiver. Boyce v. Burchard, 21 Ga. 74; see Terrell v. Goddard, 18 Ga. 664; Barnes v. Jones, 91 Ind. 161; cf. Naylor v. Sidener, 106 Ind. 179, 6 N. E. 345; Haight v. Burr, 19 Md. 130; Shannon v. Wright, 60 Md. 520; Speights v. Peters, 9 Gill (Md.) 472; Williamson v. Wilson, 1 Bland Ch. (Md.) 418; Katz v. Brewington, 71 Md. 79, 20 Atl. 139; Kirby v. Ingersoll, 1 Dougl. (Mich.) 477; Wolbert v. Harris, 7 N. J. Eq. 605; Seibert v. Seibert, 1 Brewst. (Pa.) 531; Rutter v. Tallis, 5 Sandf. (N. Y.) 610; Hayes v. Heyer, 3 Sandf. (N. Y.) 284; McCracken v. Ware, 3 Sandf. (N. Y.) 688; Wetter v. Schlieper, 4 E. D. Smith (N. Y.) 707; Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Blackeney v. Dufaur, 15 Beav. 40;

Norway v. Rowe, 19 Ves. Jr. 159; Peacock v. Peacock, 16 Ves. Jr. 49; Butchart v. Dresser, 4 DeG. M. & G. 542; Katsch v. Schenck, 18 L. J. Ch. N. S. 386; Wilson v. Greenwood, 1 Swanst. 482; Const v. Harris, Turn. & R. 496, 525; Norway v. Rowe, 19 Ves. Jr. 144; Milbank v. Revett, 2 Meriv. 405; Harding v. Glover, 18 Ves. Jr. 281.

But where an action by one partner against his copartner is not brought for a dissolution of the firm, but to continue the partnership and oust the other from the management secured to him by the partnership agreement, and to obtain the management for plaintiff, the appointment of a receiver pending the action is improper. Shubert v. Laughlin, 122 App. Div. 701, 107 N. Y. Supp. 708.

The exclusion of one partner from his full share in the affairs of the partnership is ground for the appointment of a receiver for the partnership property. Einstein v. Schnebly, 89 Fed. 540; Wolbert v. Harris, 7 N. J. Eq. 605.

A partner who has been wrongfully excluded from participation in the management of the property is entitled to a receiver, without proving the insolvency of the copartner. And this is especially true under Rev. Stats. 1895, art. 1465, providing for the appointment of a receiver in an action between partners on the application of plaintiff whose interest in the property is probable. Rische v. Rische, 46 Tex. Civ. 23, 101 S. W. 849.

A refusal of the right of a partner to share in the management of the partnership affairs and to participate in the profits is a sufficient breach of the partnership contract to warrant the appointment of a receiver, regardless of whether the business is in full operation or in process of dissolution, on a sworn petition of a partner, which shows that the firm property is in the hands of a third person, and that the petitioner has been excluded from participating in its management, but suh appointment will determine no right as between the parties nor affect the title to the property. Holder v. Shelby (Tex. Civ.), 118 S. W. 590.

Where a partner applies for a receiver in a suit for an accounting and dissolution, and alleges an agreement that each partner should devote his entire time to the business, and defendant fails to appear, such allegation will authorize the introduction of evidence of the agreement, and to charge defendant with plaintiff's services, or with the amount expended in employing a servant to do the work which defendant should have done. Valentin v. Sarrett, 25 Idaho 517, 138 Pac. 834.

Where a partnership has been dissolved, or a suit is pending for its dissolution and an accounting, and there is a lack of understanding and harmony between the partners, one of them is denied a voice in the management and control of the business, a receiver will be appointed. Martin v. Wilson, 84 Wash. 625, 147 Pac. 404.

In Wilson v. Greenwood, 1 Swanst. 471 (481), it was held that in the ordinary course of trade if one partner excludes another from taking that part in the concern which he is entitled to it is ground for the appointment of a receiver; so, also, if in the course of wind-

ing up the affairs after the determination of the partnership, the court, if necessary, interposes on the same principle.

In Kirby v. Ingersoll, 1 Dougl. (Mich.) 477, it was held that one partner had no right, without the consent of his copartners, to make an assignment and thus exclude the others where it appeared that the assignment was not of a pressing necessity.

In Const. v. Harris, 1 Turn. & R. 496 (525), it was held that the circumstance of one partner having taken upon himself the power to exclude another from his full share in the management of the business, authorizes the court to appoint a receiver.

In Gowan v. Jeffries, 2 Ashm. (Pa.) 296, it was held to be an exclusion where just and fair books were not kept and where one partner refused to furnish accounts demanded.

In Speights v. Peters, 9 Gill (Md.) 472, it was held that if one partner in the ordinary course of trade seeks to exclude another from taking that part in the concern which he is entitled to take, a receiver should be appointed on the authority of Lord Eldon in Wilson v. Greenwood, 1 Swanst. 481.

In Kershaw v. Matthews, 2 Russ. 62, where by the article of agreement it was stipulated that upon the death of one partner such deceased partner should be succeeded in business by some other person, or by his executor, and such person refused to act it was held that the death of one partner put an end to the partnership but that in such case it was not an exclusion for the reason that the latter had never been a partner.

In Bilton v. Blakely, 6 Grant Ch. (Ont.) 575, it was held that the representatives of a deceased partner had a right to inspect the books of the partnership and to be informed of the proceedings of the survivor, and, on refusal by the latter, were entitled to a receiver. Cf. Steele v. Grossmith, 19 Grant Ch. (Ont.) 141; Wilcox v. Pratt, 52 Hun 340, 5 N. Y. Supp. 361.

In Katz v. Brewington, 71 Md. 79, the allegation was that the defendant had excluded the plaintiff from all control over the business, and had refused to give information regarding it, and carried away the books from the place of business, and refused to disclose the place in which they were kept. The court say: "Each partner has an equal right to take management of the business although one of them may have only an interest in the profits and not the capital, yet his rights are involved in the proper conduct of the affairs of the firm so the profits may be made. So each partner has an equal right to information about the partnership affairs and free access to the books. The complainant has a right to learn from the books whether there were profits and whether there were debts.

In Const v. Harris, 1 Turn. & R. 496, Lord Eldon said: 'The most prominent point on which the court acts in appointing a receiver of the partnership concern is the circumstance of one partner having taken upon himself the power to exclude another partner from as full share in the management

an early case[2] Lord Eldon said: "The most prominent point in which the court acts in appointing a receiver of a partnership concern is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he who assumes that power himself enjoys."

Of course, the partners may, by contract, provide for the exclusion of one copartner from full or even partial participation in the business affairs of the partnership, in which event exclusion will not be ground for the appointment of a receiver.[3] Laches on the part of the complaining partner at being excluded from participating in the business may be ground for refusing to appoint a receiver.[4]

§ 134. Exclusion by Claims of Individual Ownership.

In addition to the ordinary form of exclusion of a partner by his copartner from participation in the affairs of the partnership is that of denying that the alleged partnership exists and hence that the plaintiff is a partner.[1] And one partner may be excluded also by the defendant claiming to own individually assets claimed by the other to be a part of partnership assets,[2] and in such

of the partnership as he who assumes the power himself enjoys.'"

2 Const. v. Harris, 1 Turn. & Russ. 496.

3 In Blakeney v. Dufaur, 15 Beav. 40, it is said that exclusion will not be permitted except in cases where the parties themselves have provided by agreement for exclusion upon the happening of certain events. Cf. Terrell v. Goddard, 18 Ga. 664; Wolbert v. Harris, 7 N. J. Eq. 605; Milbank v. Revett, 2 Meriv. 405.

4 Norway v. Rowe, 19 Ves. 143. In this case the partnership had been operating a mine and plaintiff took no interest in the matter until the mine became profitable.

1 Peacock v. Peacock, 16 Ves. 49; Blakeney v. Dufaur, 15 Beav. 40. In this connection, see, also, §§ 127 and 128, supra.

In Goulding v. Bain, 4 Sandf. (N. Y.) 716, the court refused to appoint a receiver where the existence of a partnership was denied, the court holding that the partnership must be either admitted or established.

2 Wilson v. Greenwood, 1 Swans. (Eng.) 471.

circumstances a receiver will be appointed if there is a showing of danger of loss of the property. In such circumstances a distinction is observed by the court to this extent that as against the legal title or a strong presumptive title in the defendant, the court will interfere by the appointment of a receiver very reluctantly, and only where the property is in danger of being lost or injured, but where a fund is *prima facie* the proceeds of a partnership, the court will very readily take charge of it by means of a receivership.[3] And likewise where the plaintiff claims the property in litigation as his own individual property and defendant likewise claims it as his own, the court will proceed cautiously in appointing a receiver and will not make such an appointment in a

In Bryant v. Fitzsimmons, 106 Md. 421, 67 Atl. 356, a receiver was appointed over a race horse in the possession of the defendant on a claim that it was partnership property.

In Doupe v. Stewart, 13 Grant Ch. (Ont.) 637, where after a dissolution one partner claimed greater portions of the profits as his own by reason of certain alleged misconduct of the plaintiff, and made use of the partnership funds in carrying on business in his own behalf, it was held to be a proper cause for a receiver.

Where some of the partners on dissolution hold possession of the assets, and conduct the business under claim of sole ownership, and not for the purpose of winding up the partnership, wrongfully assuming power under the partnership agreement to have the assets appraised and extinguish the other members' interest in the assets by tendering them one-third of the amount of the appraisement, the excluded members are entitled to have a receiver appointed. Nathan v. Bacon, 75 N. J. Eq. 401, 72 Atl. 359.

In Clegg v. Fishwick, 1 Macn. & G. 294 (298), where partners were jointly interested with others in a lease which was subsequently renewed in the name of some of the partners without the consent of the others, it was held to be an exclusion. And see Leach v. Leach, 18 Pick. (35 Mass.) 68; Clements v. Hall, 2 DeG. & J. 173; Clegg v. Edmondson, 8 DeG. M. & G. 787.

Where a surviving partner sold the entire partnership property to a newly formed corporation composed of himself and members of his family and refused the wife of his deceased partner access to the books, claiming that her husband's share only amounted to a very small interest, a receiver should be appointed to preserve the property. Miller v. Miller, 80 N. J. Eq. 47, 82 Atl. 513.

[3] Speights v. Peters, 9 Gill (Md.) 472.

doubtful case nor unless there is imminent danger of loss and there is no adequate remedy at law.[4]

[4] In Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537, the court said:

"The trial court was right in refusing to authorize the receiver to take possession of this property. The agreement between these parties was in the nature of a partnership agreement, but this is not material. There is no claim that this property was partnership property. Plaintiff claims it as his own individual property, and on that theory replevied it. Defendant claims it as his. So far as this property is concerned the controversy is the ordinary conflict between parties, each of whom claims property as his own. The court will proceed with great caution in granting an application for a receiver to take possession of property in controversy pendente lite. Such an application is addressed to the discretion of the trial court. It appeals not to an arbitrary discretion, but to a discretion exercised as an auxiliary to the attainment of the ends of justice. 34 Cyc. 19; Beach on Receivers, § 48. Such an application will not be granted in a doubtful case. The showing must be clear, strong, and convincing. The application will be granted only under circumstances requiring summary relief or where the court is satisfied that there is imminent danger of loss, and where there is no adequate remedy at law. 34 Cyc. 21 et seq.; Beach on Receivers, § 48; Lowell v. Doe. 44 Minn. 144, 46 N. W. 297; National Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676; Libby v. Libby, 68 App. Div. 15, 74 N. Y. Supp. 57. The court will not ordinarily appoint a receiver to take possession of property, the title to which is in dispute, until there has been a determination of the question of title, at least unless the party making the application establishes a reasonable probability of his ultimate success. 34 Cyc. 35; Hayes v. Jasper Land Co., 147 Ala. 340, 41 So. 909; Waterbury v. Merchants Union Exp. Co., 50 Barb. (N. Y.) 157, 159.

"The right to this property is not clear. The court committed no error in refusing to take it from the possession of the defendant and placing it in the hands of a receiver before the title to it is determined. The replevin suit is still pending. Plaintiff himself commenced it. It is the proper form of action in which to determine which of two contending parties is the owner of personal property. So far as we can see it furnishes an adequate remedy. Plaintiff should not be permitted to maintain two actions to establish his right to this property.

"Plaintiff contends the action of replevin does not furnish him an adequate remedy, because the bond is for an inadequate sum. Plaintiff himself fixed the amount of the bond by his own allegation of the value of the property. If he has made a mistake, his remedy to correct it is in the replevin action. He can not urge his own mistake as a reason for the appointment of a receiver."

3. Termination of Partnership by Death, Insolvency, or Other Disability.

§ 135. General Rule Respecting Termination of the Partnership.

The mere fact that a partnership has terminated is not ground for the appointment of a receiver. As has been shown in the discussion respecting the principles applicable to the appointment of receivers in cases of partnerships, there must be some special reason for the appointment of a receiver aside from the mere fact that it is about to be dissolved or is in a state of dissolution.[1]

Courts, however, are frequently called upon to appoint a receiver in the interest of a retiring partner where the terms of the dissolution agreement are being violated. Thus where a partnership has been dissolved by mutual agreement and by the terms of dissolution the remaining partners continuing the business assume and agree to pay the outstanding firm liabilities and there is a violation of the agreement in this regard, the court may properly appoint a receiver, at least of so much of the firm assets as will be sufficient to discharge the remaining firm indebtedness.[2] This is based upon the doctrine of

1 In Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615, where a partnership had expired by limitation and neither partner desired to continue the business it was held that a receiver would not be appointed on the application of one to settle the partnership affairs in the absence of any showing of mismanagement or improper conduct on the part of the person against whom the relief is sought. Cf. Shoemaker v. Smith, 74 Ind. 71; Morey v. Grant, 48 Mich. 326, 12 N. W. 202; Baker v. Backus, 32 Ill. 79; Willis v. Corlies, 2 Edw. Ch. (N. Y.) 281; Jones v. Schall, 45 Mich. 379, 8 N. W. 68; Cook v. Detroit & M. R. Co., 45 Mich. 453, 8 N. W. 74.

2 West v. Chasten, 12 Fla. 315. The court held that so long as the effects are impressed with the character of partnership property a dissolution can not destroy the rights each partner has to a general accounting, the payment of the partnership debts, and a division of the surplus, according to their respective interests. The dissolution destroyed the relation of partnership, but with it a new relation was created, to-wit, the obligation of the remaining partner

principal and suretyship or perhaps more properly upon the relation of trusteeship.[3] By the terms of the disso-

to pay the debts of the firm from the firm assets transferred to him for that purpose. In Drury v. Roberts, 2 Md. Ch. 157, where the right to the collection of the firm assets and the winding up of the firm business was delegated to one partner, it was held that there must be an abuse of this delegated power shown, or danger in order to justify the court in appointing a receiver. If he is wasting or misapplying the property, of if there is danger of insolvency, or fraud, the court will intercede. If, however, all these allegations are denied by answer the necessity is removed. If the parties on dissolution have agreed upon the method of collection of the accounts and the defendants are responsible no sufficient ground is shown for a receiver. Simon v. Schloss, 48 Mich. 233, 12 N. W. 196; Arnold v. Bright, 41 Mich. 207, 210, 2 N. W. 16.

In Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485, a bill was filed by one partner against another partner and his assignee seeking to set aside an alleged fraudulent assignment made by the latter for the benefit of creditors, without preference, and on motion for a receiver the court refused to appoint, declining to decide, however, as to the right of one partner to make a valid assignment, no insolvency appearing. (See note to this case as to the power of one partner to make an assignment without the consent of the other.) Where partners can not agree as to the mode of liquidation, the court will appoint a receiver; and if on the dissolution the partners make an agreement as to the mode of winding up the affairs and select one of their number to collect the assets, and pay the debts and distribute the remainder, a court of equity will not interfere and appoint a receiver, unless the parties prove recreant to the trust imposed upon them by the dissolution agreement. The retiring partners have a right to receive all information respecting collections made, and access to the books, and where, by reason of bitter enmity between the parties, this information and access can not reasonably be expected, and money that should be applied on firm indebtedness is diverted or not used for that purpose a receiver will be appointed. White v. Colfax, 1 Jones & S. (N. Y.) 297.

3 In Allyn v. Boorman, 30 Wis. 684, the retiring partner is held to occupy the relation of surety and entitled to the rights of a surety. In Law v. Ford, 2 Paige (N. Y.) 310, it was held that where either partner has a right to dissolve the partnership, and there is no provision as to a settlement the appointment of a receiver is a matter of course, and the court will direct the receiver to apply the assets ratably and without preference. To the same effect is Marten v. Van Schaick, 4 Paige (N. Y.) 479. On a creditor's bill against a dissolved firm where one has assumed the indebtedness, it was held that a receiver should be appointed over the separate property of the remaining partner and the partnership property but not over

lution the retiring partner transfers to the remaining partner the legal title to the partnership assets and the latter in consideration of such transfer undertakes to discharge the firm liabilities. He thus holds the property of the late firm charged with a specific purpose and the courts jealously protect the interests of the retiring partner therein. There may also be a violation of the terms of the dissolution agreement in other important particulars which will be ample cause for the intervention of the court and the appointment of a receiver.[4] But in this class of receiverships, as in others, the element of danger is in all cases a necessary element in the absence of which the court will refuse to act.

§ 136. Effect of Death of One Copartner as Ground for Receiver.

The death of a partner, as a rule, dissolves the partnership, but the surviving partner or partners are required to wind up the partnership business and for the purpose of doing so are entitled to remain in possession of the business and the partnership assets for a reasonable time, in the absence of a statute, to close up the business and account to the representatives of the deceased partner for his interest in the concern. During the winding up of the partnership business by the surviving partner or partners the court is frequently called upon to protect the interest of the deceased partner against mismanagement or fraud or great danger of loss,

the separate property of the retiring partner. Henry v. Henry, 10 Paige (N. Y.) 314. In the absence of danger the court will not appoint a new receiver in lieu of coreceivers previously appointed by consent of all parties, where the only cause of disagreement was their incompatibility of temper and personal quarrels. Conner v. Belden, 8 Daly (N. Y.) 257. Cf. Harding v. Glover, 18 Ves. Jr. 281; Peacock v. Peacock, 16 Ves. Jr. 49; Wilson v. Greenwood, 1 Swanst. 471; Butchart v. Dresser, 4 DeG. M. & G. 542.

[4] White v. Colfax, 1 Jones & S. (N. Y.) 297; also preceding note.

which is usually accomplished by the appointment of a receiver.[1]

1 Baldwin v. Booth, W. N., 1872, 229.

In Connor v. Allen, Harr. Ch. (Mich.) 371, it is held that a surviving partner has a legal right to the possession of the partnership property and the court will not deprive him of that right except upon proof of mismanagement or danger to the partnership effects. Cf. Walker v. House, 4 Md. Ch. 39; Philips v. Atkinson, 2 Bro. C. C. 272; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Davis v. Amer, 3 Drew. 64; Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 7 Atl. 647; Murray v. Mumford, 6 Cow. (N. Y.) 441; Case v. Abeel, 1 Paige (N. Y.) 393.

If the survivor does not, within a reasonable time, account with the executor, and come to a settlement, equity will interfere, in order to prevent loss, and appoint a receiver. Hartz v. Schrader, 8 Ves. Jr. 317.

The court will not interfere in case of an existing partnership except for mismanagement or violation of the partnership agreement, and where one partner dies the surviving partner has a right to remain in possession and close up the partnership business, and in such case the court will not interfere by the appointment of a receiver in the absence of unfaithfulness or insolvency. Where by agreement the capital in the business is to remain for a given length of time, the acting partner has a right to use such capital and can only be interfered with on such ground as would justify a dissolution of the partnership before the time limited therefor. Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385.

A receiver should not be appointed over partnership assets while in the possession of a surviving partner without a clear showing of mismanagement or improper conduct and danger of ultimate loss to the estate of the deceased partner. Painter v. Painter, 4 Cal. Unrep. 636, 36 Pac. 865.

The surviving partner may do everything necessary to wind up the affairs of the partnership. Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112.

The right to wind up the affairs of the partnership becomes vested in the surviving partner. Mere delay on the part of the surviving partners will not justify the appointment of a receiver. Collins v. Young, 1 Macq. 385.

Failure of surviving partners to close out the partnership business within a year after the death of one of the partners, as provided for in the articles of copartnership, will not require the appointment of a receiver, where they acted in good faith believing that such action would be prejudicial to all concerned, and agree to close out the business at once upon the commencement of proceedings for an accounting. Mason v. Dawson, 15 Misc. 595, 37 N. Y. Supp. 90, 72 N. Y. St. Rep. 123.

In all cases it is held, except where the partnership agreement otherwise provides, that the death of one partner operates instanter as a dissolution of the partnership.

Where the defendant partner who survives the partnership sets up a claim to the whole of the partnership property in himself a receiver was appointed,[2] and a receiver will likewise be appointed where one partner is dead and the survivor is mismanaging the business[3] or appropriating the assets to his individual use.[4] If, how-

Ex parte Williams, 11 Ves. Jr. 5; Vulliamy v. Noble, 3 Meriv. 614.

2 After the death of one partner a receiver will be appointed only in case of a breach of duty or in a breach of contract; and where a surviving partner is carrying on the business on his own account with the partnership effects, a receiver will be appointed. Harding v. Glover, 18 Ves. Jr. 281.

In Madgwick v. Wimble, 6 Beav. 495, it was held that where by partnership stipulation a son of one partner, or, in case of his minority, the executor, should on the death of such partner succeed to his share in the partnership business, the court considered it an option in favor of such son or executor and not an obligation. Where the defendant in an action for dissolution set up a claim to the whole of the partnership property for himself, it was held that it was unnecessary to allege or show misconduct or mismanagement on his part.

3 Miller v. Jones, 39 Ill. 54; Nelson v. Hayner, 66 Ill. 487; Walker v. House, 4 Md. Ch. 39; Renton v. Chaplain, 9 N. J. Eq. 62; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Hubbard v. Guild, 1 Duer (N. Y.) 662; Law v. Ford, 2 Paige (N. Y.) 310; Evans v. Evans, 9 Paige (N. Y.) 178; Gratz v. Bayard, 11 Serg. & R. (Pa.) 41; Madgwick v. Wimble, 6 Beav. 495; Clegg v. Fishwick, 1 Macn. & G. 264.

Receiver should not be appointed where surviving partner is solvent upon allegation that it was apprehended he had disposed of his personal assets. Dickens v. Dickens, 154 Ala. 440, 45 So. 630.

A receiver may be appointed of partnership property after the death of one partner where the surviving partner has given the administrator of the deceased partner notes for the share of the deceased partner which he fails to pay, and conducts the business in such a manner that the property is greatly depreciated in value. Adams v. Hannah, 97 Ga. 515, 25 S. E. 330.

Where a surviving partner is carrying on the business and using the assets of the deceased partner therein, a receiver may be appointed. Madgwick v. Wimble, 6 Beav. 495.

4 In Geortner v. Canajoharie, 2 Barb. (N. Y.) 625, it appeared that after the death of one partner the remaining insolvent partner sold a part of the partnership stock to pay his individual debts and the purchaser had knowledge of the insolvency and of his object of making the sale, it was held that the sale was void and that each partner had a right to have the funds applied directly to the discharge of the partnership debts

ever, the surviving partner in charge of the business is acting in good faith and responsible, the fact that he resides in another county and manages the business through an agent will not be regarded as ground for the appointment of a receiver.[5]

In order for the court to appoint a receiver over the estate of a partnership which is being settled by the surviving partner a very strong case must be made showing mismanagement or danger of loss.[6]

and that if the funds were not so applied a receiver would be appointed. Where a receiver is appointed after the death of one partner such receiver succeeds to the rights of the surviving partner. Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 7 Atl. 539.

Where decedent's estate consisted mainly of his interest in a partnership, the fact that the surviving partner, who was decedent's executor, failed to account for certain assets, of which the principal item was the good will of the partnership and the value of the use of the firm name, which he had appropriated for a new partnership, did not justify the appointment, in an action by the daughter and executrix of decedent against such executor, of a receiver pendente lite of the property of the old firm, where it was not alleged that defendant was insolvent, or likely to become insolvent. Joseph v. Herzig, 130 App. Div. 707, 115 N. Y. Supp. 33\.

5 Evans v. Evans, 9 Paige (N. Y.) 178.

6 Painter v. Painter, 4 Cal. Unrep. 636, 36 Pac. 865; Helme v. Littlejohn, 12 La. Ann. 298; Comstock v. McDonald, 113 Mich. 626, 71 N. W. 1087; Miller v. Miller, 80 N. J. Eq. 47, 82 Atl. 513; Booth v. Smith, 79 Hun 384, 29 N. Y. Supp. 790, 61 N. Y. St. Rep. 496; Dawson v. Parsons, 66 Hun 628, 21 N. Y. Supp. 212 (affirming 20 N. Y. Supp. 65), 46 N. Y. St. Rep. 721; Brown v. Finch, 63 Hun 235, 17 N. Y. Supp. 805, 28 Abb. N. C. 36; People's Nat. Bank v. Hodgin, 129 N. C. 247, 39 S. E. 959; Holden v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270; Jennings v. Chandler, 10 Wis. 21; Madgwick v. Wimble, 6 Beav. 495, 7 Jur. 661, 14 L. J. Ch. 387; Fraser v. Kreshaw, 2 Jur. (N. S.) 880, 2 Kay & J. 496, 25 L. J. Ch. 445, 4 W. R. 431; Young v. Buckett, 51 L. J. Ch. 504, 46 L. T. 226, 30 W. R. 511; Bilton v. Blakely, 6 Grant Ch. (U. C.) 575.

A receiver of partnership property should not be appointed because of the objection of complainants, pending a suit by the surviving partner against the representative of a deceased partner for an accounting and a sale of the property with permission to the complainants to purchase to enable them to continue the business in their own interests, where the complainants appear to be abundantly responsible and able to do justice on a final ac-

The mere appointment of an executor or administrator of the estate of a deceased partner is not ground for the appointment of a receiver.[7]

§ 137. Agreements Made With the Deceased or His Representatives Respecting the Business.

If the surviving partner fails to live up to agreements made with the deceased partner in his lifetime or his heirs in respect to a dissolution of the partnership or its

counting, and the appointment of a receiver would be detrimental to or destructive of the business. Comstock v. McDonald, 113 Mich. 626, 71 N. W. 1087.

In case of the death of one of the partners, the surviving partner has no right to hold and mingle the partnership assets with his own, so that they can not be distinguished, unless he gives bond and also conforms to the statutory provisions, and the administrator of the deceased partner may have a receiver appointed, unless such bond be furnished. Jennings v. Chandler, 10 Wis. 21.

Where the representative of a deceased partner makes a prima facie showing of being entitled to share in a renewed lease made after the death of the testate partner, a receiver may be appointed until the rights of the parties are determined by the courts. Clegg v. Fishwick, 1 Mac. & G. 294. But see Reinhardt v. Reinhardt, 134 App. Div. 440, 119 N. Y. Supp. 285, holding insolvent condition should be shown.

Where the surviving partner sells the partnership property to a corporation and refuses to allow the wife of his deceased partner access to the books or knowledge of the condition of affairs, it is proper to appoint a receiver. Miller v. Miller, 80 N. J. Eq. 47, 82 Atl. 513.

A bill by a distributee of the estate of a deceased member of a partnership against the surviving partner, who is also administrator of the intestate's estate, charging him with misappropriation and personal sequestration of the assets of the partnership, in violation of his duty to wind up the business without delay and with due regard for the interests of those entitled to participate, but which shows that defendant not only owns real estate sufficient to protect complainant against loss because of such misappropriation, but that he will be entitled to one-third of the aggregate net assets of the partnership, does not warrant the appointment of a receiver, even though it is further charged, but unsupported by the facts pleaded, that defendant has attempted and will attempt to convert his property into movable assets, so that the whole may be readily concealed, or else removed without the court's jurisdiction. Dickens v. Dickens, 154 Ala. 440, 45 So. 630.

7 Helme v. Littlejohn, 12 La. Ann. 298.

future operation, a receiver may become necessary. Thus where a partnership has terminated by agreement and it is part of the terms of dissolution that a third person should collect the outstanding assets and afterward one of the partners dies, the survivor can not repudiate the agreement, and if he does so the legal representative of the deceased partner has a right to a receiver.[1]

Likewise where a surviving partner agreed to sell the business to the wife and son of his deceased partner who were to operate it under certain conditions, but who after the death of the surviving partner claimed to be the owners of it, a receiver was appointed at the instance of a partnership creditor on a showing that the assets are insufficient to pay the creditors.[2]

§ 138. Effect Where All the Partners Are Dead.

Where all of the partners are dead the circumstances arising from such a condition of affairs generally make it advisable to appoint a receiver.[1] The reason assigned in an old English case for appointing a receiver in such circumstances is that, although the mutual confidence which exists between partners is not destroyed in respect to a surviving partner by the death of one of the partners, when all of the partners die no such mutual confidence survives in respect to the legal representatives of the partners.[2]

1 Davis v. Ames, 3 Drew 64.

2 Vermont Marble Co. v. Spafford, 162 Mich. 549, 127 N. W. 669.

1 Wilson v. Murphy's Admr., 33 Ky. Law Rep. 716, 110 S. W. 893; Philips v. Atkinson, 2 Bro. C. C. 272; Wilson v. Greenwood, 1 Swanst. 480; Hall v. Hall, 3 Macn. & G. 79. See, also, Walker v. House, 4 Md. Ch. 39.

Where all of the partners die, the partnership assets are not confused with the estate of the last survivor. The right of successors can only be determined in equity. Theller v. Such, 57 Cal. 447.

2 Phillips v. Atkinson, 2 Brown's Ch. Cas. 272. Also quoted to the same effect in Walker v. House, 4 Md. Ch. 39.

§ 139. Receivership on Behalf of Heirs or Legatees of Deceased Partner.

Although as a general rule the surviving partner has a right to settle the partnership affairs while the executor or administrator of the deceased partner is only entitled to have an accounting from him, still if the surviving partner so conducts affairs as to show danger to the assets of the partnership such representative of the deceased partner may have a receiver appointed under the same circumstances as the deceased partner could have done.[1] Where the surviving partner refused to allow a legatee of a deceased partner to receive his share in the partnership on the ground that under an act of Parliament the legatee, who was a clergyman, was prohibited from engaging in business, the court appointed a receiver.[2]

The refusal of an appointee under a will to become a partner is not a dissolution arising from an exclusion by the surviving partner and will not furnish ground for the appointment of a receiver.[3]

§ 140. Effect of Insanity of One Partner.

Undoubtedly the fact of one of the partners becoming insane and being thereby incapacitated from attending to his duties as a partner would be cause for the dissolution of the partnership, and if the partner in charge of the partnership business is guilty of conduct in the management thereof which endangers the property, a receiver will be appointed pending the settlement of the business.[1]

1 Miller v. Jones, 39 Ill. 54; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385, 394.

The executors of a deceased partner have the right to have a receiver appointed. Davis v. Amer, 3 Drew. 64.

2 Hale v. Hale, 4 Beav. 369.

3 Kershaw v. Matthews, 2 Russ. 62.

1 A receiver has been appointed on the ground of a partner's insanity. Reynolds v. Austin, 4 Del. Ch. 24.

In Rowlands v. Williams, 30 Beav. 310, the court refused to

§ 141. Sale or Assignment of Interest of One Partner.

A sale or assignment of the interest of one member of a partnership ordinarily operates as a dissolution of the partnership and, as a general rule, the court will not interfere by the appointment of a receiver. If, however, the remaining partner refuses to recognize the right of the assignee to have an accounting in respect to the rights of the retiring partner[1] or in any other way one party or the other excludes a party entitled to participate from participation,[2] a receiver may be appointed.

appoint a receiver or manager, as termed in the English practice, to conduct a mine, upon one of the partners becoming insane, but ordered a sale, with a manager pending such sale.

1 In Seibert v. Seibert, 1 Brewst. (Pa.) 531, one partner sold his interest to another member, and it was held that the sale was a dissolution of the firm, and that the vendee bought nothing but the right to account, but even in such case the remaining partner had no right to exclude the selling partner or his assignee and set up an adverse interest. The court say: "He (the remaining partner) can not be permitted to close the door in the face of one who holds the undisputed assignment of a partner's share, and say to his cestui que trust I hold, use, and trade with all the property as my own." Cf. Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485; Rutter v. Tallis, 5 Sandf. (N. Y.) 610.

In Kirby v. Ingersoll, 1 Dougl. (Mich.) 477, it was held that the implied authority arising from the ordinary contract of partnership does not authorize one partner without the assent of the other partners to make a general assignment of the partnership effects to trustees for the benefit of creditors, giving preference to some creditors over others; and where it appears that such assignment was made without any pressing necessity therefor, and with a view of dissolving the partnership and thereby depriving other partners of the power in the management and disposition of the partnership property it was fraudulent and void. The general rule is that one partner has no right to make an assignment of the partnership effects without the consent of the other partner. Dickinson v. Legare, 1 Desaus. (S. C.) 537. But this rule probably has an exception where one partner is abroad and has confided the management to the resident partner. Harrison v. Sterry, 5 U. S. (5 Cranch) 289, 3 L. Ed. 104; Cf. Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; the authority in such case would probably be implied, but no authority by implication can arise by the simple partnership relationship. Havens v. Hussey, 5 Paige (N. Y.) 30; Hitchcock v. St. John, 1 Hoffm. Ch. (N. Y.) 511.

2 Davis v. Grove, 2 Robt. (N. Y.)

A receiver may likewise be appointed in such circumstances where the remaining partner is guilty of gross misconduct in respect to the handling of the partnership assets.[3] The power of dissolving the firm and at the same time excluding the other partners from all partici-

134, 635. In this case one firm entered into an agreement with another firm to do business on joint account in the purchase and sale of sugar. One of the firms made a general assignment for the benefit of creditors, without preference. The other firm filed a bill against the insolvent firm and its assigns; it was held that the relation of the two firms was that of partners, on the authority of Cumpston v. McNair, 1 Wend. (N. Y.) 457; Reynolds v. Cleveland, 4 Cow. (N. Y.) 282, 15 Am. Dec. 369; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; and Smith v. Wright, 1 Abb. Pr. (N. Y.) 243; that the interest of each partner in the assets and stock of the partnership was subject to the lien of the other partners for payment beyond their share of the debts of the company, and was applicable to the payment of debts not paid, before any division of the partnership property (Addison v. Burckmyer, 4 Sandf. Ch. (N. Y.) 498; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46; Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; that the assignment of one firm only carried that residuary interest, as it was general of the real and personal estate of the assignors; that the attempt of the assigning firm to appropriate the partnership assets entitled the other firm to a receiver. Harding v. Glover, 18 Ves. Jr. 281; Roberts v. Eberhardt, 23 Eng. L. & Eq. 245; Wilson v. Greenwood, 1 Swanst. 471, 580; Const v. Harris, Turn. & R. 496; Hubbard v. Guild, 1 Duer (N. Y.) 662.

In Smith v. Brown, 50 Wash. 240, 96 Pac. 1077, the plaintiff partner sued a copartner for an accounting. The partnership had been formed by plaintiff and defendant and two others to publish a book, but the two other parties had transferred their interests in the partnership to the defendant, who claimed that the transfer terminated the partnership. The defendant thereupon took possession of the business and refused to recognize the plaintiff as a partner. It was not shown whether defendant was insolvent or that a receiver was necessary to ascertain the amount due plaintiff in the event that he should be found to be entitled to a share in the business, and on the contrary it was shown that the appointment of a receiver would injure the business. The court refused under the circumstances to appoint a receiver.

3 In Renton v. Chaplain, 9 N. J. Eq. 62, it was held that when one partner's interest is levied on and sold it works a dissolution of the firm, but the court will not appoint a receiver except in case of gross misconduct of the remaining partner. Heathcot v. Ravenscroft, 6 N. J. Eq. 113.

pation in the administering of the property by the appointment of a trustee for preferred creditors can not be presumed among the powers granted by partners to each other. Power beyond this may be given in particular instances, or may be inferred from the conduct and course of business of the partners. The circumstances in which one partner is placed may some times give him power to do what otherwise the law would not imply. The circumstances must in such case be such as to authorize the presumption that such power was conferred by the other partners, as where one partner is abroad and has confided the management of the business to the home partner. Hence, where one of the partners makes an assignment of the partnership property with the intent of excluding his copartner from his rights in the partnership, the latter may seek protection by the appointment of a receiver.[4]

But where certain property of a partnership has been assigned to the plaintiff partner as his individual property a receiver will not be appointed to take possession of it where it is not shown that his right to the property is denied or his right to the possession disturbed.[5]

§ 142. Where Both Partners Have Assigned Their Interests.

Where both partners have assigned their respective interests in the partnership and the assignee of one who is in possession but insolvent refuses to recognize the rights of the other assignee, the latter may procure the appointment of a receiver to protect his interests.[1]

So also where the partners have attempted to make a general assignment of the partnership property the appointment of a receiver is proper.[2]

4 Kirby v. Ingersoll, 1 Doug. (Mich.) 477. See, also, Anderson v. Tompkins, Fed. Cas. No. 365, 1 Brock. 456.

5 Buchanan v. Comstock, 57 Barb. (N. Y.) 579.

1 Maynard v. Railey, 2 Nev. 313.

2 Fox v. Curtis, 176 Pa. St. 52, 34 Atl. 952.

§ 143. Acceptance of Assignment by Remaining Partner and Assumption of Liability.

Where a retiring partner upon dissolution of the partnership assigns his interest in the concern to his copartner upon the condition that the latter assume and pay all the debts and obligations of the partnership but the continuing partner fraudulently disposes of part of the funds by sending them beyond the jurisdiction and failing to abide by his covenant with the partner, who is being sued for partnership debts, a receiver may be appointed upon the theory that the relation of principal and surety was created between the partners by the assignment and that the retiring partner had an inchoate lien upon the partnership assets to secure their proper application toward paying off the obligations of the partnership.[1]

But where a partnership is dissolved and the partners charge one of their members with the duty of settling its affairs and he makes a general assignment for the benefit of all of the partnership creditors without giving preference to any creditors and the partner so making the assignment is solvent, the appointment of a receiver will be refused.[2]

§ 144. Partnerships Determinable at Will.

Where under the agreement of the parties the partnership may be terminated at will by either of the partners and no provision is made for dissolution, the court will not hesitate at appointing a receiver to wind up the partnership where the partners can not agree in relation to such winding up.[1]

Some misapprehension has arisen as to several of the earlier New York cases which are frequently cited to the

1 West v. Chasten, 12 Fla. 315.

2 Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485.

1 Law v. Ford, 2 Paige (N. Y.) 310; Marten v. Van Schaick, 4 Paige (N. Y.) 479.

effect that where either party had a right to dissolve the partnership upon a bill filed for the purpose of closing its affairs, the appointment of a receiver is a matter of course.[2] Although these cases make use of expressions which are susceptible of the broad statements referred to, they were not intended to operate as broadly as stated. The true rule in this respect was explained in one of the earlier cases[3] in New Jersey by Chancellor Williamson, in which he said:

"Where the copartnership is not determinable at will and the court is resorted to for the purpose, then it follows that a receiver will be appointed, of course. The reason is, that the misconduct, or breach of trust, or the necessity, whatever it may be, which justifies the court in decreeing a dissolution, establishes the propriety of appointing a receiver. But that whenever a partnership is dissolved by mutual consent or determined by the will of either party a Court of Chancery will, as of course, and without any reason, except that such is the wish of one of the parties interested, assume the control of the business and

2 Law v. Ford, 2 Paige (N. Y.) 310; Marten v. Van Schaick, 4 Paige (N. Y.) 479.

In Cox v. Peters, 13 N. J. Eq. 39, the court, after referring to the New York cases cited above and the principles announced by them, said: "The principle must, I think, be adopted with some qualifications. Upon what principle is it, if one dissatisfied partner chooses to withdraw from the firm, that the entire management of the business should be taken from the hands of other partners and vested in a receiver? If the other partners are open to no impeachment on the ground of integrity or responsibility, why should they be deprived of the control of their affairs, and be subject to the costs and charges of a receiver? . . ."

The true principle is that adopted by Chancellor Williamson, viz., that where a partnership is dissolved by mutual consent, or determined by the will of either party, a court of chancery will not, as of course, assume the control of the business and place it in the hands of a receiver. A receiver will be appointed only where it appears necessary to protect the interest of the parties. Renton v. Chaplain, 9 N. J. Eq. (1 Stockt.) 62; Birdsall v. Colie, 10 N. J. Eq. (2 Stockt.) 63.

3 Birdsall v. Colie, 10 N. J. Eq. 63.

place it in the hands of a mere stranger, appears to me a rule which, in its general application, would work great injustice, and which I am not willing to adopt. Many a solvent partnership would terminate in insolvency if its affairs were suddenly committed to the hands of a stranger unacquainted with the intricacies of its business, the situation of its assets, and the character of its debtors."

4. Appointment of Receiver in Dissolution Proceedings.

§ 145. General Nature of the Dissolution Proceedings.

The dissolution proceedings in which receivers are sought arise either by reason of a breach of the partnership duties prior to a termination of the partnership relation[1] or as an auxiliary to dissolution proceedings instituted after the partnership relation has terminated and the partners can not agree upon a settlement of its affairs.[2]

In a dissolution suit the appointment of a receiver is only a means to attain the end contemplated in the principal action.[3]

1 There must be a clear showing of mismanagement or improper conduct and danger of loss of the property. Painter v. Painter, 4 Cal. Unrep. 636, 36 Pac. 865.

Where the partnership is not dissolved, a strong showing must be made of some breach of duty by one of the partners or some violation of the partnership agreement. Bennett v. Smith, 108 Ga. 466, 34 S. E. 156.

In the case of New v. Wright, 44 Miss. 202, the court said: "In order to justify the dissolution of a partnership on the ground of misconduct, abuse, or ill-faith of one of the parties it is not sufficient to show that there is a temptation to such misconduct, abuse, or ill-faith, but there must be an unequivocal demonstration, by overt acts or gross departures from duty, that the danger is imminent or the injury already accomplished." Citing Story, Partn., § 288; Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; Harding v. Glover, 18 Ves. Jr. 281.

2 So, also, after the dissolution has taken place, but the copartners can not agree upon a settlement of its affairs, a receiver may be appointed. Fleming v. Carson, 37 Ore. 252, 62 Pac. 374.

3 Adams v. Woods, 8 Cal. 306.

A receiver will not be appointed when the only question is whether

The mere fact that it appears that the partnership will be dissolved at the trial is not alone sufficient ground for the appointment of a receiver.[4]

Likewise the mere fact that a complaining partner prays for a dissolution of the partnership in his pleadings will not be sufficient ground for the appointment of a receiver. In order to be entitled to such relief he must show such a state of facts as entitle him at the trial to a decree of dissolution.[5]

§ 146. Receivership Before Actual Dissolution of Partnership.

Where the partnership has not been already dissolved by agreement or otherwise the court will proceed with great caution in appointing a receiver because of the effect of such an appointment upon the partnership.[1] The general rule in such cases being that a receiver will not be appointed unless a dissolution has taken place or is about to take place and the element of loss or danger to the property being apparent.[2] Where the part-

a partnership has been dissolved. Fairburn v. Pearson, 2 Macn. & G. 144.

4 Harding v. Glover, 18 Ves. 281; Fairburn v. Pearson, 2 Macn. & G. 145.

5 Goodman v. Whitcomb, 1 J. & W. 589; Smith v. Jeyes, 4 Beav. 503; Roberts v. Eberhardt, Kay 148.

1 Barnes v. Jones, 91 Ind. 161.

2 Where the plaintiff on a bill for that purpose is entitled to a dissolution, a receiver may be appointed if danger of loss is shown. Williamson v. Wilson, 1 Bland Ch. (Md.) 418; Wolbert v. Harris, 7 N. J. Eq. 605; Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Jackson v. DeForest, 14 How. Pr. (N. Y.) 81; Marten v. Van Schaick, 4 Paige (N. Y.) 479; McElvey v. Lewis, 76 N. Y. 373. See Jordan v. Miller, 75 Va. 442; Harding v. Glover, 18 Ves. Jr. 281; Smith v. Jeyes, 4 Beav. 503; Chapman v. Beach, 1 Jac. & W. 589.

There may be cases independent of statutory provisions where a receiver may be appointed to bridge over an emergency without a dissolution of the partnership, but the general rule is that a receiver for the business of a firm will not be appointed unless a dissolution has taken place or is about to take place. Dale v. Kent, 58 Ind. 584.

In Harding v. Glover, 18 Ves. Jr. 281, it was held that a receiver would not be appointed upon a mere dissolution but there must be some breach of duty of

nership has not been dissolved by the agreement of the parties, there must be sufficient grounds for the dissolution of the partnership based upon misconduct or violation of duty on the part of the defendant partner in order to warrant the appointment of a receiver.[3] The appointment of a receiver in the circumstances shown by

a partner or of the contract of partnership. In this case the defendant had been carrying on business on his own account with the partnership funds and a receiver was appointed.

So in Estwick v. Coningsby, 1 Vern. 118, a surviving partner was carrying on the business but was neglecting the collection of the debts, a receiver was ordered in default of security required.

In Smith v. Jeyes, 4 Beav. 503, it was held that the plaintiff must show a dissolution or such facts as would warrant a dissolution before the court would interfere.

A receiver will not be appointed unless the partner applying therefor is entitled to a dissolution of the partnership. Rische v. Rische, 46 Tex. Civ. 23, 101 S. W. 849.

[3] A receiver will not be appointed where it does not appear that on final decree the partnership will be dissolved. Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615; Whitman v. Robinson, 21 Md. 30; Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385; Jackson v. DeForest, 14 How. Pr. (N. Y.) 81; Van Rensselaer v. Emery, 9 How. Pr. (N. Y.) 135; Richards v. Baurman, 65 N. C. 162; Roberts v. Eberhardt or Everhardt, 1 Kay 148; Hall v. Hall, 3 Macn. & G. 79; Goodman v. Whitcomb, 1 Jac. & W. 589; Chapman v. Beach, 1 Jac. & W. 594; Smith v. Jeyes, 4 Beav. 503.

In Const v. Harris, 1 Turn. & R. 496, it is said that the court will sometimes entertain a bill to compel partners to act according to the partnership agreement and appoint a receiver; but the general rule announced in Smith v. Jeyes, 4 Beav. 503, is that there must be either a dissolution or such facts alleged which if proven at the hearing would entitle the plaintiff to a decree for dissolution. Cf. Roberts v. Eberhardt, Kay 148. The rule laid down in Sieghortner v. Weissenborn, 20 N. J. Eq. 172, is that there must be a cause for dissolution shown and as to what is a sufficient cause, it may be shown (1) that the business of the partnership is impracticable and can not be carried on except at a loss. Citing Baring v. Dix, 1 Cox Ch. 213; Jennings v. Baddeley, 3 Kay & J. 78; Bailey v. Ford, 13 Sim. 495. (2) That all confidence between the partners has been destroyed so that they can not proceed together; and this usually follows where one partner has been guilty of mismanagement. Citing Harrison v. Tennant, 21 Beav. 482; Baxter v. Welsh, 1 De G. & S. 173. See, also, Goodman v. Whitcomb, 1 Jac. & W. 589.

In a suit by one partner for dissolution, where it was not shown that the other copartners had refused to allow the plaintiff to par-

the complaining partner in his dissolution proceedings is a matter within the discretion of the court.[4] In all such cases in order to warrant the appointment of a receiver, whether under the usual statutory provisions or the general rules applicable in the absence of a statute, there must be apprehension of danger or loss to the partnership property[5] from the actions complained of. It has

ticipate in partnership affairs or that they were insolvent, the appointment of a receiver is not necessary. Wales v. Dennis, 9 Wash. 308, 37 Pac. 450.

If both partners are living it must appear that in the end, or on the final hearing there will be a dissolution of the copartnership. Waters v. Taylor, 15 Ves. Jr. 10; Peacock v. Peacock, 16 Ves. Jr. 57.

4 Gillett v. Higgins, 142 Ala. 444, 4 Ann. Cas. 459, 38 So. 664; Silveira v. Reese, 7 Cal. Unrep. 112, 71 Pac. 515; Robbins v. Reed, 174 Ind. 291, 91 N. E. 921; Meyer v. Meyer Bros., 116 La. 456, 40 So. 794; McNair v. Gourrier, 40 La. Ann. 353, 4 So. 310; Pratt v. McHatton, 11 La. Ann. 260; Gridley v. Conner, 2 La. Ann. 87; Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537; Norton v. Sperry, 113 Minn. 447, 129 N. W. 843; Walsh v. St. Paul School Furniture Co., 60 Minn. 397, 62 N. W. 383; Cox v. Volkert, 86 Mo. 505; Rhodes v. Wilson, (N. J. Eq.) 19 Atl. 732; Wilson v. Fitcher, 11 N. J. Eq. 71; Birdsall v. Colie, 10 N. J. Eq. 63; Dunham v. Jarvis, 8 Barb. (N. Y.) 88; 2 Edm. Sel. Cas. (N. Y.) 145; Pratt v. Underwood, 4 N. Y. Civ. Proc. R. 167; Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385; Greenwald v. Gotham-Attucks Music Co., 118 App. Div. 29, 103 N. Y. Supp. 123; Bimberg v. Wagenhals, 53 Misc. Rep. 13, 102 N. Y. Supp. 925; Sarasohn v. Kamaiky, 110 App. Div. 713, 97 N. Y. Supp. 529; Nolan v. Nolan, 8 Lack. Leg. N. (Pa.) 291; Spencer v. Emery, 8 Lack. Leg. N. (Pa.) 278; Shulte v. Hoffman, 18 Tex. 678; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Webb v. Allen, 15 Tex. Civ. App. 605, 40 S. W. 342; Martin v. Wilson, 84 Wash. 625, 147 Pac. 404; Pini v. Roncoroni, (1892) 1 Ch. 633, 61 L. J. Ch. 218, 66 L. T. 255, 40 W. R. 297.

Under the English practice it was held that if the court was in doubt whether the trial would result in a dissolution, it would refuse to appoint a receiver. Goodman v. Whitcomb, 1 J. & W. 589.

5 Randall v. Morrell, 17 N. J. Eq. 343, was a case where the defendant was insolvent and a receiver was appointed.

In Page v. Van Kirk, 1 Brewst. (Pa.) 282, the court say: "Although the partnership agreement provides for a notice of six months of the intention of dissolving the partnership and a clause in the agreement provides for arbitration, yet a court of equity in a proper case will appoint a receiver, such as excluding one partner from his share in the management of the concern, and refusing information; also using the partnership money for private purposes, impractica-

been held that where no time was fixed for the continuance of the partnership, and no provision made for a

bility of carrying on the business. In this case the court ably reviews all of the authorities authorizing a dissolution of the partnership before the time limited therefor by the partnership agreement, and states the following items of mismanagement for which the court will decree a dissolution: (1) where one of the partners permits a friend, without the consent of the other partner, to draw upon the concern for a large amount. Citing Master v. Kirton, 3 Ves. Jr. 75. (2) Where the conduct of the parties makes it impossible to carry on the business upon the terms stipulated, citing Walters v. Taylor, 2 Ves. & B. 304. (3) Where one partner refuses another permission to inspect the books, sells goods for an inadequate price, and appropriates partnership funds to his own use, etc." Citing Goodman v. Whitcomb, 1 Jac. & W. 589; Chapman v. Beach, 1 Jac. & W. 594.

But it has also been held that the mere fact that a partnership business is unprofitable, and should be discontinued is not of itself ground for a receiver. Moies v. O'Neill, 23 N. J. Eq. 207. Nor that the firm is largely indebted and is not making money. Shoemaker v. Smith, 74 Ind. 71. Nor want of co-operation between the partners. Roberts v. Eberhardt, Kay 148. It must be shown in addition that one partner has interfered so as to prevent the business being carried on.

And where a dissolution is probable but it does not appear that a receiver is necessary to protect the interests, a receiver will not be appointed. Birdsall v. Colie, 10 N. J. Eq. 63; Cox v. Peters, 13 N. J. Eq. 39. If the defendant offers to secure the plaintiff a receiver is not necessary. Buchanan v. Comstock, 57 Barb. (N. Y.) 568; cf. Saverios v. Levy, 40 Hun 639, 1 N. Y. St. Rep. 758; Popper v. Scheider, 7 Abb. Pr. N. S. (N. Y.) 56; Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385; Tomlinson v. Ward, 2 Conn. 396; Page v. Vankirk, 1 Brewst. (Pa.) 282, 290; Slemmer's Appeal, 58 Pa. 168, 98 Am. Dec. 255.

In a suit for dissolution of a partnership, an ex parte order granting a receiver and an injunction against the managing partner dispossessing him of the property, which was of such a nature that it could not be easily converted or dissipated, was a nullity. Goldman v. Manistee Circuit Judge, 155 Mich. 47, 118 N. W. 600.

A receiver is properly appointed of goods belonging to a firm on which there are three mortgages, while several unsecured creditors are interested and the partners are unable to agree and have applied for a dissolution of the partnership. Rolfe v. Burnham, 110 Mich. 660, 68 N. W. 980.

Under Code Civ. Proc. 713, which provides that a receiver may be appointed before final judgment where there is danger that the property will be removed beyond the jurisdiction, materially injured or destroyed, in an action for dissolution of a partnership

settlement upon such dissolution, such partnership is dissolvable upon the will of one partner and a receiver may be appointed in a proper case.[6]

But a court will not appoint a receiver over a partnership merely because the partnership is dissolved by mutual consent or may be dissolved at the will of one of the partners. A necessity to protect the interests of either the partners or the creditors must appear in order to warrant the appointment.[7]

The same general rules apply to limited partnerships.[8]

§ 147. Receivership in Case of Insolvency of the Partnership.

The insolvency of a member of a partnership in possession of the property of a partnership in the course of dissolution naturally jeopardizes the security of the property in respect to those having an interest in seeing it preserved intact and consequently furnishes a condition of affairs in which a receiver is properly appointed.[1]

and for an accounting, where it appears that defendant had entire management of the partnership business, that the business had been very successful and profitable, that plaintiff had drawn more profits than defendant, that proper books of account were kept, that no moneys were paid out without a voucher, that defendant was financially responsible, and that plaintiff was financially irresponsible, a receiver before final judgment will not be appointed, since there is no necessity for the appointment. Cohn v. Wahn, 132 App. Div. 849, 117 N. Y. Supp. 633.

6 Law v. Ford, 2 Paige (N. Y.) 310; Marten v. Van Schaick, 4 Paige (N. Y.) 479; McElvey v. Lewis, 76 N. Y. 373.

7 Cox v. Peters, 13 N. J. Eq. 39.

8 In Hogg v. Ellis, 8 How. Pr. (N. Y.) 473, the court appointed a receiver in a case of limited partnership on the ground of disagreement of partners as in other cases. See, also, Van Alstyne v. Cook, 25 N. Y. 489.

1 Under some statutes a creditor having a claim of a certain amount may have a receiver appointed where the defendant is insolvent. Citizens' Nat. Bank v. Minge, 49 Minn. 454, 52 N. W. 44.

In a suit for dissolution of a partnership in which a receiver has been appointed, the court may order a sale of the property where the partnership is insolvent and the business is being carried on at a loss. Wulff v. Superior Court, 110 Cal. 215, 52 Am. St. Rep. 78, 42 Pac. 638.

In re Hermanos, L. R. 24 Q. B. Div. 640, a receiver was appointed

"While insolvency of the defendant in possession, and against whom a receiver is sought, is frequently relied upon by the court as a ground of granting the relief, it is to be observed that insolvency alone will not, of itself, warrant a court in appointing a receiver. It must also appear that the plaintiff has a probable cause of action against the defendant, and that the benefit to result from his recovery will either be wholly lost or substantially impaired, by reason of the insolvency, unless a receiver is appointed."[2]

The reasons which actuate courts in circumstances where insolvency appears in connection with a partnership dissolution case were set forth in a New Jersey case[3] in the following language:

"The circumstance of the insolvency of one of the partners in addition to the fact of the dissolution of the firm, would under ordinary circumstances induce this court to assume the administration of the partnership affairs, I think admits of no doubt. And it seems equally

for a French firm having a branch office in England and having several members living in England, on the ground, principally, of its having been declared bankrupt in the French courts.

2 Lawrence Iron Works Co. v. Rockbridge Co., 47 Fed. 755.

In Van Alstyne v. Cook, 25 N. Y. 489, it was held that until the order of appointment is made the property of an insolvent limited partnership is liable to execution of a creditor recovering judgment otherwise than by confession, and such creditor may thus obtain a preference, the execution binding the partnership property although the judgment is against the general partners only. "The members of a limited partnership before or after insolvency are just as liable to suit for their debts as other natural persons. Their creditors are entitled to recover judgment against them with a view of reaching the individual property as well as partnership property." Speaking of the nature of the property of a limited partnership the court further say: "They are not trust funds in the hands of partners any more than ordinary partnerships. There is no rule of equity which makes them trust funds in any other sense or which gives a court of equity any control over them, or which forbids any creditor of the copartnership, or of any individual, from obtaining a lien on them by due process of law in any hostile proceedings."

3 Randall v. Morrell, 17 N. J. Eq. 343.

clear, that where the court proceeds on this consideration, an injunction is an almost indispensable auxiliary to a receiver. The insecurity of the assets, if left under the power of an insolvent member of a dissolved firm, is the motive in such case, upon which the judicial action is based; and it applies, with equal force, to the allowance of an injunction as to the appointment of a receiver. It is only by the united efficacy of these two safeguards that, when insolvency supervenes, the assets of the copartnership can be secured and preserved for the benefit of those to whom they equitably belong."

§ 148. Receivership Where the Dissolution Has Occurred.

When there has been a dissolution of the partnership by limitation, or by mutual agreement, or otherwise, and the partnership agreement is silent as to the method of closing up the business, and the members of the firm can not agree in reference thereto, a receiver may be appointed if such an appointment is necessary to preserve and protect the partnership property.[1]

[1] Where upon dissolution the firm can not agree upon an adjustment, a receiver may be appointed. Dunn v. McNaught, 38 Ga. 179; Saylor v. Mockbie, 9 Iowa 209; Van Rensselaer v. Emery, 9 How. Pr. (N. Y.) 135; McElvey v. Lewis, 76 N. Y. 373; Law v. Ford, 2 Paige (N. Y.) 310; Martin v. Smith, 21 Jones & S. (N. Y.) 277; Marten v. Van Schaick, 4 Paige (N. Y.) 479. See, also, Reid v. Freed, 100 Miss. 48, 56 So. 278.

In a suit to close the affairs of a partnership admittedly dissolved, a receiver will be appointed only when it appears necessary to protect the interests of the parties. Nathan v. Bacon, 75 N. J. Eq. 401, 72 Atl. 359.

In Speights v. Peters, 9 Gill (Md.) 472, where after dissolution the partners failed to agree upon an adjustment, the funds being in the hands of one partner, a receiver was appointed.

It was held that it was not always necessary that the court should be satisfied that the property is in imminent peril and that where one partner in the ordinary course of trade seeks to exclude another from taking that part in the concern which he is entitled to take, a receiver should be appointed. And after dissolution takes place, or is intended, if one partner acts against the interest of the other or carries on trade with the partnership funds, or in any other manner excludes his copartner from that share to which

A receiver of partnership property is proper in a suit for the settlement of partnership affairs where the partnership has expired by its own limitation and the partners do not desire to continue the business and representatives of five-sixths of the interest therein request such appointment.[2]

§ 149. Receivership Where the Partners Have Agreed as to Method of Dissolution.

Where the partners have agreed among themselves not only to dissolve their partnership but also as to the manner in which the affairs of the partnership shall be settled, the court is very reluctant to appoint a receiver at the instance of one of the partners.[1] If, however, the set-

he is entitled in winding up the concern, a court of equity will appoint a receiver.

In Dunn v. McNaught, 38 Ga. 179, where the contract provided that upon giving six months' notice if the firm did not pay ten per cent profits on the capital, the firm should be dissolved, and the evidence showed that it did not pay ten per cent, the partnership was terminated and a receiver appointed. Cf. Hamill v. Hamill, 27 Md. 679.

A receiver should not be appointed in an action for partnership dissolution and settlement, unless necessary to protect the property or the interests of the parties. But a receiver should not be appointed in such an action where there were no debts, and the courts had definitely settled the accounts of the parties, and nothing would be coming to plaintiff. Albrecht v. Diamon, 125 Minn. 283, 146 N. W. 1101.

A receiver may be appointed to wind up the affairs and distribute the assets of persons engaged in a manufacturing enterprise, who became partners through an invalid corporate organization and thereafter ceased business. Smith v. Schoodcc Pond Packing Co., 109 Me. 555, 84 Atl. 268.

2 Witherbee v. Witherbee, 17 App. Div. 181, 45 N. Y. Supp. 297.

1 Fullenwider v. Bank of Waldo, 101 Ark 259, 142 S. W. 149; Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615; Heflebower v. Buck, 64 Md. 15, 20 Atl. 991; Drury v. Roberts, 2 Md. Ch. 157; Parkhurst v. Muir, 7 N. J. Eq. 307; Hoffman v. Hauptner, 135 App. Div. 148, 119 N. Y. Supp. 1022; Meyer v. Reimers, 49 App. Div. 638, 63 N. Y. Supp. 1112, affirming 30 Misc. 307, 63 N. Y. Supp. 681; Rice v. Baggot, 54 Hun 637, 7 N. Y. Supp. 518, 27 N. Y. St. Rep. 181, 4 Silv. Sup. 383, affirmed, Rice v. Baggot, 130 N. Y. 636, 29 N. E. 151; McDonald v. Trojan Button Fastener Co., 56 Hun 648, 10 N. Y. Supp. 91, 31 N. Y. St. 374; Law v. Garrett, 8

tlement of the partnership affairs has been delegated to one or more of the partners and they do not perform it as agreed or elements of bitterness or loss of confidence arise in connection with the settlement proceedings, the court may appoint a receiver to close the matter.[2] Likewise where the partners have in their partnership agree-

Ch. D. 26, 38 L. T. 3, 26 W. R. 426.

Where the precise method of dissolving the partnership is agreed upon in the copartnership agreement and provision is made in the agreement for the appointment of a person for that purpose, the court will not appoint a receiver. Meyer v. Reimers, 30 Misc. Rep. 307, 63 N. Y. Supp. 681.

Where a partnership is dissolved by mutual consent a court of chancery will not place it in the hands of a receiver. Cox v. Peters, 13 N. J. Eq. 39.

Where the partners have entered into an agreement in respect to the manner of dissolving their partnership affairs, a receiver will not be appointed where no danger to the assets is shown and the defendant is financially responsible. Simon v. Schloss, 48 Mich. 233, 12 N. W. 196.

In Martin v. Smith, 21 Jones & S. (N. Y.) 277, where a dissolution had been made by agreement and subsequently one of the members died, it was held that his death was not an objection to the appointment of a receiver.

2 White v. Colfax, 1 Jones & S. (N. Y.) 297. Upon the dissolution, partners may make such an agreement as to the winding up as they shall deem fit, and a court of equity will not interfere and appoint a receiver unless the parties prove recreant to the trust imposed on them. When such an agreement has been made all the members of the firm are entitled to have supervision over the acts of those selected, to receive information from them respecting collections made, to ask for and have imparted information why collections are not pressed, and have access to the books of the firm; and if those selected deny this right or unreasonably interfere with its exercises, or even if the relations of the parties are so changed that the exercise of this right would reasonably be expected to be attended with unpleasantness or embarrassment, the court will appoint a receiver. In this case the feeling of friendliness had changed into bitter enmity and under such circumstances it would be unreasonable to anticipate that the plaintiff's right of supervision, etc., could any longer be exercised without great unpleasantness and embarrassment, if indeed it could be exercised at all.

The court may appoint a receiver where there is a violation of the dissolution agreement. Word v. Word, 90 Ala. 81, 7 So. 412; West v. Chasten, 12 Fla. 315; Miller v. Jones, 39 Ill. 54; Drury v. Roberts, 2 Md. Ch. 157; Berry v. Folkes, 60 Miss. 576; Ballard v. Callison, 4 W. Va. 326.

ment agreed to refer matters of disagreement between themselves to arbitrators, the court will not as a rule interfere by appointing a receiver,[3] but where they have agreed that some person should be selected to settle the partnership affairs upon a dissolution but they fail to agree on some person, the court may solve the question by appointing a receiver.[4] But where the partners in their partnership agreement have provided for the method of closing up the partnership upon its termination by lapse of time and the plaintiff who is seeking the appointment of a receiver has refused to abide by the agreement, while the defendant has been willing to do so, the court will refuse to make the appointment.[5] The partners can not by their agreement interfere with the rights of the creditors to obtain payment of their debts from the partnership property prior to a distribution to the part-

3 In Young v. Buckett, 51 L. J. Ch. 504, the partnership agreement provided that in case of disputes between the partners they should be settled by arbitration, yet a receiver was appointed.

In Law v. Garrett, L. R. 8 Ch. Div. 26, the court refused a receiver on the application of one partner on the ground that the partners by an agreement had referred all matters in dispute to a foreign court, and although the court had a right to appoint pending an arbitration it would not do so unless a special case was made, on the ground that it would interfere with the court of arbitration. Cf. Semple v. Flynn (N. J.), 8 Cent. Rep. 549. As to partnership as between the parties, see Waugh v. Carver, 2 H. Bl. 235, 246.

4 In Mitchel v. Lister, 21 Ont. Rep. 22, it is held that where the partnership articles provided that, on dissolution, the partners should select a person to collect the accounts and settle the partnership affairs, the court would, upon a failure of the parties to agree on some person, appoint a receiver. Cf. Davis v. Amer, 5 Drew. 64; Law v. Garrett, L. R. 8 Ch. Div. 26; Plewes v. Baker, L. R. 16 Eq. 564.

5 Where articles of partnership provided a method for winding up the affairs of a firm on termination by lapse of time, and the defendant partner followed such method, but plaintiff refused to observe it and it appeared that plaintiff owned no part of the partnership property, but was deeply in debt to it, the court should not appoint a receiver at the instance of the plaintiff in an action for an accounting. Hoffman v. Hauptner, 135 App. Div. 148, 119 N. Y. Supp. 1022.

ners.[6] And where a partner, upon voluntary dissolution of a partnership, accepts a personal covenant of his copartner to pay its liabilities and account to him for his interest in the assets, he is not entitled, in an action for an accounting and the recovery of the amount which the copartner agreed to pay him, to the appointment of a receiver of the property.[7]

5. Receivership on Application of Creditors.

§ 150. On Application of Partnership Creditors.

In matters of partnership the court will sometimes appoint a receiver in an action brought by the general creditors of the firm in behalf of themselves and the other creditors, the purpose in such case being primarily the appointment of a receiver and ultimately the ratable distribution of the assets of the firm. But in this class of cases there must be mismanagement or insolvency and threatened loss as in other cases of what are commonly called "creditors' actions."[1]

[6] If the court should appoint a receiver for a partnership which is dissolved by agreement, under which one of the partners takes possession of the property for the purpose of winding up the firm, the court could order a partial distribution of assets, but the rule that partnership debts must be paid before distribution to partners would still obtain, and it would be the court's duty as in administration of estates to see that the partial distribution did not interfere with the payment of debts in full. Adams v. Carmony, 44 Ind. App. 291, 87 N. E. 708 (rehearing denied, 89 N. E. 327).

[7] Alcott v. Vultee, 33 App. Div. 245, 53 N. Y. Supp. 474.

[1] A general creditor is not entitled to obtain the appointment of a receiver over a partnership unless he can show that he will sustain great and irreparable injury because of fraudulent misconduct of the firm or of some of the partners. Sanderson v. Stockdale, 11 Md. 563; State v. Dickinson, 59 Neb. 753, 82 N. W. 16; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Jones v. Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

The creditors of a partnership may obtain the appointment of a receiver where it is necessary to preserve the property. Oliver v. Victor, 74 Ga. 543; Staar v. Moy Tong Koon, 145 Ill. App. 341; Choppin v. Wilson, 27 La. Ann. 444; Lawrence Lumber Co. v. A. J. Lyon & Co., 93 Miss. 859, 47 So. 849; Greenwood v. Brodhead,

But a simple partnership creditor of a copartnership has no such lien on the partnership assets as entitles him

8 Barb. (N. Y.) 593; Henry v. Henry, 10 Paige (N. Y.) 314; Stone Co. v. McLamb & Co., 153 N. C. 373, 69 S. E. 281.

The cases of Burgwyn Bros. Tobacco Co. v. Bentley, 90 Ga. 508, 16 S. E. 216, and Oliver v. Victor, 74 Ga. 543, were actions brought by general creditors. In the latter case suit was brought to set aside a voluntary assignment in which a receiver was appointed. In Henry v. Henry, 10 Paige (N. Y.) 314, it was held that a creditor was not entitled to a receiver of the separate property of one of the partners who had sold his interest to his copartner, the latter assuming the payment of all indebtedness; that the receivership should be against the firm property and the separate property of the remaining partner unless some valid excuse should be given for not doing so.

In Greenwood v. Brodhead, 8 Barb. (N. Y.) 593, it was held that creditors at large must have a judgment and a lien either legal or equitable and to be in a position to assert such lien. In Venable v. Smith, 98 N. C. 523, 4 S. E. 514, it was held that before a receiver would be appointed it must be manifest that there is mismanagement of the property and that it is in danger of being lost or that it is in possession of an insolvent or unfit trustee. Cf. Dick v. Laird, 4 Cranch C. C. 667, Fed. Cas. No. 3891.

Where under an agreement between a surviving partner and the widow and son of his deceased partner, the latter carried on the business under a contract to purchase it, but after the death of the surviving partner they claimed to own the partnership property which was insufficient to pay the partnership creditors, a creditor may obtain the appointment of a receiver for the purpose of distributing the assets ratably among the creditors. Vermont Marble Co. v. Spafford, 162 Mich. 549, 127 N. W. 669.

In Fechheimer v. Baum, 37 Fed. 167, 2 L. R. A. 153, the court say: "It is now settled that the courts of the United States may administer an equitable right granted by the law of the state in suits of which, from other reasons, they have jurisdiction. It was urged that creditors without judgment had no right to apply, in equity, for the appointment of a receiver. That this is the general rule is undeniable, but there are exceptions to it, and one of these exceptions, of apparently clear distinctness, is where the lawmaking power has enacted, in terms, that the debt need only be matured, with payment demanded and with a refusal, as is the law in Georgia. It is true also—as is held in this circuit in Jaffrey v. Brown, 29 Fed. 476, 477—that a party not intending to pay, by inducing one to sell him goods on credit, through the fraudulent concealment of his insolvency, and of his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods." Crittenden v.

to the appointment of a receiver to settle up the partnership estate upon its insolvency.[2]

In order to maintain an action for the appointment of a receiver of partnership assets, a creditor must show that he can not enforce payment of his debt by judgment and execution. Hence he must show, not only the insolvency of the partnership, but of the copartners as individuals; and even then, if no lien nor return of *nulla bona* on execution has been obtained, it is questionable whether a receiver of partnership assets should be granted, except where the assignment act applies.[3]

Where a creditor has levied an execution on the interest of an individual partner, the court will not appoint a receiver over the partnership property at his instance

Coleman, 70 Ga. 293, 295; Donaldson v. Farwell, 93 U. S. 633, 23 L. Ed. 994. Upon the question of the right of a seller to disaffirm the sale and retake the property sold by him, upon the ground of fraud and misrepresentation, see note to Jaffrey v. Brown, 29 Fed. 476, 485. In La Chaise v. Lord, 1 Abb. Pr. (N. Y.) 213, it was held that the court would not appoint a receiver where the application was in behalf of one firm, out of a large number of creditors of an insolvent firm. Suit must be brought by all the creditors of the insolvent firm who will unite therein, and all the defendants sought to be made liable, as partners, should admit the indebtedness or, in other words, where a receiver is asked without judgment the indebtedness must be admitted. See, also, Hardt v. Levy, 72 Hun 225, which was an action by the general creditors and all others who might come in for the purpose of procuring a receiver. In this case it was held that such an action (without judgment) could not be maintained against a general partnership but that it might be maintained against a limited partnership. Cf. Innes v. Lansing, 7 Paige (N. Y.) 583; Van Alstyne v. Cook, 25 N. Y. 489.

In an action by a creditor for the appointment of a receiver of partnership property, where evidence shows waste, mismanagement, and collusion on the part of one of the defendant partners, and probably loss to another defendant partner, it makes a prima facie case warranting the appointment of a receiver. Whilden v. Chapman, 80 S. C. 84, 61 S. E. 249.

2 Waples-Platter Co. v. Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200.

A general creditor of a partnership has ordinarily no right to have a receiver appointed. Crippen v. Hudson, 13 N. Y. 161.

3 Whilden v. Chapman, 80 S. C. 84, 61 S. E. 249.

without a strong showing of inadequacy of his legal remedy.[4]

§ 151. On Attacking Assignments and Conveyances by the Partnership.

In a suit by creditors attacking an assignment by a partnership on the ground that it was giving an unlawful preference to certain creditors, it is proper to appoint a receiver pending the litigation.[1]

Likewise an unsecured creditor of a partnership, which had executed deeds of trust to secure creditors, can not obtain an *ex parte* appointment of a receiver of a partnership by merely showing the execution of the deeds of trust, an advertisement for the sale of the property of the partnership under the deeds, the death of one of the partners, and the failure of the survivor to give bond for the administration of the partnership estate, without showing the insolvency of the partnership or either of the partners, or of the creditor secured by the deeds of trust, and without showing the invalidity of the deeds of trust.[2]

And where a partnership executing a valid mortgage with the right of the mortgagee to sell mortgaged assets on default voluntarily turned over the assets to the mortgagee to foreclose, the court should not at the suit of another creditor appoint a receiver of the property and deprive the mortgagee of his right, in the absence of any

4 Staar v. Moy Tong Koon, 145 Ill. App. 341.

1 Oliver v. Victor, 74 Ga. 543.

A receiver of property conveyed by an insolvent partnership to one of the firm creditors at an overvaluation, to hinder and defeat other creditors, should not be appointed absolutely without giving the purchasers the alternative of giving bond and security, where they are not alleged to be insolvent, and the property consists of a sawmill and fixtures and a large number of animals used therewith, the care of which would be a great expense to a receiver. Stillwell v. Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963.

2 Lawrence Lumber Co. v. A. J. Lyon & Co., 93 Miss. 859, 47 So. 849.

showing of insolvency, of the mortgagee or mismanagement or bad faith on his part; and the mere fact that the partners resumed possession of the property without the knowledge of the mortgagee by means of a tortious act did not affect the right to appoint a receiver.[3]

§ 152. Effect Where Partners Procure Receivership to Defraud or Delay Creditors.

A receivership in an action to dissolve a partnership will be set aside as to creditors of the partnership where made with intent to hinder, delay, and defraud them.[1]

Where the partners procure the appointment of a receiver merely to allow themselves to settle their affairs in a leisurely way and thereby delay and hinder their creditors, a judgment creditor will be allowed to pursue the remedies arising by virtue of his judgment.[2]

§ 153. Effect of Appointment of Receiver on Creditors.

Upon the appointment of a receiver for a partnership its entire property is placed in the custody of the court appointing the receiver. The possession of the receiver, being that of the court, is protected from interference from both the creditors of the partnership and from the partners.[1] The receiver of the partnership property does

[3] Stone Co. v. McLamb & Co., 153 N. C. 378, 69 S. E. 281.

[1] Metcalf v. Moses, 35 App. Div. 596, 55 N. Y. Supp. 179.

[2] Myers v. Myers, 15 App. Div. 448, 44 N. Y. Supp. 513.

[1] Adams v. Woods, 9 Cal. 24; Naglee v. Minturn, 8 Cal. 540; Adams v. Woods, 8 Cal. 152, 68 Am. Dec. 313; Adams v. Hackett, 7 Cal. 187; Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; Wallace v. Milligan, 110 Ind. 498, 11 N. E. 599; Andrew's Succession, 16 La. Ann. 197; McIntosh v. Perkins, 13 Mont. 143, 32 Pac. 653; Veith v. Ress, 60 Neb. 52, 82 N. W. 116; Ross v. Titsworth, 37 N. J. Eq. 332; Gross v. Gross, 128 App. Div. 429, 112 N. Y. Supp. 790; Holmes v. McDowell, 76 N. Y. 596, affirming 15 Hun 585; Clapp v. Clapp, 10 N. Y. St. Rep. 733; Barry v. Kennedy, 11 Abb. Pr. (N. S.) (N. Y.) 421; Waring v. Robinson, 1 Hoff. Ch. (N. Y.) 524; Foster v. Field, 13 Okla. 230, 74 Pac. 190; In re Hamilton, 26 Ore. 579, 38 Pac. 1088; Cole v. Price, 22 Wash. 18, 60 Pac. 153; Patterson v. Patterson, 182 Fed. 952; Chater v. Maclean, 3 Eq. Rep. 375; Prentiss v.

not obtain by his appointment any rights over the individual property of the partners.[2] And he takes the property subject to all the equities, liens, and encumbrances existing against it while in the hands of the partnership.[3]

Brennan, 1 Grant Ch. (U. C.) 484; Helmore v. Smith, 35 Ch. D. 449, 55 L. T. 72.

In Blakeney v. Dufaur, 15 Beav. 40, the master of rolls says: "The province of this court upon a motion for a receiver is quite clear; its duty is merely to protect the property and not to decide the ultimate rights between the parties."

When a receiver is appointed over the property of a partnership, its assets are in the custody of the court and can be reached only with the permission of the court. Lawson v. Dunn, (N. J.) 49 Atl. 1087.

In Waring v. Robinson, 1 Hoff. Ch. (N. Y.) 524, it was held that when a partnership was dissolved and a receiver appointed, notice of which was published in a paper circulating in the town where the defendant lived, the payment of a debt to one of the partners would be void if he had notice of the appointment brought home to the debtor; and that the filing of a bill was not a dissolution, but the receiver was appointed in anticipation that a dissolution must take place. After the appointment of a receiver one partner can not give preference to creditors by confessing judgment in his favor.

Where a judgment is obtained against partners and a receiver has been appointed to hold the assets, the judgment can not be enforced by an execution levied on the assets in the hands of the receiver, but the judgment creditor may share in the assets on a proper application to the court. Bogert v. Turner, 135 App. Div. 530, 120 N. Y. Supp. 420.

Ordinarily a levy on an execution or attachment subsequent to the appointment will be subordinated to the title of the receiver. Knode v. Baldridge, 73 Ind. 54.

2 Adams v. Hannah, 97 Ga. 515, 25 S. E. 330; Wallace v. Milligan, 110 Ind. 498, 11 N. E. 599; Saylor v. Mockbie, 9 Iowa 209.

3 Security Title & T. Co. v. Schlender, 190 Ill. 609, 60 N. E. 854; Gillam v. Nussbaum, 95 Ill. App. 277; Rickman v. Rickman, 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C 1237.

A creditor of the partnership having a lien on its property can not be deprived of it by means of a receivership. Greenwood v. Brodhead, 8 Barb. (N. Y.) 593.

In Davenport v. Kelly, 42 N. Y. 193, it is said that 'a judgment creditor acquires no preference by the commencement of an action in the nature of a creditor's bill until the appointment of a receiver therein over a junior judgment, as to personal property which is the subject of a levy and sale on execution. Citing Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494, 516; Van Alstyne v. Cook, 25 N. Y. 489. It is very clear that as to personal property which is the subject of levy and sale on execution a creditor by an equity suit acquires no preference as against a judgment

Hence the appointment of the receiver does not affect the existing rights of creditors in respect to the partnership property.[4] The appointment of a receiver over a solvent partnership at the instance of one of the partners will not ordinarily prevent the partnership creditors from securing judgments against the partnership.[5] But one who purchases the interest of a partner subsequent to the appointment of a receiver over the partnership is not allowed to interfere with the possession of the receiver.[6]

6. Who May Be Appointed Receiver.

§ 154. Eligibility to Be Appointed.

In the English practice, it is not an infrequent practice to appoint one of the partners receiver where he is familiar with the business and not guilty of misconduct which would tend to impeach the idea of the property being safe in his hands. But under such an appointment,

creditor of the debtor until the entry of an order appointing a receiver in such equity suit. The vigilant creditor, who by his execution seizes and sells the property of his debtor before the appointment of a receiver in an equity action, secures a preference which the law sanctions and protects.

4 Adams v. Woods, 9 Cal. 24; Stuparich Mfg. Co. v. Superior Court, 123 Cal. 290, 55 Pac. 985; Norton v. Sperry, 113 Minn. 447, 129 N. W. 843; Bird v. Austin, 40 N. Y. Super. Ct. 109; Van Alstyne v. Cook, 25 N. Y. 489; Higgins v. Bailey, 7 Rob. (N. Y.) 613; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; Blakeney v. Dufaur, 15 Beav. 40, 51 Eng. Reprint 451.

5 It has been held that a general creditor of a partnership may proceed to obtain a judgment and attachment and gain priority over other creditors before a final decree dissolving the partnership in a suit for that purpose and the appointment of a receiver since, until such final decree dissolving the partnership, it can not be known whether the partnership is insolvent or not. Adams v. Woods, 8 Cal. 152, 67 Am. Dec. 313; Adams v. Woods, 9 Cal. 24; Myers v. Myers, 15 App. Div. 448, 44 N. Y. Supp. 513; Schloss v. Schloss, 14 App. Div. 333, 43 N. Y. Supp. 788; Matter of Thompson, 10 App. Div. 40, 41 N. Y. Supp. 7, 40, 75 N. Y. St. 1133; Bergin v. Deering, 70 Hun 379, 24 N. Y. Supp. 36, 53 N. Y. St. 893. But see in this connection: Longstaff v. Hurd, 66 Conn. 350, 34 Atl. 91.

6 Noonan v. McNab, 30 Wis. 277.

the receiver is not allowed to receive a salary for his services as receiver and he is required to furnish a bond conditioned upon his accounting for the property and moneys received by him.[1]

This method is sometimes followed in American practice and especially by agreement of the parties to the litigation, as in such circumstances he is under the control and direction of the court, so that no interest can be prejudiced and the bond given is a protection as to the proceeds.[2]

1 Wilson v. Greenwood, 1 S. W. 471; Sargent v. Read, 1 Ch. D. 600; Collins v. Barker (1893), 1 Ch. 578.

As to the appointment of one of the parties as receiver the court in Blakeney v. Dufaur, 15 Beav. 40, says: "It is probable that if the master should appoint either of the partners he will select the one who is at present in possession of the assets; but he would then be in possession of the assets in a totally different character from that in which he is at present. He would then be the officer of the court, having given due security to account for the moneys he shall receive; but in such case it is without salary.

As to the propriety of appointing one of the partners receiver and manager the master of rolls in Sargant v. Read, L. R. 1 Ch. Div. 600, 608, says: "It seems the plaintiffs are entitled on the undisputed figures to rather more than three-fourths of the capital; they are entitled either to three-fourths or four-fifths of the profit; and they are the original owners of the business who have been carrying it on without any substantial interference on the part of the defendant for upwards of a year. It appears that the defendant was unable through ill health to attend to business, but that does not at all affect the fact that they are the persons who carried it on. . . . On the other hand if I deprive the plaintiff of the opportunity of being receiver I might inflict most serious injury on the business." Cf. Collins v. Barker (1893), 1 Ch. 578.

2 Conner v. Belden, 8 Daly (N. Y.) 257; Whitesides v. Lafferty, 3 Humph. (Tenn.) 150; Todd v. Rich, 2 Tenn. Ch. 107.

In Brien v. Harriman, 1 Tenn. Ch. 467, it was held to be unusual to appoint one or the partners receiver, but if it was done it must be without salary, citing Wilson v. Greenwood, 1 Swanst. 481. Where a partner is appointed receiver and carries on the business under the direction of the court and large profits accrue therefrom, all the parties are permitted to participate in such profits. McMahon v. McClernan, 10 W. Va. 419, 467; but see Durbin v. Barber, 14 Ohio 311; Whitesides v. Lafferty, 3 Humph. (Tenn.) 150; Taylor v. Hutchison, 25 Gratt. (Va.) 536, 18 Am. Rep. 699. In

Where a partner is selected as receiver of the partnership, he thereupon ceases to act in his capacity as a partner and becomes responsible to the court as its officer in charge of the property.[3]

Where there is an unreasonable delay on the part of the surviving partner in winding up the partnership and there is waste of the property on the part of the survivor, the administrator of the deceased partner may be appointed receiver, but he will be required to furnish a bond in addition to his regular bond as administrator [4]

A person will not be appointed receiver of a partnership who is interested in judgments against its property and who is connected by marriage with parties secured by a deed of assignment for the benefit of its creditors and who is charged with knowledge of the fraudulent misapplication of assets by members of the partnership.[5]

And a federal court will not appoint a person receiver of a partnership who resides out of its jurisdiction in a state where none of the partnership assets are located.[6]

Where one of the partners has been appointed receiver of the partnership and has acted in such capacity for more than a year, the plaintiff in the litigation is estopped

Beverley v. Brooke and Beverley v. Scott, 4 Gratt. (Va.) 187, 212, it is said: "During such controversy the rents are accruing in the custody of the court ready to be paid over to the party ultimately prevailing. In truth from the time of the order of appointment both parties are in possession by the hand of the receiver and when the question of right is ultimately decided the possession of the party prevailing becomes exclusive throughout the whole period by relation to the date of the order. This is clear both upon principle and authority. In such case there can be no rule of diligence for the exclusive appropriation of the rents." See, also, Reynolds v Austin, 4 Del. Ch. 24; Hubbard v. Guild, 2 Duer (N. Y.) 662.

3 Whitesides v. Lafferty, 3 Humph. (Tenn.) 150; Gridley v. Conner, 2 La. Ann. 87; Blakeney v. Dufaur, 15 Beav. 40.

4 Miller v. Jones, 39 Ill. 54.

5 Watson v. Bettman, 88 Fed. 825.

6 Watson v. Bettman, 88 Fed. 825.

from claiming that he is disqualified from acting because of being interested.[7]

In general, however, the same principles are applied in selecting a receiver for a partnership as are employed in other cases of receivership.[8]

7. Relating to the Procedure of the Appointment.

§ 155. Nature of Pleadings and Notice Necessary.

A receiver will not be appointed over property claimed by defendant by a summary order of the court upon an affidavit of one of the parties to an action for dissolution of partnership that the property is partnership property.[1] In proceedings for the appointment of a receiver facts must be stated in the complaint showing the necessity or propriety for the appointment.[2] And a receiver will not be appointed on the application of one having but a small interest, where the appointment would affect large interests of contractors and other third persons.[3]

It has been held that a partnership creditor may maintain a bill in the federal court to settle a partnership and subject the partnership assets, although there may be at

7 In an action to dissolve, an accounting was had, after which the court appointed defendant partner as receiver. After he had acted for more than a year without objection, and the estate was mainly settled, plaintiff objected that the receiver was interested partly, and disqualified. Held, that after such long acquiescence he could not raise the question. Reneau v. Lawless, 79 Kan. 553, 100 Pac. 479.

8 In this connection see §§ 62 et seq., supra.

1 Stuparich Mfg. Co. v. Superior Court, 123 Cal. 290, 55 Pac. 985.

In Gregory v. Gregory, 1 Sweeny (N. Y.) 613, the court refused to appoint a receiver over specific property without satisfactory proof that such specific property is in fact partnership property.

In Higgins v. Bailey, 7 Robt. (N. Y.) 613, it was held improper for the court to appoint a receiver upon motion and undertake to determine what is partnership property as between the partners and third persons.

2 Tomlinson v. Ward, 2 Conn. 396; Const v. Harris, 1 Turn. & R. 496.

3 Devlin v. Hope, 16 Abb. Pr. (N. Y.) 314.

the same time a bill between the partners to settle the partnership pending in a court of concurrent jurisdiction of the state wherein the property is in the hands of a receiver, so long as it does not interfere with the possession of the receiver.[4]

A court of equity will not in a suit between partners appoint a receiver of the partnership where there is no prayer for a dissolution.[5] In such proceedings, it is necessary to establish the existence of the partnership and the facts essential to the jurisdiction of the court.[6]

The same rules respecting notice apply to members of partnerships in proceedings for the appointment of a receiver, and consequently the courts are reluctant to appoint a receiver without notice to the defendant,[7] but where some of the partners are non-residents, it is held not necessary to serve notice upon such non-resident members where the resident members appear in the proceeding.[8]

4 Logan v. Greenlaw, 12 Fed. 10.

5 Pirtle v. Penn, 3 Dana (Ky.) 247, 28 Am. Dec. 70.

6 Norton v. Sperry, 113 Minn. 447, 129 N. W. 843.

7 McCarthy v Peake, 18 How. Pr. (N. Y.) 138, 9 Abb. Pr. 164; Mann v. Gaddie, 158 Fed. 42, 88 C. C. A. 1.

Where receivership proceedings for a solvent firm were in fact the proceedings of the firm, and the court acted on representation of that fact, citation to the partners was not necessary. Southwell v. Church, 51 Tex. Civ. 547, 111 S. W. 969.

8 But the court will refuse to appoint a receiver over the interest of a non-resident partner in a non-resident partnership. Harvey v. Varney, 104 Mass. 436.

In Alford v. Berkele, 29 Hun 633, an action was brought for dissolution where the resident partners appeared and it appeared that no notice was served upon the non-resident defendant partner, but the court appointed a receiver upon the authority of People v. Norton, 1 Paige (N. Y.) 16, 17; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438; Bloodgood v. Clark, 4 Paige (N. Y.) 574.

In Ogden v. Warren, 36 Neb. 715, 55 N. W. 221, a receiver was appointed of the partnership goods of a foreign partnership having effects in the state of Nebraska.

In this connection see, also, In re Hermanos, L. R. 24 Q. B. Div. 640, where it appeared that a Paris firm having a branch office in England had been declared a bankrupt in the former country

§ 156. Effect of Answer Admitting Allegations of Complaint.

Where in a suit by creditors of a partnership against its survivors for its business and the appointment of a receiver, the answer admits all of the material allegations of the bill, the court will appoint the receiver[1] if there is no suspicion of collusion between the parties to the litigation. The same rules apply in such circumstances as are applicable to the effects of pleadings in other cases.

§ 157. Effect of Allegations of Complaint Being Fully Denied.

The court will not as a rule appoint a receiver where the allegations of the bill asking for the appointment are fully denied by a verified answer. This is in accordance with the practice of equity courts under the general equity practice.[1]

The court will naturally refuse to appoint a receiver where the allegations of the bill are so general that a charge of perjury could not be based upon them and the answer is very clear and full in its denials of the general grounds upon which the appointment of the receiver is sought.[2]

where a syndicate had been appointed to administer the estate. Subsequently a bankruptcy petition was presented in England and an order made for a receiver. The syndicate appeared in court and moved to set aside all further proceedings. There was no evidence as to the domicile of the firm further than that two of the parties resided in England where the firm had large assets. The court held that it had jurisdiction to appoint a receiver, and that the fact that a bankruptcy proceeding had been commenced prior in a foreign country not shown to be the domicile of the debtors, was no ground for staying the proceedings in England.

1 Dick v. Laird, 4 Cranch. C. C. 667, Fed. Cas. No. 3891.

1 Williamson v. Monroe, 3 Cal. 383; Rhodes v. Lee, 32 Ga. 470; Hottenstein v. Conrad, 9 Kan. 435; Coddington v. Tappan, 26 N. J. Eq. 141; Parkhurst v. Muir, 7 N. J. Eq. 307; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Popper v. Scheider, 7 Abb. Pr. N. S. (N. Y.) 56; Wales v. Dennis, 9 Wash. 308, 37 Pac. 450.

2 Williamson v. Monroe, 3 Cal. 383.

§ 158. Right of Creditor to Intervene in Partnership Litigation.

In a suit to dissolve a partnership and for the appointment of a receiver, a creditor of the partnership holding collateral security for his debt, consisting of a promissory note containing a power of sale, may intervene by a petition, asking that the security may be sold and the proceeds applied to the payment of his debt and that he may be admitted to prove his claim for the residue, and an order for the sale of the security is within the authority of the court.[1]

§ 159. Determination of Disputed Questions of Fact by Jury.

Where the existence of the partnership over which it is sought by the plaintiff to obtain a receiver is denied, the court will not appoint a permanent receiver until it is determined that a partnership actually did exist between the parties, although a receiver may be appointed to preserve the property if in danger of being lost.[1] Upon the raising of such an issue of fact the court may direct it to be tried at law and may refuse to try it upon a mere motion for a receiver.[2]

§ 160. What Will Be Determined in the Order of Appointment.

The court will not pass upon the ultimate rights of the partners as between themselves upon making an order appointing a receiver *pendente lite,* since the only object of the appointment is to preserve the property of the partnership pending the ultimate decision in the case.[1]

1 White v. White, 169 Mass. 52, 47 N. E. 499.

1 See §§ 127 and 128, supra.

2 Fairburn v. Pearson, 2 Mac. & G. 144.

Thus where there is an issue as to whether plaintiff was entitled to participate in the profits of the business, the court may direct that issue to be tried by a jury. Peacock v. Peacock, 16 Ves. 49.

1 Rische v. Rische, 46 Tex. Civ. 23, 101 S. W. 849; Blakeney v. Dufaur, 15 Beav. 40.

In Brush v. Jay, 113 N. Y. 482, 21 N. E. 184, overruling 50 Hun 446, 3 N. Y. Supp. 332, it is held that it is manifestly improper to determine a material issue upon affidavits in anticipation of the trial and determination of the issues joined. The court say: "We

Thus in a suit for dissolution of a partnership and an accounting the court should not order one partner to turn over firm property to the receiver until it is determined that he has property belonging to the partnership in his possession, since the object of the suit is to determine the equities of the individual parties in respect to the property involved in making up the final judgment.[2]

The order of appointment will not be extended so as to cover property which is alleged to belong to the partnership where it is denied that it is partnership property and the issue has not been heard by the court.[3]

As a general rule, the appointing court will not determine in its order of appointment what particular property belongs to the partnership but will direct the receiver to determine such questions in proceedings in which the claimants of the property are the litigants.[4]

The question of whether a partnership exists in fact being one going to the jurisdiction of the court is naturally covered by the order of appointment.[5]

Where the appointment of the receiver is not made until the final determination of the litigation, the court

know of no practice which authorizes the court in this manner to defeat the object of the litigation and place the subject of the action beyond the reach of the court ultimately to award it to those showing title thereto. We do not think the special term had authority to take up on motion one of the material issues of the case and under objection by one of the parties make an order which was practically a final judgment in respect to the property involved in such issue."

The appointment of a receiver in an action for dissolution of a partnership and for the appointment of a receiver to wind up the firm affairs is merely preliminary to a hearing and adjustment of all differences upon which the partners may be thereafter heard. Norton v. Sperry, 113 Minn. 447, 129 N. W. 843.

2 Gross v. Gross, 128 App. Div. 429, 112 N. Y. Supp. 790.

3 Gregory v. Gregory, 1 Sweeny (N. Y.) 613.

4 Higgins v. Bailey, 7 Rob. (N. Y.) 613.

5 See § 127, supra.

naturally will determine all of the issues raised by the litigation.[6]

§ 161. How the Partnership Property Is Described in the Order.

The property of the partnership which is placed in the hands of a receiver should be described with reasonable certainty. If the property can only be ascertained from an inspection of the books and accounts of the partnership, it will be sufficient to describe it in a general way as "notes, accounts, personal property, and lands" of the partnership.[1] It is immaterial if the legal title to property of the partnership is in the name of a third person, such as a corporation. The court may appoint a receiver of the property notwithstanding that the legal title to it is held in the name of such third person.[2]

§ 162. Furnishing of Bond by the Receiver.

The same general rules in respect to the necessity of the receiver furnishing a bond apply to receivers for partnerships. The necessity for furnishing such a bond is generally fixed by the statutes of the several states.[1] A bond on behalf of the receiver ought to be exacted even though the statute does not require one, and it should be broad enough in its terms to protect all of the assets

6 Morey v. Grant, 48 Mich. 326, 12 N. W. 202.

1 Martin v. Wilson, 84 Wash. 625, 147 Pac. 404.

2 Fischer v. Superior Court, 98 Cal. 67, 32 Pac. 875. See, also, Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615.

1 Before a receiver is appointed, it is essential that the complainant should either give bond or upon good cause shown should be exempted from so doing, as provided by act May 15, 1903, "concerning the appointment and discharge of receiver." And the finding of such good cause should be incorporated in the order of appointment. Staar v. Moy Tong Koon, 145 Ill. App. 341.

The English partnership act of 1890 which allows a judgment creditor of a partner to obtain a receiver of his interest in the partnership business applies to a foreign partnership having a branch house of business in England. Brown v. Hutchinson (1895), 1 Q. B. 737.

of the partnership.[2] The duty of furnishing such a bond may, however, be waived by the failure of the parties to be benefited thereby not requiring one to be furnished.[3]

§ 163. Denial of Application for Receiver as Bar to Subsequent Application.

The denial of an application for a receiver in a suit for an accounting instituted by one of the partners but which suit was dismissed upon the plaintiff's own motion, is not a bar to a subsequent application for a receiver by the same partner since such an application is merely ancillary to the principal relief sought in the suit itself.[1]

The refusal to grant, on application of one of two corporations which had formed a partnership to publish a newspaper, an injunction restraining its business manager, who was a large stockholder in the other corporation, from further activity in the partnership affairs, made by a judge in vacation on the ground that the partnership contract between the corporations was *ultra vires,* was not *res judicata* of the issues in another suit between the parties asking for a receiver and a distribution of assets of the partnership.[2]

§ 164. Allowance of Costs and Fees.

The allowance of costs and of fees of the receiver in proceedings for the dissolution of a partnership are matters within the sound discretion of the court.[1] As has been before stated, the practice is where one of the part-

2 Where a partner recovering possession of property from a receiver held by him as partnership property gives a bond conditioned upon his accounting for all the assets and property of the partnership as ascertained by the court, book accounts or cash on hand are assets within the meaning of the bond. Larsen v. Winder, 20 Wash. 419, 55 Pac. 563.

3 Shulte v. Hoffman, 18 Tex. 678.

1 Anderson v. Powell, 44 Iowa 20.

2 News-Register Co. v. Rockingham Pub. Co., 118 Va. 140, 86 S. E. 874.

1 The allowance of costs in proceedings for dissolution of a partnership is in the discretion of the

ners is appointed receiver to require that he act in that capacity without compensation.[2]

§ 165. Venue of the Suit to Appoint a Receiver.

In a suit to dissolve a partnership, the venue is determined by the residence of parties, and not by the locality of the firm assets, even when such assets include real estate; and hence the initial proceedings for the dissolution of a partnership and the appointment of a receiver should be had in the place of the partner's domicile.[1]

And it has been held that the jurisdiction of a court of equity in an action to wind up a partnership is not local merely, but extends so far as to authorize the appointment of a receiver to sell real property constituting a part of the partnership assets even though it may be situated in another state.[2]

court. Costello v. Scott, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222.

The allowance of fees of the receiver as costs in the proceedings for dissolution of partnership is a matter in the legal discretion of the trial court. Costello v. Scott, 30 Nev. 43, 94 Pac. 222 (judgment in 93 Pac. 1 modified on rehearing).

Where, both members of a partnership having died, a representative of its principal creditors was appointed receiver of the partnership property, which consisted of a whisky distillery, in a suit brought for that purpose by agreement between the creditors and the devisees and heirs of each partner, and the attorney for such creditors thereafter acted as attorney for the receiver, each of the partner's estates being represented by attorneys, on the question as to whether the attorney's fees for services to the receiver should be paid out of the partnership funds or by such principal creditors, evidence held to show that such services were for the benefit of the partnership property, and that his fee was properly payable out of the partnership funds. Wilson v. Murphy's Admr., 33 Ky. Law Rep. 716; 110 S. W. 893.

[2] In this connection see § 154, supra.

[1] Williams v. Williams, 83 Misc. Rep. 560, 145 N. Y. Supp. 564.

[2] Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067.

8. Powers and Duties of the Receiver.

§ 163. General Effect of the Appointment.

The general effect of the appointment of a receiver is to place the property of the partnership in the custody of the court.[1] Where a partnership is insolvent, the appointment of a receiver is in effect an equitable assignment for the benefit of creditors.[2] Where the suit in which the receiver is appointed is not one affecting creditors particularly, and is merely a litigation between the partners which is subject to being settled or dismissed at any time by the partners, then the effect of the receivership is not like that of an assignment for the benefit of creditors and in such circumstances a creditor may pursue independent remedies.[3]

1 See § 153, supra.

The receivership funds not subject to garnishment or attachment. Longstaff v. Hurd, 66 Conn. 350, 34 Atl. 91. But see Adams v. Hackett, 7 Cal. 187, and Adams v. Woods, 8 Cal. 152, 68 Am. Dec. 313.

2 Winslow v. Wallace, 116 Ind. 317, 1 L. R. A. 179, 17 N. E. 923; Re Hamilton, 26 Ore. 579, 38 Pac. 1088.

In a suit for the dissolution of an insolvent partnership the appointment of a receiver places the assets of the partnership under the control of the court for pro rata distribution among the general creditors where the insolvency is clearly set forth in the pleadings. Myers v. Myers, 18 Misc. Rep. 663, 43 N. Y. Supp. 737 (affirmed in 15 App. Div. 448, 44 N. Y. Supp. 513).

A receiver of an insolvent partnership appointed for the purpose of winding up its affairs is the representative of the partnership creditors. Brockhurst v. Cox, 72 N. J. Eq. 950, 73 Atl. 1117 (affirming 71 N. J. Eq. 703, 64 Atl. 182).

3 See § 153 for discussion of effect of the appointment on creditors.

In Chase's Case, 1 Bland Ch. (Md.) 206, 213, 17 Am. Dec. 277, it was held that the appointment does not involve the determination of any right, or affect the title of either party in any manner whatever. "From this case it seems to be settled," the court say, "that until a dissolution has been judicially declared and a receiver ordered to make a pro rata distribution of the partnership assets among the creditors they are not prevented from resorting to adverse proceedings and that when a creditor does resort to such proceedings he may thereby gain a preference over other creditors who are less diligent." The reason of the above rule is based upon the fact that the proceeding is between partners and the plaintiff may at any time dismiss his

In a proceeding to dissolve a partnership the receiver, it has been said, takes the equitable title without an assignment.[4] In a strict sense, however, the receiver acquires no title but only the right of possession as an officer of the court for the purpose of preserving the property and handling it in accordance with the orders of the court.[5] He takes the partnership property, as

bill. But see Waring v. Robinson, 1 Hoff. Ch. (N. Y.) 524.

Where the receivership is not one arising out of a creditors' action but in a suit between the partners, the receiver is not a representative of the creditors and can assert no greater rights in respect to the partnership property than could the partners. Security Title etc. Co. v. Schlender, 190 Ill. 609, 60 N. E. 854; Weber v. Weber, 90 Wis. 467, 63 N. W. 757.

The appointment of a receiver does not absolve the partners from their partnership debts, nor stay or prevent action against the members of the partnership for the recovery of the debts. Bogert v. Turner, 135 App. Div. 530, 120 N. Y. Supp. 420.

4 Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

In Wallace v. Yeager, 4 Phila. (Pa.) 251, it was held that the receiver succeeds not only to the legal title of the partners as joint tenants, but also to the equitable rights and remedies of the firm. Pearce v. Gamble, 72 Ala. 341; Smith v. Danvers, 5 Sandf. (N. Y.) 669. Cf. Cox v. Volkert, 86 Mo. 505.

5 In Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60, an action was brought to dissolve the partnership and it was held that the receiver took no title to the property; the court say: "A receiver pendente lite is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title of the property is not changed by the appointment. The receiver acquires no title and only the right of possession as an officer of the court. The title remains in those in whom it was vested when the appointment was made. The object of the appointment is to secure the property pending the litigation so that it may be appropriated in accordance with the rights of the parties as may be determined by the judgment in the action." Citing Skip v. Harwood, 3 Atk. 564; Gresley v. Adderly, 1 Swanst. 573; Thomas v. Brigstocke, 4 Russ. 65; Bertrand v. Davies, 31 Beav. 436; Green v. Bostwick, 1 Sandf. Ch. (N. Y.) 185; Singerly v. Fox, 75 Pa. 112; Kirkpatrick v. Corning, 38 N. J. Eq. 234.

After a receiver is appointed the property is in the control of the court and can not be levied on by attachment or other judicial process. Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; McGowan v. Myers, 66 Iowa 99, 23 N. W. 282.

If, however, the partnership has been wound up and there is a bal-

we have shown before, subject to existing liens and equities,[6] but has a priority of right in respect to liens or judgments obtained subsequent to his appointment.[7]

ance in the hands of a receiver which belongs to one partner it is subject to the rights of creditors. Willard v. Decatur, 59 N. H. 137.

A purchaser of one partner's interests after the appointment is subject to the rights of the receiver. Noonan v. McNab, 30 Wis. 277.

A receiver of a partnership appointed in an action by one partner against the other can not be garnished in an action by a creditor of the firm without leave of the court appointing him. Blum v. Van Vechten, 92 Wis. 378, 66 N. W. 507.

6 See § 153, supra.

A receiver of a firm takes only the rights of the firm, and is affected by all claims and liens and equities which would prevail against the firm. Rickman v. Rickman, 180 Mich. 224, **Ann. Cas.** 1915C, 1237, 146 N. W. 609.

The receivership court should, however, pending an action for the dissolution of a solvent partnership, upon application permit the levy of an execution upon the assets in the hands of the receiver under a judgment against the partners. Re Thompson, 10 App. Div. 40, 41 N. Y. Supp. 740.

A receiver of a partnership for the purpose of distributing its assets pro rata among its creditors will not be required to permit a levy on the partnership property of a writ of attachment by a firm creditor issued before the proceeding for the dissolution of the partnership were commenced. Myers v. Myers, 15 App. Div. 448, 44 N. Y. Supp. 513.

A receiver of a partnership appointed on the same day that a bank balance in the name of the firm was appointed by the bank, under an agreement with the depositor in payment of sums due it, is not entitled to the fund as against the bank unless it appears that he was appointed before the account was closed. London etc. Bank v. Hanover Nat. Bank, 36 App. Div. 487, 55 N. Y. Supp. 941.

A receiver, who is placed in charge of a drug business in an action between the partners, is properly required to pay over to the postmaster a fund deposited by one of the partners derived from a branch postal station business and deposited in the firm name in a separate account. Sachs v. Sachs, 181 Ill. App. 296.

7 A judgment rendered against a partnership after the appointment of a receiver upon an indebtedness incurred prior to the receivership is not a preferred claim. Williams v. Groat, 73 Fed. 59.

Where partnership assets are in the possession of a receiver they are not subject to levy under an execution on a judgment rendered subsequent to the appointment. Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172. But the rule is otherwise when the judgment was rendered prior to the appointment. Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 **Am. Dec.** 347.

He has, however, no greater power concerning the winding up of the partnership business than the partners possessed.[8]

Where a receiver is appointed over the property of a partnership after the death of one of the partners, he naturally supplants the surviving partner in respect to administering its affairs.[9]

§ 167. General Powers and Duties of the Receiver.

The general powers and duties of a receiver of a partnership are not materially different from those of receivers generally. He naturally must look to the order of appointment to ascertain the general scope of his powers.[1]

He must use ordinary and reasonable diligence in the execution of his trust.[2] And he must, of course, act with

8 Niemann v. Niemann, L. R. 43 Ch. Div. 198; Wiekersham's Case, L. R. 8 Ch. 831, 28 L. T. 653.

9 Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 7 Atl. 647; Helme v. Littlejohn, 12 La. Ann. 298.

Where a receiver is appointed at the instance of an administrator of a deceased partner, he is clothed with the rights of the deceased partner in respect to administering the partnership for the benefit of the creditors of the partnership. Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

1 The disposition of a fund in the hands of a receiver, in a suit to dissolve a partnership and distribute its assets, can not be affected by any action of the parties to the suit so as to deprive the court of power to control it. Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491.

The receiver may do everything necessary to wind up the firm business in the ordinary manner, and is not compelled to follow the directions of any of the partners. Holloway v. Turner, 61 Md. 217; Dixon v. Dixon, (1904) 1 Ch. 161, 73 L. J. Ch. 103.

In Fincke v. Funke, 25 Hun (N. Y.) 616, where an action was commenced by an administrator against the two remaining partners, after a receiver was appointed. The court held that the receiver had no specific authority conferred upon him to bring actions and that the title of the property did not vest in him; that the receiver in a partnership case is vested only with such power as is conferred upon him by the order; that he is merely a common law receiver whose duty is only to protect the property, the title therein remaining in the partnership.

2 Johnston v. Keener, 23 Ill. App. 220.

the utmost good faith in respect to his handling of the receivership property.

He can not loan the receivership funds to himself or to the firm of which he is a member.[3]

A receiver ordinarily is the representative of the interests of all parties concerned, and the special representative of none.[4]

But where a receiver has been appointed for an insolvent partnership for the purpose of winding up its affairs, he is in effect the representative of the partnership creditors and it is his duty to set aside mortgages or conveyances made in fraud of their rights.[5]

§ 168. Duties of the Receiver Respecting the Collection of Partnership Assets.

It is, of course, one of the duties of a receiver to collect the debts and assets of the partnership.[1] And he may by

3 Ryan v. Morrill, 83 Ky. 352.

4 Tillinghast v. Champlin, 4 R. I. 173 (189), 67 Am. Dec. 510.

Where the receiver is appointed at the instance of one of the partners, he does not, like a receiver in insolvency, represent the creditors in such a manner as to avoid a partnership mortgage which was not filed of record. Berlin Mach. Works v. Security Trust Co., 60 Minn. 161, 61 N. W. 1131.

He is a trustee for all the partners (Honore v. Colmesnil, 1 J. J. Marsh (Ky.) 506), but has no power to bind them to a new obligation. Lake v. Munford, 4 Smedes & M. (Miss.) 312.

A receiver of a partnership represents not only the members of the firm, but also all the creditors in an action brought by him. Lees v. Dobson, 26 App. Div. 624, 49 N. Y. Supp. 902.

But he does not represent creditors to such an extent as to attack a chattel mortgage given by the firm. Walsh v. St. Paul School etc. Co., 60 Minn. 397, 62 N. W. 383.

5 A receiver of an insolvent partnership, appointed for the purpose of winding up the affairs of the partnership and distributing its assets to its creditors, is the representative of the partnership creditors, and as such he may by suit or defense avoid a chattel mortgage given by the partnership which is void as against them. Brockhurst v. Cox, 72 N. J. Eq. 950, 73 Atl. 1117, affirming 71 N. J. Eq. 703, 64 Atl. 182.

1 Jackson v. De Forest, 14 How. Pr. (N. Y.) 81.

The partners may be compelled to turn over to the receiver mon-

virtue of his appointment sue the debtors of the partnership if necessary to do so in order to collect debts.[2] And he may sue to recover unpaid subscriptions to the capital of the partnership.[3]

A receiver appointed in a litigation between the partners and not occupying the position of a receiver appointed in a creditors' suit, can not sue to set aside a fraudulent conveyance made by the partnership prior to the appointment of the receiver.[4]

eys collected by them just prior to the appointment of the receiver. Murphy v. Du Berg, 11 Abb. N. C. (N. Y.) 112.

A receiver of a partnership may upon his own motion and without leave of court sue to recover property belonging to the partnership. Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

2 Helme v. Littlejohn, 12 La. Ann. 298; Nealis v. Lissner, 52 Hun 503, 5 N. Y. Supp. 682, 24 N. Y. St. 196; Fincke v. Funke, 25 Hun (N. Y.) 616; Prentiss v. Brennan, 2 Grant Ch. (U. C.) 274. But see McBride v. Ricketts, 98 Iowa 539, 67 N. W. 410.

Ordinarily, however, he is not permitted to sue to recover debts without leave of court. Fincke v. Funke, 25 Hun (N. Y.) 616.

He generally may sue in his own name to collect all debts. Henning v. Raymond, 35 Minn. 303, 29 N. W. 132.

3 Torbe v. Strauss, 155 Wis. 518, 144 N. W. 184 (rehearing denied, 144 N. W. 1136).

4 Weber v. Weber, 90 Wis. 467, 63 N. W. 757.

A receiver of partnership assets appointed in a suit for an accounting between partners has no authority to compel one of the partners to regain and turn over to him property which has passed out of his hands long before. Ferguson v. Bruckman, 23 App. Div. 182, 48 N. Y. Supp. 887.

Ordinarily he has no right to bring an action to set aside transactions of the partners, such as the conveyance of firm property, as in fraud of creditors. Walsh v. St. Paul School Furniture Co., 60 Minn. 397, 62 N. W. 383; Berlin Mach. Works v. Security Trust Co., 60 Minn. 161, 61 N. W. 1131.

A common law receiver, appointed under the court's equitable powers to hold the assets of a partnership and dispose of them as the court shall direct, may refuse to sue to set aside a conveyance by a partner until indemnity for costs and expenses is given, where the cause of action is the sole asset of the firm. Flinn v. Hanbury, 157 App. Div. 207, 141 N. Y. Supp. 844.

Where the receiver is appointed in a litigation between the partners, he merely occupies the position of the partnership in respect to its property and can not exercise greater rights in relation thereto than the partners themselves could assert. Security Title

A receiver appointed in supplementary proceedings is only entitled to retain out of property or funds enough to pay the judgment upon which he was appointed receiver and the expenses of the receivership.[5]

Equity will not at the suit of receiver of a partnership compel a reconveyance of property conveyed by the firm to another to enable him to borrow money thereon for the firm's benefit without relieving the mortgagor of all personal liability.[6]

etc. Co. v. Schlender, 190 Ill. 609, 60 N. E. 854.

The receiver succeeds to the equitable rights and remedies of the partners and their creditors when he is appointed over an insolvent partnership. Pearce v. Gamble, 72 Ala. 341.

The appointment of a receiver of a partnership because of its insolvency operates as an assignment for the benefit of creditors. Winslow v. Wallace, 116 Ind. 317, 1 L. R. A. 179, 17 N. E. 923.

But it has been held that he may maintain an action in another state to set aside an assignment made by one partner to a creditor in fraud of another creditor where there are no local creditors having rights affected thereby. Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Sloan v. Moore, 37 Pa. 217.

A receiver of a partnership ordinarily has no greater powers than the partners possessed. Niemann v. Niemann, 43 Ch. D. 198.

[5] Appointment of a receiver in supplementary proceedings held to dissolve a partnership of which debtor was a member and to entitle the receiver to withdraw the debtor's share of the property to apply on the judgment, under Code Civ. Proc., § 2468, vesting the debtor's property in the receiver. Lovins v. Laub, 85 Misc. Rep. 336, 147 N. Y. Supp. 304.

A receiver appointed in supplementary proceedings against a partnership who brings an action to set aside a transfer by the partnership when insolvent with intent to prefer certain creditors, in violation of 1 N. Y. Rev. Stats., p. 766, § 20, is not entitled to all the proceeds of the property so transferred, without regard to its amount, but only to a sufficient amount to pay the judgments upon which he was appointed receiver and the expenses of the receivership. Stiefel v. Berlin, 28 App. Div. 103, 51 N. Y. Supp. 147.

[6] Security Trust Co. v. Dinsmore, 186 Mich. 273, 152 N. W. 964.

In the above case Mr. Justice Ostrander said: "Courts of equity do not, for receivers or for other parties complainant, divest citizens of property which it is admitted they rightfully hold as security, at least not without actually relieving them of the obligation to secure which the property was pledged to them. It is obvious that the partners could not secure a reconveyance of the

The individual property of members of the partnership is not within the control of a receiver of the partnership.[7] But where real property is held by the partners as tenants in common but used for partnership purposes and was improved with partnership funds and regarded by them as partnership property, it was held to pass to the receiver of the partnership.[8]

The receiver of a partnership is entitled to recover from the surviving member of the partnership the possession of all funds, evidences of indebtedness, personal property, and choses in action belonging to the partnership. His right of possession is superior to that of the surviving partner.[9]

But a receiver ought not to be authorized in advance to prosecute and defend without further order of the court any actions brought by or against the partners pertaining to the partnership business.[10]

§ 169. Rights of Receiver of Individual Partner.

A receiver of an individual partner, who has absconded, appointed in a divorce suit, has no right to interfere with

property upon the theory of the bill, unless they paid the debt which they gave the property to secure, or wholly relieved defendant from liability therefor. It is equally obvious that the holder and owner of defendant's note and of the mortgage he gave to secure it, and the holder of the collateral pledged by defendant to secure the other note, which is brought in question, are not bound by the decree. In considering whether the bill can be amended, this court can not know whether the complainant desires to maintain the bill as a bill to redeem, or whether the court appointing the receiver will permit it to maintain such a bill—whether it can tender to defendant the relief he is entitled to if complainant's contention is sustained."

7 Hiles v. Dunn, 61 N. J. Eq. 391, 48 Atl. 315; Wallace v. Milligan, 110 Ind. 498, 11 N. E. 599.

Where the property in the possession of a receiver of partnership property is in fact the individual property of one of the partners, that individual partner may assign it. Weinrich v. Koelling, 21 Mo. App. 133.

8 Smith v. Danvers, 5 Sandf. (N. Y.) 669.

9 Miller v. Jones, 39 Ill. 54.

10 Witherbee v. Witherbee, 17 App. Div. 181, 45 N. Y. Supp. 297.

the interests of the absconding partner in the partnership in the absence of waste or other equitable grounds for a receiver over the partnership.[1]

§ 170. Effect of One of the Partners Being Appointed Receiver.

Where one of the partners has been appointed receiver over the partnership he will not be permitted to retain funds collected by himself in his receivership capacity upon the plea that they were due him personally. The disposition of the funds collected by him is a matter within the control of the court since the funds when collected are in the custody of the court.[1]

And where one of the partners is appointed receiver of the partnership, his possession of the partnership property thereupon becomes that of the court, and if he uses such property for his private benefit or profit he must account to the court and not to his copartner.[2]

§ 171. Suing and Being Sued.

The same general rules in respect to the necessity of obtaining leave of court to sue a receiver apply to receivers of partnerships. They can not ordinarily be sued without the permission of the court.[1]

Unless restricted by order of court, the receiver in an action to liquidate partnership affairs may intervene in a suit against the firm and set up as many defenses as he may have reason to believe can be sustained, notwith-

1 Hamill v. Hamill, 27 Md. 679.

1 Gridley v. Conner, 2 La. Ann. 87.

2 Whitesides v. Lafferty, 3 Humph. (Tenn.) 150.

1 Robinson v. Hodgkins, 168 Mass. 465, 47 N. E. 195; Blum v. Van Vechten, 92 Wis. 378, 66 N. W. 507.

A common law receiver appointed in pursuance of the court's equitable powers to hold the assets of a firm pendente lite and dispose of them as the court shall direct can not be sued for a partnership debt. Bogert v. Turner, 135 App. Div. 530, 120 N. Y. Supp. 420.

standing such defenses might inure to the benefit of the members of the firm, though not pleaded by them.[2]

The receiver may generally sue without leave of court where he is doing so for the purpose of recovering possession of partnership property with the intent of applying it to the purposes of the receivership.[3]

§ 172. Binding Force of Previous Orders or Judgments Upon Receiver.

In a suit by a receiver of a partnership to foreclose a vendor's lien on property sold by him the defendants can not assert as a defense that one of the partners was not a party to the litigation in which the receiver was appointed where it is not shown that he was in fact alive or within the jurisdiction of the court.[1] A receiver in a suit between partners for dissolution can not question judgments confessed by the firm to give preferences.[2]

2 Honegger v. Wettstein, 15 Jones & S. (N. Y.) 125.

3 A partnership receiver, appointed in a suit by a representative of a deceased partner against the surviving partner to compel a settlement of the affairs of the partnership, and the application of its property to its debts, is an officer of the court, invested with the whole equitable title to the firm assets without an assignment; represents, in any suit affecting the partnership property, the interests therein of all parties to the suit in which he was appointed, if not of persons who are not parties; is clothed with all the rights and equities of the deceased partner for the purposes of his trust; and may sue, without leave, in this country, to obtain possession of the partnership property for the purpose of applying it to the partnership debts, and need not, on a bill filed for that purpose, join the representative of the deceased partner as a party. Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

1 Stelzer v. LaRose, 79 Ind. 435.

An order made under Code Civ. Proc., § 564, authorizing a receivership in certain actions between partners, can not be attacked in an action by the receiver except for want of jurisdiction to make it, since in such action the appointment is only collaterally involved. Title Ins. & Trust Co. v. Grider, 152 Cal. 746, 94 Pac. 601.

2 The appointment of a receiver of a partnership at the instance of an attaching creditor does not prevent the issuance of another order of attachment without a new affidavit or bond, to another county, against land belonging to one of the partners. Runner v. Scott, 150 Ind. 441, 50 N. E. 479;

A judgment against the receiver of a partnership in a suit commenced under leave of court on a claim in the nature of costs incurred by the receiver in the management and conduct of the business during his receivership and the estate under receivership was chargeable with its payment. The receiver represented all persons interested in the estate and the judgment was conclusive upon them and was conclusive against the surviving partner and creditors whether made parties to the action or not.[3]

§ 173. Receiver Is Bound by Equities Against Partnership.

The receiver is under the general rule bound to recognize the equities and liens existing against the partnership.

Thus where a retiring member of a partnership sold his interest in the business to his copartners upon consideration that they would pay certain partnership notes but he, nevertheless, was compelled to pay them, he may recover the amount so paid by him from the receiver of the new firm made up of the remaining partners since his rights of reimbursement were the same against the new partnership as they were, had the old partnership not been discontinued.[1]

But the fact that creditors of a partnership had from time to time deposited money with it as security for advances will not require the receiver of the partnership

Weber v. Weber, 90 Wis. 467, 63 N. W. 757.

The receiver of a partnership engaged in the brewing business may be directed by the court to take charge of the stock in trade and continue the business with a view to closing it up. Skipp v. Harwood, Dick 114.

The court may continue a partnership business through its receiver after the termination of the partnership for the purpose of disposing of it as a going business where it is to the best interests of the interested parties to do so. Taylor v. Neate, 39 Ch. D. 538.

3 Painter v. Painter, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90.

1 Allyn v. Boorman, 30 Wis. 684.

after its insolvency to pay moneys so received in full where the deposits were not special ones and the moneys were not kept separate since in the circumstances the creditors had no special lien upon the funds.[2]

§ 174. Conducting of the Partnership Business by the Receiver.

A receiver will not be appointed over a partnership for the mere purpose of carrying on the business. The carrying on of business operations by the receiver must be incidental to the receivership.[1] A court will not per-

2 Butler v. Sprague, 66 N. Y. 392; Attorney-General v. Continental Life Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55.

1 Schloss v. Schloss, 14 App. Div. 333, 43 N. Y. Supp. 788.

In Hall v. Hall, 3 Macn. & G. 79, the purpose of the suit was to continue the business through a receiver. It was held that the object being to continue the partnership it was not according to the practice of the court to appoint a receiver. See, also, Wilson v. Greenwood, 1 Swanst. 471; Goodman v. Whitcomb, 1 Jac. & W. 589; Walworth v. Holt, 4 Myl. & C. 619; Const v. Harris, Turn. & R. 496. "The conclusion," the court says, "I come to is that by the rule and practice of this court, a receiver or manager is only granted where it is ancillary to the object of dissolution."

In Roberts v. Eberhardt, Kay 148, it is said that where the purpose is the appointing of a receiver to continue the business the court does not readily grant the order.

In Jackson v. De Forest, 14 How. Pr. (N. Y.) 81, it was held that the court would not take upon itself the responsibility of carrying on the partnership business. In some cases where it may be necessary to secure the good will of the partnership business to the purchaser and the full value of the partnership property to the partners on the sale a receiver is allowed to carry on the business until he can make a favorable sale of the property. Cf. Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510, where sufficient time was allowed to dispose of the property advantageously. Marten v. Van Schaick, 4 Paige (N. Y.) 479, is to the same effect.

In Allen v. Hawley, 6 Fla. 142 (164), 63 Am. Dec. 198, it is said that it could never have been contemplated that a court of chancery should become the superintendent of the private affairs of individuals. Its legitimate purpose is to adjust the rights and settle the disagreements of the parties growing out of such transactions. See, also, Wolbert v. Harris, 7 N. J. Eq. 605.

In Waters v. Taylor, 15 Ves. Jr. 10, the Lord Chancellor (Eldon) said. "Then considering the nature of this property can the plaintiff call upon the court to assume the management of the theater? . . . My opinion is that this court has no jurisdiction to man-

§ 175. Whether Receiver of a Law Firm May Continue the Law Practice of the Firm.

There is a strong intimation in a case decided by the Supreme Court of the State of Washington[1] to the effect that a receiver could not be authorized to attend to the practice of a law partnership in the courts. The decision, however, was based upon the form of the order appointing the receiver, which merely authorized the receiver "to take charge of any and all business of every kind and nature belonging to said firm," and which the court held was not broad enough to authorize the receiver to attend to the law practice of the partners in the courts, the court in this respect saying:

"It is finally contended that the court appointed a receiver to take charge of the cases now pending in the Superior Court of Lincoln County, in which the parties to this action have been employed as attorneys. It is true that, in the affidavit filed by the respondent, he says that it is necessary that a receiver be appointed to take charge of the business of the firm now pending in the courts, but the order appointing a receiver does not go that far. The receiver is directed to take charge of the property of the parties pending an accounting which must necessarily follow. It is true that the order directs that the receiver shall take charge of all business of the firm, but this follows directly after a direction to 'collect any and all outstanding accounts, notes, and obligations of every kind and nature due said firm, and to report the same to this court, especially giving him power and authority to assemble said property and to bring suit for the collection of any obligations due said firm,' thus 'and in short to take charge of any and all business of every kind and nature belonging to said

1 Martin v. Wilson, 84 Wash. 625, 147 Pac. 404.

In the above case the receiver was appointed upon the ground of a lack of harmony between the partners and the exclusion of one partner from the affairs of the partnership.

firm,' etc. When read together, we think it is sufficiently clear that the court had no intention, as he probably had no power, to appoint a receiver to attend to the practice of the parties in the courts of this state."

§ 176. Joint Operation of Two Railroads by Receiver of One of Them Constitutes No Partnership.

No partnership exists between two railroads either as between the parties or as to third persons merely because the receiver of one of the companies operates both roads jointly and part of the gross receipts is paid to the other company.[1]

§ 177. Liability of Receiver for Torts.

A receiver of a partnership is not liable for a tort committed by it before his appointment.[1] We do not, however, understand that the person who has suffered by reason of a tort committed prior to the receivership is deprived from suing for the tort and subjecting the property of the receivership toward payment of his judgment with other general creditors.[2]

§ 178. Sale of the Partnership Assets by the Receiver.

A sale of partnership property in the hands of a receivership will not be ordered in advance of a final hearing where one of the issues to be determined in the receivership is the title to the property.[1]

And a trial court should not order a sale of the partnership assets pending an appeal upon the question whether the court had jurisdiction to appoint a receiver.[2]

1 Houston etc. Ry. Co. v. McFadden, 91 Tex. 194, 40 S. W. 216, 42 S. W. 593.

1 Emory v. Faith, 113 Md. 253, Ann. Cas. 1912A, 586, 77 Atl. 386.

2 See § 58, supra, for general liability of the receivership for torts and negligence.

The receiver of a partnership which had wrongfully cut timber upon land of the plaintiff was held properly sued for such acts. Everett v. Gores, 89 Wis. 421, 62 N. W. 82.

1 Brush v. Jay, 113 N. Y. 482, 21 N. E. 184.

2 McNab v. Noonan, 28 Wis. 434.

mit its receiver to continue the business unless the failure to do so will result in a serious loss because of loss of the good will attached to it or where the nature of the business is such that its principal value consists in its existence as a going business. Under such circumstance the maintenance of the business by the receiver will be incidental to the duty of the receiver to preserve the receivership property for the benefit of those ultimately entitled to it.[2] Where a business is not at the

age this concern merely for the purpose of carrying it on. The court will order it to be sold or foreclosed; will deal with it as property, but no further. . . . I do not see my way to make such an order, and if I did I must, by acting, ruin all concerned. They have still the locus pœnitentiæ, and if they will not settle their own interests, it is immaterial, whether the consequences shall be produced by their own acts or by mine." See, also, Niemann v. Niemann, L. R. 43 Ch. Div. 198, where it is held that a receiver will not be appointed over a partnership, and authorized to do acts in the nature of a compromise or settlement which the partners were not authorized to do.

The liquidator of a partnership or corporation which has been dissolved by vote of the parties in interest and gone into liquidation is without authority to continue its business as a going concern, and will be held to strict responsibility for so doing. In re Browne & Jenkins Co., 106 La. 486, 31 So. 67.

See § 61, supra, in respect to general rule as to conducting the receivership as a going business.

2 Rochat v. Gee, 137 Cal. 497, 70 Pac. 478; Allen v. Hawley, 6 Fla. 142, 164, 63 Am. Dec. 198; Gillam v. Nussbaum, 95 Ill. App. 277; Blythe v. Gibbons, 141 Ind. 332, 35 N. E. 557; Levi v. Karrick, 8 Iowa 150; Wolbert v. Harris, 7 N. J. Eq. 605; Crane v. Ford, 1 Hopk. Ch. (N. Y.) 114; Jackson v. DeForest, 14 How. Pr. (N. Y.) 81; Marten v. Van Schaick, 4 Paige (N. Y.) 479; Heatherton v. Hastings, 5 Hun (N. Y.) 459; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129, 130; Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; Witherbee v. Witherbee, 17 App. Div. 181, 45 N. Y. Supp. 297.

The value of a business engaged in publishing a newspaper is so largely dependent upon its being continued as a going concern that a receiver will generally be permitted to continue it. Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510; Marten v. Van Schaick, 4 Paige (N. Y.) 479.

The receiver of a partnership appointed in an action for dissolution has authority to sell manufactured articles on hand. Montross v. Mabie, 30 Fed. 234.

In Heatherton v. Hastings, 5 Hun (N. Y.) 459, the court said: "Although ordinarily a court of equity will not undertake to carry

time of the appointment of a receiver a going business the court will not ordinarily authorize a receiver to start the business and continue it in operation.[3]

But where at the time of the appointment of a receiver for a partnership the partners were engaged in carrying out a contract to furnish a certain amount of lumber to another concern, the receiver very properly was permitted to complete the contract by manufacturing the lumber where done at the request of the partners.[4]

The creditors of a receiver who is conducting the partnership business with the consent of the creditors of the partners are entitled to priority in respect to their claims against the receivership.[5]

on the business of contending parties by means of a receiver, yet cases sometimes arise where the refusal to do that for a limited period would result in great loss to the persons interested. That such cases are exceptional and justify, as well as require, the exercise of authority which, under other circumstances, would be plainly improper."

[3] In Merrell v. Pemberton, 62 Ga. 29, the defendant had no place of business, and if the plaintiff had any it was beyond the limits of the state. The court refused to appoint a receiver for the purpose of opening up a house for the manufacture and sale of medicines, on the ground that it is only where a place of business is established that the court will appoint a manager.

[4] Rochat v. Gee, 137 Cal. 497, 70 Pac. 478.

It is within the province of a court of equity, in a suit to wind up the business of a partnership which had been formed to carry out a contract for the construction of a public work, to appoint receivers to complete the contract, shown to be for the benefit of the firm's creditors; and a creditor, who subsequently recovered judgment on his claim, will not be permitted to enforce his judgment by a levy, where it would defeat the purpose of the receivership and be to the detriment of all other creditors. Patterson v. Patterson, 182 Fed. 952.

[5] Ivie v. Blum & Bitting, 159 N. C. 121, 74 S. E. 807.

Where a partnership was employed as a del credere factor to sell a cargo of lumber, and a receiver of the partnership, subsequently appointed, guaranteed a certain amount, the principal is entitled to such amount, though the lumber sold for less. In re Federal Union Surety Co., 73 Misc. Rep. 28, 132 N. Y. Supp. 196.

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1 Brush v. Jay, 113 N. Y. 482, 21 N. E. 184.

2 McNab v. Noonan, 28 Wis. 434.

The general rules in respect to sales of the receivership property will be treated in the chapter devoted to the general subject. If the partnership has been licensed to sell patented articles, the receiver in closing up its affairs will be permitted to sell such patented articles as the partnership had on hand.[3]

Where the business of the partnership has a valuable good will attached to it it has been held that the receiver should dispose of it. His failure to do so will make him liable to account for it.[4]

So, also, where the good will of a business is one of the principal assets of a partnership the court may direct the receiver of the partnership to sell the lease of the place where the business was conducted, together with the good will, and the court will protect the purchaser by restraining the partners from interfering with it. And if it appears that the good will can be sold more advantageously to one of the partners, the court will allow the individual partners to buy it.[5] The purchaser of the partnership assets and contract rights is protected as against interference by the partners.[6]

3 Where a partnership over which a receiver is appointed has a license to sell patented stoves, its receiver in closing up its affairs may sell such stoves as are on hand. Montross v. Mabie, 30 Fed. 234.

4 Mechanics' Nat. Bank v. Landauer, 68 Wis. 44, 31 N. W. 160.

The good will may be sold, at receiver's sale or otherwise, separate and apart from the assets of the firm, and there is no rule of law disqualifying partners from bidding upon the good will at public auction. Cook v. Collingridge, Jac. 607.

5 Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379. In this case the business consisted of an insane hospital.

6 Where an execution against a partnership was returned unsatisfied, and a receiver was appointed who took charge of and sold all its assets and contract rights, the title to such assets and contract rights by the sale passed to the purchasers, and one of the partners could not thereafter maintain an action upon one of such contracts. Weinstein v. Welden, 160 App. Div. 554, 145 N. Y. Supp. 772 (reversing 80 Misc. Rep. 348, 142 N. Y. Supp. 406).

§ 179. Right to Sell Partnership Assets Outside of State.

Where the partners are within the jurisdiction of the court and the court has acquired jurisdiction over their persons, a receiver appointed over the partnership, who is authorized to sell all property, choses in action, and other effects of the partnership within the jurisdiction of the court, may sell choses in action and accounts due the partnership from persons residing outside of the state.[1]

§ 180. Duty of Receiver to Pay the Debts and Account Therefor.

The duty of the receiver ordinarily is to take charge of the partnership assets, collect the outstanding debts, and use the funds collected to pay the expenses of the receivership and liquidate the partnership creditors.[1]

Where the receiver was appointed with the consent of the partners, it was held allowable for him to pay debts of the partnership out of funds collected without first reporting to the court.[2]

Where a receiver is appointed in a suit for dissolution to collect the debts owing to the partnership he may be directed by the court to pay over to the plaintiff such portion of the sums collected as belong pro rata to him.[3]

A receiver of a partnership may be required to allow the interested parties to examine his books of account

1 Loney v. Penniman, 43 Md. 130.

1 Wallace v. Milligan, 110 Ind. 498, 11 N. E. 599; Fogg v. Tyler, 111 Me. 546, 90 Atl. 481.

Where an interlocutory decree dissolving a partnership and appointing a receiver gave the receiver no authority to pay firm debts, the court had power to amend the decree nunc pro tunc, so as to permit the receiver to pay the debts, and to direct the referee appointed to pass on the receiver's accounts to take proof of all payments of firm liabilities theretofore made by him. Kliger v. Rosenfeld, 130 App. Div. 421, 114 N. Y. Supp. 1006.

2 Kellar v. Williams, 3 Rob. (La.) 321.

3 Maher v. Bull, 44 Ill. 97.

showing his conduct of the business of the receivership,[4] since it is his duty to render an account of his receivership.[5]

After a receiver has been appointed the partners are not entitled to any portion of the money into which partnership assets have been converted until all partnership debts have been paid.[6]

§ 181. Disposition of Earnings and Meeting Losses in Operations by Receiver.

Funds earned by a receiver after dissolution of a firm should not be credited to the capital account, but should be paid into the general fund to be applied with other assets to capital and profits, according to the proportion that the original capital bore to the profits earned.[1]

If a judgment is recovered against a receiver of a partnership for funds advanced to him to publish a directory, and the publication results in a loss, it is proper to order

4 Maund v. Allies, 4 Myl. & Cr. 503.

Where a receiver of partnership property was appointed, and the parties were ordered to deliver to him all the partnership books and papers, which were to be open to the inspection of the parties and their attorneys and accountants only, and a paper purporting to be a subpoena duces tecum was served upon the receiver requiring him to appear before the commissioner of accounts and produce all of the books, etc., an order to show cause, directed to the parties, why the order directing the parties to deliver the books, etc., to the receiver should not be amended to permit him to obey the subpoena, was improperly made, since he had no standing in the action to apply for such relief, he not being a party and not standing in the shoes of the copartners, and, though he could apply to the court for instructions as to whether he should obey the subpoena, he could not seek a modification of the order which did not concern him. In re Foster, 139 App. Div. 769, 124 N. Y. Supp. 667 (affirming order, 68 Misc. Rep. 120, 123 N. Y. Supp. 465).

5 Gridley v. Conner, 2 La. Ann. 87; Clapp v. Clapp, 10 N. Y. St. Rep. 733.

6 Rochat v. Gee, 137 Cal. 497, 70 Pac. 478; Bishop v. Pendley, 138 Ga. 738, 76 S. E. 63; Slater v. Slater, 78 App. Div. 449, 80 N. Y. Supp. 363.

1 Kennedy v. Hill, 89 S. C. 462, 71 S. E. 974.

the judgment satisfied out of any of the assets of the firm except the directory business.[2]

§ 182. Vacation of the Appointment.

The general rules applicable to the vacation of orders appointing receivers will be treated in a subsequent chapter.

Where, however, receivers have been appointed in a suit between partners to wind up a partnership formed to carry out a contract for the construction of a public work, on a bill alleging insolvency and that the completion of the contract by receivers will be for the benefit of creditors, to which the majority of the creditors have consented, an affidavit of the attorney for a single judgment creditor, stating his belief merely that the firm is solvent and that the receivership was obtained for the purpose of hindering and delaying the creditors, and for the benefit of the partners, is insufficient to justify the vacation of the receivership or the granting of leave to such creditor to issue an execution and levy the same on partnership property in the hands of the receivers.[1]

2 Painter v. Painter, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90.

1 Patterson v. Patterson, 184 Fed. 547.

CHAPTER VIII.

RECEIVER IN RELATION TO JOINT ADVENTURES.

§ 183. When Receiver Will Be Appointed.

A receiver will not be appointed in a suit by one of the parties to a joint adventure without a showing of fraud or mismanagement or damage to the joint assets.[1]

Thus a receiver has been appointed to take possession of a race horse of great value, and to sell it and divide the proceeds among those entitled thereto, where one of the several owners of the horse secured a third party to attach the horse and it was appraised at a low value and was about to be sold.[2]

But where, in a suit for dissolution of a joint adventure and for an accounting, there was a sharp contest between the parties as to the nature of the agreement, and the question of whether the relationship existed was contested and the business was of such a nature that the court could not carry it on under a receivership, and the defendants were solvent and able to respond in damages, the application for a receiver will be denied.[3]

1 Warwick v. Stockton, 55 N. J. Eq. 61, 36 Atl. 488.

A receiver of uncollected accounts due in a joint enterprise was appointed. Candler v. Candler, Jac. 225.

In King v. Barnes, 51 Hun 550, 4 N. Y. Supp. 247, the action was brought to establish and enforce the rights of the parties who had advanced money and incurred liabilities in reliance upon the agreement for a joint enterprise, and it was held that the case was peculiarly within the jurisdiction of a court of equity and that a receiver was necessary to final and complete relief. See same case on joint relationship of the parties in 109 N. Y. 267, 16 N. E. 332.

Receiver may be appointed in a partition suit whenever facts appear which justify such an appointment. Goodale v. Fifteenth Dist. Court, 56 Cal. 26; Reas v. Clemence, 173 Cal. 106, 159 Pac. 432.

2 Shehan v. Mahar, 17 Hun (N. Y.) 129. See, also, Andrews v. Betts, 8 Hun (N. Y.) 322.

3 Bernitt v. Smith-Powers Logging Co., 184 Fed. 139.

One of the parties to an action for the appointment of a receiver, who concedes that it is proper to appoint a receiver to take charge of and sell property belonging jointly to the parties, and divide the proceeds between them, may properly be required to pay over to the receiver money in his hands, arising from a sale by him of other property which had belonged to himself and the other party, the title to which they had derived by virtue of the same transaction as that by which they acquired the ownership of the property turned over to the receiver, where there has been no accounting and settlement as to the property sold.[4]

[4] Whitley v. Berry, 105 Ga. 251, 31 S. E. 171.

CHAPTER IX.

RECEIVERS IN PARTITION PROCEEDINGS.

§ 184. In General.

Receivers are frequently appointed in suits for partition,[1] but ordinarily in a partition suit there is less occa-

1 Goodale v. Fifteenth Dist. Court, 56 Cal. 26; Baughman v. Reed, 75 Cal. 319, 7 Am. St. Rep. 170, 17 Pac. 222; Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052; Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655; Ames v. Ames, 148 Ill. 321, 36 N. E. 110; Rapp v. Reehling, 122 Ind. 255, 23 N. E. 68; Davidson v. I. & M. Davidson Real Estate etc. Co., 226 Mo. 1, 136 Am. St. Rep. 615, 125 S. W. 1143; Weise v. Welsh, 30 N. J. Eq. 431; Goldberg v. Richards, 5 Misc. Rep. 419, 26 N. Y. Supp. 335; Mesnig v. Mesnig, 81 Misc. Rep. 290, 143 N. Y. Supp. 219; Verplanck v. Verplanck, 22 Hun (N. Y.) 104; Christ Church v. Fishburne, 83 S. C. 304, 65 S. E. 238; Ohio Fuel Oil Co. v. Burdett, 72 W. Va. 803, Ann. Cas. 1915D, 1033, 79 S. E. 667; Heinze v. Butte & B. Cons. Min. Co., 126 Fed. 1, 61 C. C. A. 63.

In Heinze v. Kleinschmidt, 25 Mont. 89, 63 Pac. 927, the court applied the rule applicable to cases of tenants in common in a partition suit over a mining property, namely, that a receiver will be appointed in such cases (a) where one tenant is in possession and excludes his co-tenant from participation in the possession or income; (b) where the tenant in possession is insolvent and refuses to account to his co-tenant; (c) where one tenant refuses to join his co-tenant in the execution of necessary leases for the property owned in common, or interferes in the collection of rents with the tenants in possession; (d) where the court can see from the showing made that the appointment of a receiver is required in order to properly protect the interests of the parties.

A receiver may be appointed in a suit for partition to take charge of the real estate and collect its rents and profits pending the litigation. Jones v. Abbott, 228 Ill. 34, 119 Am. St. Rep. 412, 81 N. E. 791.

Pending a suit for partition, the court may appoint a receiver to lease the property and collect the rents and profits. Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96.

Under the early English practice, the court would not appoint a receiver in a partition proceeding except under exceptional circumstances. Norway v. Rowe, 19 Ves. 144, 159; Milbank v. Revett, 2 Meriv. 405. The cases of this character in which receivers were appointed do not generally go into any detail as to the reasons for

sion for the appointment of a receiver than in a foreclosure proceeding since the person in charge of the property having an interest in it can be charged in the final judgment with the amounts of the rents received by him. The party applying for the appointment of a receiver in a partition suit must show a clear case and that his rights will be jeopardized unless the receiver is appointed.[2] In other words it is essential in cases of this sort, as in other classes of cases, that it appear to be reasonably necessary to a preservation of the rights of the parties that the receiver be appointed.[3]

the appointment. Calvert v. Adams, 2 Dick. 478; Evelyn v. Evelyn, 2 Dick. 800; Street v. Anderton, 4 Bro. C. C. 414.

2 Patterson v. McCunn, 46 How. Pr. (N. Y.) 182; Darcin v. Wells, 61 How. Pr. (N. Y.) 259; Bathmann v. Bathmann, 79 Hun 477, 29 N. Y. Supp. 959.

3 Ames v. Ames, 148 Ill. 321, 36 N. E. 110; Duncan v. Campau, 15 Mich. 415; Low v. Holmes, 17 N. J. Eq. 148; Weise v. Welsh, 30 N. J. Eq. 431; Vincent v. Parker, 7 Paige (N. Y.) 65; Bowers v. Durant, 40 Hun 640; 2 N. Y. St. Rep. 127; Verplanck v. Verplanck, 22 Hun (N. Y.) 104; Pignolet v. Bushe, 28 How. Pr. (N. Y.) 9; Heinze v. Butte & B. Consol. Mine Co., 126 Fed. 1, 61 C. C. A. 63; Higgins Oil etc. Co. v. Snow, 113 Fed. 433, 51 C. C. A. 267; Sandford v. Ballard, 33 Beav. 401.

A receiver of the rents and profits of tenement houses will not be granted at the suit of the life tenant against a remainderman who, by agreement of the parties, has been managing the property, in the absence of proof of mismanagement resulting to the plaintiff's injury. Rollwagen v. Rollwagen, 59 Hun 625, 13 N. Y. Supp. 635, 37 N. Y. St. Rep. 293.

A court of equity may in partition proceedings in respect to a large number of lots appoint a receiver to rent the property in whole or in part and pay the rents to the co-tenants in accordance with their respective interests in the property. Rutherford v. Jones, 14 Ga. 521, 60 Am. Dec. 655.

While receivers are sometimes appointed to collect rents pending partition proceedings, such an appointment is not authorized where there is nothing to show any real necessity therefor or imminent danger of loss. Baker v. Baker, 108 Md. 269, 129 Am. St. Rep. 439, 70 Atl. 418.

Where the appointment of a receiver appears to be reasonably necessary to preserve the property and the parties to the partition suit agree to it the court will appoint a receiver. Bowers v Durant, 40 Hun 640, 2 N. Y. St. Rep. 127.

An application by one tenant in common for a receiver was refused where the prayer of the bill for an accounting and a sale and division of the chattels was not sustained

by the evidence. Blood v. Blood, 110 Mass. 545.

A receiver will not be appointed in a partition suit where no tenant in common is attempting to oust the plaintiff or is in any way interfering with his common possession and use of the property or otherwise endangering the rights of the plaintiff. Reas v. Clemence, 173 Cal. 106, 159 Pac. 432.

Where a surrogate had appointed a temporary administrator of decedent's personalty, the Supreme Court, in an action for partition of his real estate, would not appoint a receiver pendente lite, since under Code Civ. Proc. Sec. 2675, authorizing the surrogate to confer on a temporary administrator authority to do any act in regard to decedent's real property necessary to its preservation or benefit, the surrogate might still authorize such temporary administrator to perform the acts regarding decedent's real estate for which a receiver was desired. Weiher v. Simon, 41 Misc. Rep. 202, 83 N. Y. Supp. 927.

In partition cases as in other circumstances where an appointment of a receiver is sought there must be shown a clear or equitable right, reasonably clear and free from doubt, attended with danger of loss. Heinze v. Kleinschmidt, 25 Mont. 89, 63 Pac. 927.

Where there was an outstanding lease, with an option to renew, which lease was involved in the partition action, and there were unpaid taxes on the property, which lease a deceased person had contracted to sell, and the administrator's sureties were dead, and the administrator's bond was not for a large amount, it was held that a receiver to collect the rents of the property should be appointed. Glaser v. Burns, — Misc. —, 154 N. Y. Supp. 22.

On a petition for partition of real estate belonging to the heirs of an estate not yet settled, there is no occasion for the appointment of a receiver, and it is questionable whether in such a case the court has power to appoint a receiver, even with the assent of all the parties. McCarty v. Patterson, 186 Mass. 1, 71 N. E. 112.

In Hargrave v. Hargrave, 9 Beav. 549, the plaintiff, an infant, insisted that he and defendant were co-heirs, entitled to the estate, and that outstanding terms existed which prevented the plaintiff from proceeding at law. The defendant was in possession of the whole. The prayer of the bill was for partition and accounting, and for a receiver. The defendant denied the plaintiff's legitimacy. The motion for a receiver was argued, and the master of rolls said he would examine the cases and give judgment at a future day. He afterward granted the order, but gave no reasons therefor. In another case, the parties were tenants in common of copyhold property, the legal estate being in a trustee for them. The defendant was in possession but there was no proof of exclusion. The plaintiff was allowed a receiver of his moiety. Sandford v. Ballard, 30 Beav. 109. Subsequently, it appeared that the conduct of the defendant amounted to an exclusion. A receiver was, therefore, appointed over the whole property. Sandford v. Ballard, 33 Beav. 401.

§ 185. Effect of Hostile Feelings or Disagreements Between Co-Tenants.

Where such strong hostility exists between tenants in common as to indicate a probability of future injury to the interests of one of the parties to a partition suit, a receiver may properly be appointed to preserve the property during the litigation.[1] In such circumstances the court will naturally require such a showing of hostility which will readily be reflected in a probable destruction of the subject of the litigation.[2]

§ 186. Effect of Ouster or Refusal to Account for Profits.

A receiver is frequently appointed in partition proceedings where it is shown that one co-tenant is in possession and excludes his co-tenant from participation in the possession or income.[1] But the ouster must be of such a

1 In an equitable action for the partition of real estate, where the plaintiff showed good reason to believe that some portion of the property could not be rented, in consequence of the refusal of the defendant to unite with the other tenant in common (plaintiff), and that the rents of other portions which had been rented could not be collected in consequence of her interference,—Held, that it was proper, in order to preserve the property from serious loss, to appoint a receiver. Pignolet v. Bushe, 28 How. Pr. (N. Y.) 9.

A receiver was appointed in a divorce suit, of property held under agreement for joint occupancy. Baggs v. Baggs, 55 Ga. 590.

Courts of equity are averse to appointing receivers of land held by tenants in common, who can not agree on its management, though a receiver will be appointed, where the sole object was to secure a receiver and the collection and equitable division of the rents and profits. Bilder v. Robinson, 73 N. J. Eq. 169, 67 Atl. 828.

2 Such ill-will and hostility between the joint owners of property as prevents unity of action in its management will not warrant the court in placing it in the hands of a receiver, when neither of the owners is excluded from the property. Lamaster v. Elliott, 53 Neb. 424, 73 N. W. 925.

1 Low v. Holmes, 17 N. J. Eq. 148; Goodale v. 15th Dist. Ct., 56 Cal. 26; Duncan v. Campau, 15 Mich. 415; Milbank v. Revett, 2 Meriv. 405. But see: Varnum v. Leek, 65 Iowa 751, 23 N. W. 151; Sandford v. Ballard, 33 Beav. 401; Vaughan v. Vincent, 88 N. C. 116.

Where one co-tenant refuses to join with his co-tenants in leasing a portion of the premises and otherwise interferes with the col-

character as to be more than that of a merely colorable one.[2]

lections of the rents and profits, it is proper to appoint a receiver. Pignolet v. Bushe, 28 How. Pr. (N. Y.) 9.

"It is of the very essence of a tenancy in common that the tenants have each and equally the right to occupy the property and take the profits." Blood v. Blood, 110 Mass. 545.

Where one of alleged tenants in common claims the right to the entire property in fee simple, and seeks to collect all the rents thereof on a bill for partition, it is proper to appoint a receiver to collect the rents and pay taxes and insurance during the litigation. Christ Church v. Fishburne, 83 S. C. 304, 65 S. E. 238.

In the case of Holmes v. Bell, 2 Beav. 298, a receiver was appointed when one of the co-tenants was in possession of the whole rents. This application was not made by nor on behalf of either co-tenant, but by a third party, in a proceeding to foreclose a mortgage against both co-tenants.

[2] The mere fact that one co-tenant is occupying the property in a manner which does not make him liable for an accounting is not ground for the appointment of a receiver pending a suit for partition, since he has a right to so occupy it unless his occupation amounts to a virtual ouster of the complainant. Varnum v. Leek, 65 Iowa 751, 23 N. W. 151.

A receiver will not be appointed in a partition suit where no tenant in common is attempting to oust the plaintiff or is in any way interfering with his common possession and use of the property or otherwise endangering his rights. Reas v. Clemence, 173 Cal. 106, 159 Pac. 432.

In Georgia, the proposition is maintained "that a court of equity has jurisdiction to appoint a receiver, at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits, and excluding their companion from the receipt of any portions thereof, such tenants are insolvent." Williams v. Jenkins, 11 Ga. 595.

The mere fact that one co-tenant notifies the tenants of the premises to pay the rents to him and not to his co-tenants was held insufficient to show such an exclusion of the co-tenants as would warrant the appointment of a receiver. Tyson v. Fairclough, 2 Sim. & St. 142. In the above case Sir John Leach said:

"I may observe that, even in the case of any actual exclusion of one tenant in common by another, I doubt whether this court would appoint a receiver. If it were an exclusion which amounted to an ouster at law, the party complaining must assert at law his legal title. If it were not such an exclusion, this court would compel the tenant in common in rent to account to his companion, but would not, I think, act against his legal title to possession. The reason is, because the party complaining may at law relieve himself by the writ of partition."

A receiver will not be appointed

So also it has been held in a suit for partition if the defendants dispute the title of the plaintiff and cause delay in the accounting of the rents and profits, the appointment of a receiver is proper.[3] But where the property has been conveyed to the person in possession, the court will refuse to appoint a receiver until the question of title has been determined where such person in possession is solvent.[4]

§ 187. Effect of Property to Be Partitioned Being Used in Partnership Capacity.

Where the property owned by the parties as tenants in common is used by them for purposes of trade and their relation toward each other in respect to it is like that of partners, a receiver may be appointed in a partition suit even though the facts would not warrant such an appointment in the case of ordinary tenants in common. Such would be the case where the parties were operating a mine or colliery in which they held various interests. In such circumstances the court would appoint a receiver upon a showing of facts which would warrant the

over a mining claim which is in possession of a tenant in common with the consent of his co-tenant, in a suit for partition upon a showing of a merely colorable ouster of the party in possession. Heinze v. Kleinschmidt, 25 Mont. 89, 63 Pac. 927.

In the above case the court said: "The administrator having gone into possession (if, indeed, he was in possession) by consent of the plaintiffs, with the understanding that he was at liberty to engage in mining, nothing short of a showing of a clear ouster and refusal to account, coupled with a want of financial ability to answer in a suit for this purpose, would probably justify a court in taking the property from his hands through the agency of a receiver."

3 Where the other tenants not only deny the plaintiff's title but endeavor to entangle the whole title and refuse to account for the rents and profits, the appointment of a receiver is proper. Duncan v. Campau, 15 Mich. 415.

4 In a partition suit where it appears that the property has been conveyed to the person in possession, a receiver should not be appointed until the trial of the issue as to the right of possession, where the persons in possession are solvent. Richter v. Lindemann, 166 App. Div. 33, 152 N. Y. Supp. 784.

appointment in the event that the parties were deemed to be copartners.[1]

§ 188. Effect of Insolvency of Tenant in Possession.

In a suit for partition where the tenant in possession is insolvent, such insolvency coupled with actions on his part which tend to endanger the preservation of the property, make a case appropriate for the appointment of a receiver.[1] In fact the insolvency of the person in possession or collecting the rents and profits of the property which is the subject of the partition suit would be one of the strongest arguments for the appointment of a receiver coupled with allegations of the character just mentioned.[2]

1 Hill v. Taylor, 22 Cal. 191, 194; Fereday v. Wightwick, 1 Russ. & M. 46; Jeffreys v. Smith, 1 Jacob & W. 298, 302; Williams v. Jenkins, 11 Ga. 595; Darcin v. Wells, 61 How. Pr. (N. Y.) 259; Parker v. Parker, 82 N. C. 165; Stith v. Jones, 101 N. C. 360, 8 S. E. 151; Thomas v. Nantahala Marble & T. Co., 58 Fed. 485, 7 C. C. A. 330.

1 In a partition suit the allegation that the defendant in possession is of little or no responsibility is not of itself ground for appointing a receiver. Darcin v. Wells, 61 How. Pr. (N. Y.) 259.

Where the property of co-tenants is left in the possession of one tenant in common for the purposes of managing it, a receiver will not be appointed over it in a suit for partition where there is no allegation of insolvency against such party in possession. Pierce v. Pierce, 55 Mich. 629, 22 N. W. 8.

2 Pending a suit for a sale of land for division among co-tenants, equity will not, by appointing a receiver, interfere with the lawful possession of one of the tenants, who is not shown to dispute the title or to disturb the possession of his co-tenants; especially if there is no sufficient averment of insolvency. Cassetty v. Capps, 3 Tenn. Ch. 524.

Where one in possession of joint property is insolvent and is collecting the rents and using the same, a receiver is proper. Roche v. Roche, 42 Hun 652, 3 N. Y. St. Rep. 500.

Where one tenant in common excludes his co-tenant from possession, refuses to pay rents, lets the property go without repair, fails to pay the taxes and assessments when due, and is wholly insolvent, a receiver may be appointed pending a suit for partition and an accounting for rents. Hodgin v. Hodgin, 175 Ind. 157, 93 N. E. 849.

§ 189. Effect Where Party in Possession Is Solvent and Offers Indemnification.

Where the ground for the appointment of a receiver in a partition proceeding can be remedied by the ability on the part of the defendant to respond in damages, the court will not generally appoint a receiver.[1] There are doubtless circumstances where a financial ability to respond in damages or a willingness on the part of the defendant to indemnify the party seeking the appointment of a receiver will be disregarded and a receiver appointed.[2]

The appointment of a receiver is discretionary with the court in partition proceedings. Hence the court may appoint a receiver to take charge of rents collected by an executor notwithstanding that he is financially responsible and offers to indemnify the plaintiff against loss.[3]

§ 190. Receivership Where Care of Subject-Matter Involves Heavy Expense.

The court will not appoint a receiver over property which is the subject of a partition suit merely because the

1 Where the defendant in possession does not dispute the title or interfere with his co-tenants and does not appear to be insolvent, the appointment of a receiver should be refused. Cassetty v. Capps, 3 Tenn. Ch. 524.

A receiver will not be appointed in a partition proceeding where the party in possession is solvent. Pierce v. Pierce, 55 Mich. 629, 22 N. W. 81.

A receiver was refused in a partition proceeding where it was shown that the party in possession had refused to account for the rents, but it appearing that such party had expressed a willingness to render an account at any time and pay over the share of the plaintiff. Bathmann v. Bathmann, 79 Hun 477, 26 N. Y. Supp. 959.

2 Plaintiffs in partition, having a right to have a receiver appointed, can not be deprived of that right on the objection of a defendant because the person claiming the rents is amply responsible, though the defendant offers to indemnify against loss by such collector, or to take charge of the estate and collect the rents free of charge, and give a bond of indemnity. Rapp v. Reehling, 122 Ind. 255, 23 N. E. 68.

In this connection see, also, sections 15 and 25, supra, relative to the furnishing of a bond to protect the rights of the plaintiff.

3 Rapp v. Reehling, 122 Ind. 255, 23 N. E. 68.

care of the property involves a considerable expense, such as in the case of a mining property with machinery and the usual equipment upon property of that character.[1]

§ 191. Effect Where One Party Claims as Tenant by the Curtesy.

In a suit for partition where one of the parties claims as tenant by the curtesy, a receiver will not be appointed on the application of the plaintiff since if the claimant of the estate in curtesy should prevail, the heirs are not entitled to possession during the life of the tenant and the appointment of the receiver would constitute a determination of the rights of the plaintiff on an interlocutory order.[1]

§ 192. Receiver in Aid of Final Judgment of Partition.

Where lands, in part subject to executory contracts of sale of separate parcels, are partitioned, each parcel of the common estate covered by a contract of sale may be treated as a distinct estate and partitioned in severalty, subject to the condition of the contract, and, if the interested parties can not agree to whom payments shall be made, the court, in aid of final judgment of partition, may appoint a receiver for that purpose under the provisions of a statute which permits a receiver to be appointed in an action between parties jointly interested in any property or fund.[1]

§ 193. Partition Proceedings Relative to Personal Property.

In considering the question whether a receiver should be appointed in a suit for partition by one tenant in common against his co-tenants it is necessary to bear in mind the general principles which govern the possession

1 Heinze v. Kleinschmidt, 25 Mont. 89, 63 Pac. 927.
1 Bender v. Van Allen, 28 Misc. Rep. 304, 59 N. Y. Supp. 885.
1 Rich v. Smith, 26 Cal. App. 775, 148 Pac. 545.

of property as between co-tenants. Thus a co-tenant of personal property out of possession has no remedy at law against the tenant in possession unless his dealing with the property has been of such a character as to amount to a conversion of the same by him. But each of the co-tenants is equally entitled to the possession of the property and if the possession of one excludes the other this does not amount to a conversion. There is no hostility at law unless the co-tenant has been guilty of an actual or practical conversion or an actual or practical destruction of the common property. It appears to be well settled that equity has exclusive jurisdiction of suits for the partition of personal property even though the defendant denies the title of plaintiff.[1] Courts are averse to appointing receivers over personal property held in co-tenancy on the application of one of the co-tenants although receivers are appointed in proper cases.[2] Thus

1 Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679.

2 Blood v. Blood, 110 Mass. 545; Low v. Holmes, 17 N. J. Eq. 148; Andrews v. Betts, 8 Hun (N. Y.) 322; Shehan v. Mahar, 17 Hun (N. Y.) 129; Laing v. Williams, 135 Wis. 253, 128 Am. St. Rep. 1025, 115 N. W. 821.

Where, in an action in partition, under Rev. St. 1909, § 2619, by a mortgagee of a half interest in partnership property, who through breach of a condition of the mortgage had become a joint owner with the other partner, it appears that such partner is in possession, wasting the property by selling and converting it to his own use, or otherwise jeopardizing the interest of plaintiff, a receiver may be appointed to take charge of the property, though the petition does not allege that it is inadequate to satisfy plaintiff's demands, the court saying: "We do not agree with counsel for defendant that the court erred in appointing a receiver. The action is analogous, in many respects, to a statutory foreclosure of a mortgage, and the court, as in such cases, has authority to take charge of the property in controversy when it appears necessary to the protection of the interests of the parties pending a final adjudication. If the joint owner in possession is wasting the property, selling and converting it to his own use, or otherwise jeopardizing the interests of the other joint owner, a proper case was presented for the court taking charge of the property by the hand of its receiver appointed for that purpose. It was not necessary for the petition to allege that the property was inadequate to satisfy the demand of

if pending a proceeding for the partition of personalty, the defendant threatens the destruction or removal of the property, he may be enjoined or a receiver may be appointed.[3] And where a receiver is appointed over personal property, which is found to be indivisible, in a partition suit, the property should be sold and the proceeds divided among the parties entitled to it.[4]

Where the remedy of a co-tenant against his co-tenants for their manner of managing the common property is an action at law for conversion, a receiver will not be appointed where it is not shown that the property was agreed to be used in the carrying on of a business and it is not shown that there is any necessity to sell or divide the property by reason of the death or insolvency of any of the parties.[5] And where the parties are using the personal property in the carrying on of a business, the court upon application of one of the co-tenants for a partition of the property which is in the possession of the defendant may refuse to appoint a receiver upon the defendant giving adequate security to reimburse the plaintiff for the deterioration or destruction of the property by use and the rents and profits pending the litigation.[6]

plaintiffs against Davidson on the notes, since the relationship of plaintiff to Karr was not that of mortgagee, but of a joint owner having the absolute legal title to an undivided half interest in the property." Halferty v. Karr, 188 Mo. App. 241, 175 S. W. 146.

3 Thompson v. Silverthorne, 142 N. C. 12, 115 Am. St. Rep. 727, 54 S. E. 782.

4 Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679.

Parties jointly interested in the profits of a business are entitled to a receiver of the books and papers necessary to wind up the concern, where it is conceded that an accounting is required. Davidge v. Coe, 22 Jones & S. 360, 9 N. Y. Supp. 310.

5 Blood v. Blood, 110 Mass. 545.

6 Low v. Holmes, 17 N. J. Eq. 148.

When one joint tenant of a newspaper plant, a married woman, excludes the other tenant from its use and commits waste, she can not complain that the court declines to appoint a receiver if she will give bond to preserve the property and pay what might thereafter be decreed to be due to complainant. Davis v. Leonard, 66 Fla. 351, 63 So. 584.

§ 194. Matters Relating to the Procedure of the Appointment.

Where the court had jurisdiction of the subject matter in an action for partition and also of the parties and a receiver was appointed on notice, the fact that notice was given under the original complaint and disposed of after an amended and supplemental complaint was filed, did not render the appointment invalid.[1]

Where, in a partition suit a receiver of the rents and profits has been appointed, and a judgment is thereafter rendered dismissing the complaint, the court does not lose jurisdiction of the funds brought into court under the receivership, and may direct the receiver to account therefor.[2]

The court should not appoint a receiver in partition until the parties to be affected have an opportunity to be heard, when the petition does not fully disclose facts necessary to inform the court of the real situation, such as the right of the petitioner to relief and the necessity for making the appointment without notice, especially if the petition shows some right of possession of the property or to the rents and profits in another.[3]

1 Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052.

2 On the settlement of an action for partition in which a receiver of the rents and profits has been appointed, who is also a receiver of said rents in a prior action still pending, the court, on a motion for discontinuance, can vacate only the order appointing the receiver in the partition action, and should leave the parties to apply for an accounting by the receiver in the action in which he was first appointed, on which application the amount of his compensation can be determined. Horn v. Horn, 115 App. Div. 292, 100 N. Y. Supp. 790.

By the dismissal of the complaint in an action of partition upon the grounds that the will of the plaintiff's ancestor created an equitable conversion, the court does not lose jurisdiction over funds in the hands of a receiver of the rents and profits theretofore appointed in such action. Baker v. Baker, 36 App. Div. 485, 55 N. Y. Supp. 824 (re-argument denied, 39 App. Div. 629, 57 N. Y. Supp. 281).

3 Baker v. Baker, 108 Md. 269, 129 Am. St. Rep. 439, 70 Atl. 418.

Where in an action for partition, in which a third person intervenes to enforce his right to support from the property, the court may appoint a receiver to take charge of the property and rent it out, and order to be paid from the rents the taxes, other preferred claims, and the allowance due the intervener for support. And the court may, if the parties desire, sell the land, but before the proceeds are divided provision must be made for the support of such intervener.[4]

The fact that the court appointed a receiver in partition to collect the rents and profits from the tenants in possession does not, even if erroneous, affect the petitioner's right to a partition.[5]

§ 195. Rights and Duties of the Receiver.

A receiver appointed to take charge of real property and to collect and hold the rents and profits during the pendency of an action of partition is a chancery or common-law receiver, as distinguished from a statutory receiver, and does not take title or have power to sue for permanent injury to the freeholder by adjoining owners. Hence a complaint in an action by such a receiver for damages to the real property, under bare allegations that he was authorized by an order of court to bring the action, but without stating the substance of such order, does not state facts sufficient to constitute a cause of action.[1]

But a receiver appointed in partition proceedings may maintain a suit against a tenant who has accepted a lease from him.[2]

4 Webster v. Cadwallader, 133 Ky. 500, 134 Am. St. Rep. 470, 118 S. W. 327.

5 McCarty v. Patterson, 186 Mass. 1, 71 N. E. 112.

1 Rinehart v. Hasco Building Co., 153 App. Div. 153, 138 N. Y. Supp. 258.

2 A receiver appointed in an action of partition to which all persons interested were parties, may maintain an action for rent after the co-tenant in possession has recognized the receiver's title by joining in the execution of a lease by him in which he agrees to pay

The court may authorize the receiver to lease the property *pendente lite*, and while it is better practice to give notice of a motion for such action on his part, an *ex parte* order giving the receiver power to lease is not void, although the court may modify or vacate such an order where it extends beyond the close of litigation, although the rights of the lessee may be affected by it, and the court may in such circumstances direct the lessee to be indemnified out of the property.[3]

Where a federal court of equity, in a suit for the partition of lands, has appointed a receiver for such lands, he may, by leave of the court, file a bill in equity to protect his possession, and to require the defendants, as authorized by a state statute, to set up for adjudication an adverse claim made by them, alleged to constitute a cloud on the complainant's title, which will seriously interfere with any partition that may be ordered by the court; and such bill, being ancillary to the original suit, is within the jurisdiction of the court, regardless of the citizenship of the parties, since where the court has jurisdiction of the original actions and having appointed a receiver, the property being in the custody of the court, the court will protect its officer in his possession and treat opposition to such officer as opposition to the court itself. Such a proceeding is not an action of ejectment. The object of the suit is to facilitate the sale of the property upon partition.[4] And where a life tenant is allowed in a suit for partition to elect whether to take a specific sum or a certain income for life, such an election may be made by his receiver, appointed in supplementary pro-

him a stated rental. Smith v. Lavelle, 13 Misc. Rep. 528, 34 N. Y. Supp. 695.

[3] Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96.

[4] Connor v. Alligator Lumber Co., 98 Fed. 155. In this connection see, also, Re Tyler, 149 U. S. 181, 13 Sup. Ct. 785, 37 L. Ed. 689; Rouse v. Letcher, 156 U. S. 49, 15 Sup. Ct. 266, 39 L. Ed. 341; Ledoux v. La Bee, 83 Fed. 761, cited by the court in the above case.

ceedings, and the court may reopen the proceedings to allow the receiver to intervene for that purpose.[5]

And in accordance with the general duties of a receiver, the receiver appointed in partition proceedings has a right to maintain an action for an accounting in respect to the estate involved in the partition.[6] And where a widow assigns her dower right, although unmeasured, to a receiver in supplementary proceedings he may maintain an action to admeasure it but could not maintain partition.[7]

5 Wood v. Powell, 3 App. Div. 318, 38 N. Y. Supp. 196.
6 Kaiser v. Adams, 37 Misc. Rep. 204, 75 N. Y. Supp. 195.
7 Payne v. Becker, 87 N. Y. 153.

CHAPTER X.

INTERESTS IN REAL ESTATE.

1. Over What Interests in Real Property Receivers Are Appointed.

§ 196. In General.

A receiver may be appointed over any interest in real property which is deemed to be of sufficient value to be regarded as the subject of litigation such as a tenancy for life,[1] a reversionary interest,[2] an equity of redemption[3] and the like,[4] as will be shown hereafter.

1 Higgins Oil etc. Co. v. Snow, 113 Fed. 433, 51 C. C. A. 267.

Where a tenant for life fails or neglects to pay the interest upon encumbrances against the property, a receiver for that purpose has been appointed at the instance of the remainderman. Bertie v. Lord Abingdon, 3 Mew. 560, 566; Shore v. Shore, 4 Drew 501.

See, also, St. Paul Trust Co. v. Mintzer, 65 Minn. 124, 60 Am. St. Rep. 444, 32 L. R. A. 756, 67 N. W. 657.

As a tenant for life is required to pay taxes and make such repairs as will preserve the property from decay, if he neglects to do either a receiver may be obliged to collect sufficient of the rents to discharge the obligations of the tenant. Murch v. Smith Manufacturing Co., 47 N. J. Eq. 193, 20 Atl. 213.

Likewise a receiver may be appointed to provide for the renewal of leases held by a tenant for life of renewable leases in a proper case. Micklethwait v. Micklethwait, 1 De G. & J. 504; Bennett v. Colley, 2 M. & K. 225.

Where a tenant for life over whose estate a receiver has been appointed, dies, the remainderman was held entitled to go into possession without making any application to the court. Britton v. M'Donnel, 5 Tr. Eq. 275; Re Stack, 13 Tr. Ch. 213.

So, also, a receiver will be appointed over the rents and profits of a life estate where the life tenant refused to produce the title deeds necessary to make out title on a sale of the remainder in accordance with the provisions of the instruments creating the title. Brigstocke v. Mansel, 3 Madd. 47.

2 Fuggle v. Bland, 11 Q. B. Div. 711; Tyrrell v. Painton (1895), 1 Q. B. Div. 202.

3 Bailey v. Lane, 15 Abb. Pr. (N. Y.) 373 note; Ex parte Evans, L. R. 13 Ch. Div. 253; Smith v. Cowell, 6 Q. B. Div. 75.

4 A receiver may be appointed over a judgment debtor's interest in an outstanding charge upon

§ 197. As Between Tenants in Common.

Some of the decisions affecting the rights of tenants in common have been considered in connection with the subject of partition. The general rule in respect to the rights of co-tenants is that courts are averse to appointing receivers in controversies between them and will not appoint a receiver over the property where it is not shown that the defendants are in the exclusive possession of the rents and profits and excluding their co-tenants from participation therein or are insolvent or so mismanaging the property as to imperil it or cause its loss.[1]

land and subsisting policies of insurance. Beamish v. Stevenson, 18 L. R. Ir. 319. See, also, Orr v. Grierson, 28 L. R. Ir. 20.

In Tompkins v. Fonda, 4 Paige C. C. (N. Y.) 448, the court required the defendant to assign to the receiver for the purpose of this suit her right of dower in certain premises and he was authorized to proceed in her name for the recovery of the same and receive the rents and profits until the further order of the court.

Where a married woman seised of real estate has issue of the marriage, born alive and dies without disposing of such property, and her husband survives her, he becomes entitled to an estate as tenant by the curtesy which estate will pass to a receiver of his property appointed in supplementary proceedings who may by virtue of such receivership recover the rent due at the time of his appointment as well as that accruing afterwards. Beamish v. Hoyt, 2 Rob. 307, 25 N. Y. Sup. Ct. Rep. 307.

In litigation by grantees of rent charges, a receiver may be appointed to protect the property from dilapidation. White v. Smale, 22 Beav. 72.

A receiver was appointed over the benefice of a clergyman of the Church of England where he had made the debt, which was the subject matter of the litigation, a charge upon it. White v. Bishop of Peterborough, 3 Swans. 109.

In England it is held that where one has a right or estate of such a character that his creditors may have execution against it by writ of elegit, it is such an estate over which a receiver may be appointed. Davis v. Duke of Marlborough, 1 Swans. 74.

[1] Blood v. Blood, 110 Mass. 545; Heinze v. Kleinschmidt, 25 Mont. 89, 63 Pac. 927; Vaughan v. Vincent, 88 N. C. 116.

Where one co-tenant who is in possession of the property is disposing of the property and appropriating the proceeds of such disposition and is shown to be insolvent, a receiver is properly appointed. Sims v. Adams, 78 Ala. 395.

Courts will not appoint a receiver against a tenant in common

Mere dissensions and the existence of ill will between the co-tenants will not be regarded as sufficient ground for the appointment,[2] unless such facts prevent a proper use of the property or operate as a substantial exclusion of the complaining co-tenant from the rents and profits arising from the property.[3] A person claiming to be a co-tenant of property may be refused a receiver on the ground of his laches in asserting his rights. Thus where in the case of a mining property he made no complaint of being excluded from participation until after the property had become valuable.[4] Courts in cases of controversies between co-tenants, as in other cases, have sometimes directed that the co-tenant in possession should give security to the complaining co-tenant for his portion of the rents and profits or in default of such security it

except in cases of destructive waste or gross exclusion. Ex parte Billinghurst, 1 Amb. 46; Ex parte Radcliffe, 1 Jac. & W. 640.

Except in extreme cases, the appointment will be denied. Scurrah v. Scurrah, 14 Jur. 874; Norway v. Rowe, 19 Ves. Jun. 144; Milbank v. Revett, 2 Merid. 405; Spratt v. Ahearne, 1 Jones Eq. 50.

If the co-tenants are insolvent, in possession and excluding the plaintiff from his share of the rents and profits, a tenant in common may have a receiver. Williams v. Jenkins, 11 Ga. 595; Cassetty v. Capps, 3 Tenn. Ch. 524.

Where the tenant excluding his co-tenants from participation in the rents and profits is insolvent, a strong case is made for the appointment of a receiver. Williams v. Jenkins, 11 Ga. 595.

The owner of a life estate in an undivided one-eighteenth of certain oil lands was held entitled to a receiver pending proceedings to determine plaintiff's title to the property. Higgins Oil etc. Co. v. Snow, 113 Fed. 433, 51 C. C. A. 267.

May procure the appointment of a receiver, where the defendant or tenant in position is insolvent. Hill v. Taylor, 22 Cal. 191.

As to what will constitute such an exclusion, see Tyson v. Fairclough, 2 Sim. & St. 142; Sandford v. Ballard, 33 Beav. 401.

[2] Wallace v. Pierce-Wallace Pub. Co., 101 Iowa 313, 63 Am. St. Rep. 389, 38 L. R. A. 122, 70 N. W. 216.

[3] Lamaster v. Elliott, 53 Neb. 424, 73 N. W. 925.

[4] Norway v. Rowe, 19 Ves. Jun. 144.

A receiver may be appointed over a rent charge. Wise v. Beresford, 3 Dr. & War. 276; Cullen v. Dean etc. of Killaloe, 2 Ir. Ch. 133.

would appoint a receiver to secure the same.[5] And in cases where the appointment of a receiver is proper, the court may appoint a receiver of the rents and profits of the moiety claimed by the plaintiff where the defendant is in possession of the whole.[6] But when the conduct of the co-tenant in possession is of such a character as to amount to an exclusion of the complaining co-tenants from the property itself, the receivership will be extended over the whole property.[7] The same general rules are applicable to cases of tenancies in common of equitable estates.[8]

§ 198. Tenants in Common Using the Property as a Business.

As was shown before, property held as tenants in common when used for purposes of trade may be treated as partnership property and the rights of the parties considered in the light of the principles applicable to controversies between partners if a receiver is sought.[1] Cases of this sort most frequently arise in connection with property used for mining purposes, but in such cases an additional circumstance is also considered in connection with the preservation of the property, and that is that the working of the property operates as a destruction of the property itself and sometimes the failure to work it will injure it by the filling of the workings with water in case of a mine, or of the drainage of the oil by neighboring oil wells in case of oil wells. On account of the peculiarities of cases of this kind, we will treat the matter in a separate subdivision.

5 Street v. Anderton, 4 Bro. C. C. 414.

6 Hargrave v. Hargrave, 9 Beav. 549.

7 Sandford v. Ballard, 33 Beav. 401.

8 Sandford v. Ballard, 30 Beav. 109.

1 In this connection see, also, § 187, relative to the partitioning of property used in a business capacity.

See, also, Roberts v. Eberhardt, Kay. 148, 159.

2. Actions for the Recovery of Real Property.

§ 199. Settlement of Disputes as to Title.

It is not the policy of the courts of equity to take charge of real estate and manage it through a receiver as against a party in possession asserting title in himself unless it is shown to be in imminent danger of great waste or irreparable injury. But even in such cases the courts will require a strong showing as to the likelihood of the plaintiff ultimately establishing his right to recover. The realty the subject matter of the litigation is not capable of destruction or removal and hence the necessity for a receiver can seldom be so urgent as in other cases. Exception to this rule has been recognized in cases of mining property where the actual value of the property may be recovered.[1] But where the party in possession has no clear legal right to the possession and the property is exposed to danger and loss, it is the duty of the court to appoint

1 Kelly v. Steele, 9 Ida. 141, 72 Pac. 887; Willis v. Corlies, 2 Edw. Ch. (N. Y.) 281.

See, also, Thompsen v. Diffenderfer, 1 Md. Ch. 489; Furlong v. Edwards, 3 Md. 99; Kipp v. Hanna, 2 Bland (Md.) 26; Speights v. Peters, 9 Gill 472, 479; Vause v. Woods, 46 Miss. 120; Bryan v. Moring, 94 N. C. 694; Rollins v. Henry, 77 N. C. 467; Schlecht's Appeal, 60 Pa. St. 172; Lenox v. Notrebe, Fed. Cas. No. 8246b, Hemp. 225; Overton v. Memphis etc. R. Co., 10 Fed. 866, 3 McCrary 436.

The court is slow to appoint a receiver of real estate where the legal title is in controversy, and one of the parties is in the peaceable possession under claim of right. This rule, however, does not apply where the property is already in the possession of a receiver, and a third party claiming adversely to the others asks to have the receivership continued. State v. Allen, 1 Tenn. Ch. 512.

Where one party has a clear right to the possession of the property, and the dispute is as to the title only, the court will incline against disturbing the possession. Ellett v. Newman, 92 N. C. 519; Myers v. Estell, 48 Miss. 372, 401; Parkhurst v. Kinsman, Fed. Cas. No. 10760, 2 Blatchf. 78; Lenox v. Notrebe, Fed. Cas. No. 8246b, Hemp. 255.

Where there are many creditors claiming the land of a debtor, some by deed and some by judgment, the land should be placed in the hands of a receiver, to be rented for the benefit of those who shall be entitled. Cole's Adm'r v. McRae, 6 Rand (Va.) 644.

a receiver pending the litigation.[2] On the other hand, where the title to property is in dispute and both parties to the litigation claim to be its owner in fee, the court will not appoint a receiver over it.[3] And unless the plaintiff is able to show a reasonable probability of establishing title in himself, and that the property is in danger, the court will refuse to appoint a receiver even though it be shown that the defendant is insolvent.[4]

The general rule in respect to the appointment of receivers over real estate may be stated as follows: A court of equity will not appoint a receiver of real estate, or of its proceeds, in the possession of defendants holding under a regular title during the pendency of the suit, although it has the power to do so in exceptional cases.

But in order to bring a case within the exceptions to this general rule there must be clear proof (1) that there is imminent danger that unless a receiver is appointed the property, or its proceeds, will be materially deteriorated in value or wasted; (2) that the plaintiff will suffer irreparable loss from such deterioration or waste, and he can rarely suffer such loss when the defendants are solvent and abundantly able to respond to any damage they cause, or where they will give a good bond of indemnity against it; (3) that upon the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately recover.

This rule is based upon the idea that a court of equity will always endeavor to prevent the exercise of its jurisdiction by way of appointing a receiver as a substitute for the functions of a successful action of ejectment, a jurisdiction particularly applicable to a court of law.[5]

2 Hlawacek v. Bohman, 51 Wis. 92, 8 N. W. 102.

3 Sengfelder v. Hill, 16 Wash. 355, 58 Am. St. Rep. 36, 47 Pac. 757.

4 Ryder v. Bateman, 93 Fed. 16.

5 Folk v. United States, 233 Fed. 177, 147 C. C. A. 183. (Opinion by Judge Sanborn sitting as judge of the Circuit Court of Appeals.)

Where there is imminent danger of loss without an adequate rem-

edy at law, a receiver will be appointed to possession of property but not ordinarily where title is merely in dispute. Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537.

Where the basis of the action is the assumed ownership by plaintiff of the land and its profits and involves merely legal as distinguished from equitable rights, a receiver will not be appointed. San Jose Safe Deposit Bank v. Bank of Madera, 121 Cal. 543, 54 Pac. 85.

The insolvency of one in possession of real estate is ground for a receiver if the plaintiff shows title and a reasonable probability of recovering. Ryder v. Bateman, 93 Fed. 16.

The court may appoint a receiver where property in the possession of one in which another claims an interest is allowed to depreciate. Jones v. Quayle, 3 Ida. 640, 32 Pac. 1134.

A receiver will be appointed in an action involving the title and right to possession of real property, where the complainants have a good equitable title to the land and in equity the right to its immediate possession, although the naked legal title is outstanding, and it appears that the defendants in possession are insolvent and are destroying the timber on the land. Smith v. Lusk, 119 Ala. 394, 24 So. 256.

But where the contest is over the title to a chattel real, which is in the possession of the defendant, the facts that the defendants are insolvent and that the ground rent is largely in arrears are not sufficient, of themselves, to warrant the appointment. Kipp v. Hanna, 2 Bland (Md.) 26. The chattel real in this case was a house standing on leasehold property.

In an action where two parties claim possession and are interfering with each other, appointment is proper. Hlawacek v. Bohman, 51 Wis. 92, 8 N. W. 102; Corbin v. Thompson, 141 Ind. 128, 40 N. E. 533.

A receiver may be appointed against the legal title in a clear case. Lloyd v. Passingham, 16 Ves. Jun. 59.

A receiver will be appointed where title is involved and the party in possession is committing waste. Collins v. Richart, 14 Bush (77 Ky.) 621.

The ground for the appointment of a receiver of real estate is that the property is in danger of being injured or destroyed. Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088.

In an action for the possession of land on the ground that the transfer from plaintiff's ancestor was void for mistake and fraud, a receiver will be appointed upon a showing of fraud, insolvency and waste. Tufts v. Little, 56 Ga. 139; Rogers v. Marshall, 6 Abb. Pr. N. S. (N. Y.) 457.

The appointment of a receiver in the case of a disputed title to real property is in the judicial discretion of the court, and will be made before judgment in a proper case, although there is a tenant in possession to receive the rents. The court since the passage of the English judicature act 1873, § 25, subs. 8, has jurisdiction to appoint a receiver in the case of a disputed title to real property. Fox-

§ 200. Actions in Ejectment.

Following the principles set forth in the preceding section it is apparent that a receiver will not ordinarily be appointed in an action of ejectment.[1]

The general rule is that where the litigation involves merely a dry legal title, a court of equity will refuse to interfere and will refer the plaintiff to his remedy at law.[2]

Hence in actions of ejectment, the issue being merely as to the legal title of the respective parties, a receiver of the rents and profits will not be appointed unless some special equitable ground is shown entitling the plaintiff to the rents and profits or showing that sequestration is essential to his protection.[3]

well v. Van Grutten (1897), 1 Ch. 64, 75 L. T. N. S. 311.

In this connection see, also, § 11, supra.

1 Under the Code of Civil Procedure provisions, the court has no jurisdiction to appoint a receiver in an action of ejectment. Bateman v. Superior Court, 54 Cal. 285; Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131.

Where two parties claim under legal titles the validity of which is pending at law, a receiver will not be appointed for the rents and profits. Squire v. Hewlett, 141 Mass. 597, 6 N. E. 779.

2 San Jose Safe Deposit Bank v. Bank of Madera, 121 Cal. 543, 54 Pac. 85; Mapes v. Scott, 4 Ill. App. 268; Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537; Sengfelder v. Hill, 16 Wash. 355, 58 Am. St. Rep. 36, 47 Pac. 757.

3 Payne v. Atterbury, Harr. (Mich.) 414; State v. District Court, 13 Mont. 416, 34 Pac. 609; Rollins v. Henry, 77 N. C. 467; Emerson's Appeal, 95 Pa. St. 258.

The general rule is that as between contestants over legal title a court of equity will not interfere and appoint a receiver over the income of crops. Thompson v. Sherrard, 22 How. Pr. (N. Y.) 155, 35 Barb. 593; Corey v. Long, 12 Abb. Pr. N. S. (N. Y.) 427; People v. New York, 10 Abb. Pr. (N. Y.) 111.

The refusal in such case to grant plaintiff a receiver of the rents and profits is based upon the fact that the action of ejectment is not for the unlawful withholding of possession, but is brought against the defendants as trespassers, and the claim against defendants is for damage as trespassers. The appointment of a receiver to recover damages in an action of trespass is unknown to the law.

A receiver will not be appointed over land pending an action of ejectment for its recovery where

A court of equity is sedulous to prevent the successful invocation of its preliminary injunction or appointment of a receiver to perform the function of a successful action of ejectment, while the plaintiff at the same time avoids the trial of titles indispensable to the success of such an action.[4]

It is always essential in order to obtain the appointment of a receiver in an ejectment suit that the existence of some peculiar equities be shown making the exercise of the equitable jurisdiction of the court in respect to receiverships essential for the protection of the subject matter of the litigation.[5]

the defendant was a bona fide purchaser. Whitworth v. Wofford, 73 Ga. 259.

In Stephens v. Kaga, 142 Ind. 523, 41 N. E. 930, the court refused to appoint a receiver to harvest and sell crops pending a statutory new trial in an action of ejectment.

4 Folk v. United States, 233 Fed. 177, 147 C. C. A. 183.

5 Freer v. Davis, 52 W. Va. 35, 94 Am. St. Rep. 910, 43 S. E. 172.

In Bateman v. San Francisco Super. Ct., 54 Cal. 285, it is held that a receiver in ejectment cases can not be appointed under the California code. In Rollins v. Henry, 77 N. C. 467, it is held that where the contest is simply one over disputed title to property, both parties claiming the legal title, a receiver will not be appointed even where the defendant is insolvent. A receiver will be appointed only when the plaintiff sets forth an apparently good title, not sufficiently controverted by the answer, and shows imminent danger of loss. Kron v. Dennis, 96 N. C. 327; Whitworth v. Wofford, 73 Ga. 259; Davis v. Taylor, 86 Ga. 506, 12 S. E. 881.

There must be strong grounds for relief shown, in which the element of danger of loss is apparent. Ireland v. Nichols, 37 How. Pr. (N. Y.) 222. The statute under which this decision was rendered provided that the plaintiff should have damages for the rents and profits of the premises recovered.

A receiver may be had to preserve property where there is danger of an eviction. Fetherstone v. Mitchell, 9 Ir. Eq. Rep. 480.

Where the plaintiff shows a good title and it appears that the defendant is insolvent and collecting rents which he will not be able to refund and that the estate is being wasted as a result of neglect, a receiver will be appointed. Rogers v. Marshall, 38 How. Pr. (N. Y.) 43; Ireland v. Nichols, 1 Sweeny 208, 37 How. Pr. (N. Y.) 222; Payne v. Atterbury, Harr. (Mich.) 414.

Where in ejectment the plaintiff has recovered judgment, he is better entitled to a receiver pending further legal proceedings where necessary to preserve the rents and profits.[6]

Pending an action in ejectment for the recovery of land, a bill for the appointment of a receiver to take charge of the rents and profits arising out of the property will be regarded as in the nature of an ancillary one to an action at law and merely for the protection of the rents and profits of the property. It does not contemplate a change of the status of the realty itself.[7]

§ 201. Rule in England Under Judicature Act.

Under the Judicature Act of 1873 allowing a receiver to be appointed in "all cases in which it shall appear to the court to be just or convenient" that the act applies to ejectment cases, and that therefore the court should consider in each case whether it is just or convenient that a receiver be appointed. And the court observed:

"In considering each particular case we have first to look at the person in possession and consider how long he has been in possession and whether he claims under any and what title; we must look also at all the other circumstances which may be material, and the risk to which the tenants may be exposed is one not to be lost sight of."[1]

§ 202. Receiver to Collect the Rents and Profits.

Under the modern practice in a number of states mesne profits may be recovered in the action of ejectment and in some instances the right to do so is expressly given by statute.[1] Hence where the rents and profits are an issue

6 Whitney v. Buckman, 26 Cal. 447; Collier v. Sapp, 49 Ga. 93; Frisbee v. Timanus, 12 Fla. 300.

7 Ulman v. Clark, 75 Fed. 868.

1 John v. John (1898), 2 Ch. Div. 573. In this connection see, also, Foxwell v. Van Grutten (1897), 1 Ch. Div. 64.

1 Henry v. Davis, 149 Ala. 359, 43 So. 122, 13 Ann. Cas. 1090; Johnston v. Fish, 105 Cal. 420, 45

in the case, the court may appoint a receiver to take charge of them where they are not being properly applied and are in danger of being lost through the insolvency of the party in possession or through other causes. The existence of facts indicating fraudulent acts or practices on the part of the person collecting the rents and profits coupled with the fact of his insolvency is generally regarded as a sufficient ground for the appointment of a receiver.[2] But a receiver ought not be appointed where the alleged insolvency is denied and it appears that the party in possession is able to respond for the use of the property and account for the rents and profits which he may collect,[3] or where such party offers to pay the rents and profits into court to await the termination of the

Am. St. Rep. 53, 38 Pac. 979; Trubee v. Miller, 48 Conn. 347, 40 Am. Rep. 177; White v. Rowland, 67 Ga. 546, 44 Am. Rep. 731; Barson v. Mulligan, 191 N. Y. 306, 16 L. R. A. (N. S.) 151, 84 N. E. 75; Credle v. Ayers, 126 N. C. 11, 48 L. R. A. 751, 35 S. E. 128; Murphy v. Bolger, 60 Vt. 723, 1 L. R. A. 309, 15 Atl. 365.

2 Kreling v. Kreling, 118 Cal. 421, 50 Pac. 549; Roberts v. Mullinder, 94 Ga. 493, 20 S. E. 350; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Bryan v. Moring, 94 N. C. 694; Durant v. Crowell, 97 N. C. 367, 2 S. E. 541; McNair v. Pope, 96 N. C. 502, 2 S. E. 54.

Where it is necessary in order to preserve the rents and profits of property which has escheated to the state, a receiver may be appointed in escheat proceedings instituted by the state. People v. Norton, 1 Paige Ch. (N. Y.) 16, 17.

In one case the court appointed a receiver of the license of a public house together with the rents and profits for the purpose of preserving the property as a licensed property. In this case the licenses were in jeopardy and a strong showing was made of the probability of the plaintiff ultimately recovering the possession. Charrington & Co. v. Camp (1902), 1 Ch. 386.

It seems, however, that where personal property or the rents and profits of real estate are in dispute, it is sufficient if a proper case for relief by a receivership be shown, whether fraud or spoliation be charged or not, and in such case a receiver will be appointed by the court for the security and more speedy collection of the property, for the benefit of such persons as shall finally appear entitled. State v. Northern Central R. R. Co., 18 Md. 193.

3 Hamburgh Mfg. Co. v. Edsall, 7 N. J. Eq. 298, 8 N. J. Eq. 141; De Walt v. Kinard, 19 S. C. 286.

litigation,[4] although as shown before the fact that a party offers to furnish security is not an absolute ground prohibiting the court from appointing a receiver.[5] The appointment or refusal to appointment lies within the discretion of the court but doubtless the appointment of a receiver in a case where the rights of the petitioning party could be amply safeguarded by offered security or protection of the disputed fund would be regarded as an abuse of discretion.

In all cases of this kind, however, the court follows the general rule which has been evolved in connection with interference with the possession of real estate on behalf of a claimant not in possession who merely presents a legal title which may be asserted in a court of law. In such a case unless the party presents some equitable grounds for the appointment, the court will not interfere by appointing a receiver. This is upon the theory that the court will regard the person in possession of real property as entitled to keep it until some one else shows a better title. Besides a distinction is observed in respect to the fact that real property is stationary while personal property may be removed.[6] In other words in all such cases, the plaintiff must show a strong character of title with a probability of ultimately recovering combined with equitable considerations indicating imminent danger to

4 A court in the exercise of its discretion may refuse to appoint a receiver over real estate where the party who is in possession of the property offers to pay the rents and profits into court to await the termination of the litigation. Prebble v. Boghurst, 1 Swans. 309.

5 Revisal 1905, § 453, requiring defendants in ejectment to give bond before defending, does not abridge the power of the court to appoint a receiver to secure the rents and profits. Arey v. Williams, 154 N. C. 610, 70 S. E. 931.

6 Carrow v. Ferrior, L. R. 3 Ch. App. 719; Talbot v. Hope Scott, 4 K. & J. 96; Pfeltz v. Pfeltz, 14 Md. 376.

The court will refuse a receiver for the rents and profits pending an appeal from a judgment to the effect that the defendant is in possession as a purchaser and not as a tenant of the plaintiff. Corbin v. Thompson, 141 Ind. 128, 40 N. E. 533.

the property or to its rents and profits unless the court intervene by the appointment of a receiver.[7]

§ 203. Receiver to Gather Crops.

A receiver will be appointed over crops where the parties are contesting the title of the land, each claiming to be in possession, and where each is interfering with the other in harvesting crops grown by him, and threatening forcible resistance.

In such circumstances the appointment of a receiver would save all parties their full rights and yet prevent waste.[1]

So also on granting an injunction to restrain a sale of land on which there is a crop of grain, it is proper to

7 Whyte v. Spransy, 19 App. (D. C.) 450; Mayo v. McPhaul, 71 Ga. 758; Cofer v. Echerson, 6 Iowa 502; Ryder v. Bateman, 93 Fed. 16; Bainbrigge v. Baddeley, 3 Mac. & G. 414.

A receiver will be appointed where the plaintiff shows an equitable title to part of the property in controversy and a legal and equitable title to the balance while defendant shows neither and there are numerous tenants of the property. Cole v. O'Neill, 3 Md. Ch. 174.

A receiver has been appointed to collect rents and profits where one court had decided in favor of plaintiff while another court had enjoined him from taking possession and the defendant who had been collecting the rents and profits was insolvent. Atlas Sav. etc. Assn. v. Kirklin, 110 Ga. 572, 35 S. E. 772.

Receiver may be appointed to protect the dower interest of a widow where the property is shown to be in the possession of a person who is insolvent and hence the rents and profits are endangered. Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277.

But in such a case, it must be clearly shown how the rents and profits are jeopardized. Knighton v. Young, 22 Md. 359.

And where it is shown that a widow is fraudulently disposing of her dower rights so as to deprive her creditors of its benefit, a receiver may be appointed to protect it and apply its proceeds to the payment of her debts. Tenbrook v. Jessup, 60 N. J. Eq. 234, 46 Atl. 516.

A receiver is not proper for the purpose of collecting and preserving future rents to abide the termination of an action which involves mere legal and not equitable rights. San Jose Safe Deposit Bank v. Bank of Madera, 121 Cal. 543, 54 Pac. 85.

1 Hlawacek v. Bohman, 51 Wis. 92, 8 N. W. 102.

consider it a part of the land and appoint a receiver to harvest and preserve it where the defendants are insolvent and the complaint shows a scheme to defraud plaintiff. If the tenant in possession is entitled to anything for his services in cultivating the land, his equities can be adjusted in the receivership.[2]

But a mere lease giving the landlord part of the crops raised on the leased land as compensation for its use does not give the landowner such equities as entitle him to a receiver to take possession of the ungathered crop.[3]

Where the parties are by the terms of the lease tenants in common of the crop and the tenant, who is insolvent, denies the right of the landlord to any portion of the crop and threatens to remove it and dispose of it, the court very properly appoints a receiver.[4] Where a receivership is created in an action of ejectment against a person who had ejected the tenant of the plaintiff from the premises, the tenant may intervene in the receivership, not for the purpose of contesting the receivership but to share in the fund brought into court by the receiver in harvesting the crop upon the land in controversy.[5] In the event that a crop is exempt from attachment except in case of a claim contracted in its production and in which event the process shall show that fact, an order appointing a receiver to take charge of the crop should show the fact that it was so produced, but the failure to do so will not be regarded as fatal to the appointment.[6] Where, in an ejectment action, the statutory bond furnished by the defendant is ample to secure the legal

A receiver may be appointed to take and state an account of timber cut from premises in dispute, even where the parties are solvent. John L. Roper Lumber Co. v. Wallace, 93 N. C. 22, 23.

[2] Corcoran v. Doll, 35 Cal. 476.

[3] Williams v. Green, 37 Ga. 37.

[4] Baughman v. Reed, 75 Cal. 319, 7 Am. St. Rep. 170, 17 Pac. 222.

[5] Ex parte Breedlove, 118 Ala. 172, 24 So. 363.

[6] Civ. Code 1902, vol. 1, § 2633, provides that the yearly products of a homestead shall be subject to attachment, to enforce claims contracted in the production of the

rights of the plaintiff in the event of his recovery, the court will refuse to appoint a receiver over the crop.[7]

same, but the court issuing process therefor shall certify that it is issued for that purpose. Held that, though an order appointing a receiver of defendant's crops at the suit of a labor claimant should have certified that it was issued to secure payment of an obligation contracted in the production of the crops, a failure to do so was not fatal to its validity. Holladay v. Hodge, 84 S. C. 109, 65 S. E. 1019.

7 A receiver to harvest and sell crops will not be appointed, pending the statutory new trial, in an ejectment action, as the undertaking to pay all costs and damages which shall be recovered in the action, required by Ind. Rev. Stat. 1894, § 1076, as a condition of a new trial, affords an adequate remedy at law if damages for conversion of the crops would be recoverable in the action, and, if not recoverable, the remedy would be improper. Stephens v. Kaga, 142 Ind. 523, 41 N. E. 930.

In the above case, the court in laying down the rules which govern in cases of this character, said: "The appointment of a receiver to gather and sell the crops if appellants succeed in the ejectment action will deprive them of their property rights in such crops and will substitute therefor a claim against the receivership for such balance of the proceeds of the sale as may remain after the payment of the expenses of harvesting and marketing, and the costs of receivership, including receiver's fees, attorney's fees, court costs, etc. Such rights should not be so embarrassed and its value diminished unless it may be made to appear clearly that if the appellee shall ultimately succeed in the principal action he will, should a receiver be denied, suffer the loss of a like property right in such crops with no proper, efficient and adequate remedy for the recovery of the value to him of such crops. On the one hand, it is claimed that, though appellants may be insolvent and may intend to convert the crops, the bond which they gave in the principal case takes the place of their solvency and makes good any claim which the appellee may be entitled to enforce against them for the conversion of such crops. On the other side, it is urged that the bond can not be held to cover liabilities arising subsequent to its execution and not involved in the issue at the time of its execution and that the appellee is not required to suffer the conversion but is entitled to the specific property rather than to a recovery of damages. In the absence of the bond, if appellants were insolvent, we think there could be no reasonable doubt but that a receiver should have been appointed, if the pleadings were so framed as to present the question of damages. R. S. 1894, § 1236; Bitting v. Ten Eyck, 85 Ind. 357; Galloway v. Campbell, 142 Ind. 324, 41 N. E. 597. It is asserted on behalf of the appellants and is conceded for the appellee, that equity will not permit the appointment of a receiver in any case where the party applying has a clear and effective legal

§ 204. Receiver of Homestead.

It is said to require a very strong case in order to authorize a court of equity to place a homestead in the hands of a receiver.[1] Doubtless where the homestead is exempt from execution process, it will be free from a receivership in a creditor's suit, but if the controversy is in respect to the property itself, it will undoubtedly be governed by the general rules applicable to receiverships.

§ 205. Receiver May Be Appointed at Instance of Defendant.

Where a plaintiff who, during the pendency of his suit to recover real property, takes possession of part of the property and resists the re-possession of it by the defendants under his claim of title to it, a receiver may be appointed on the application of the defendants to preserve the rents pending the termination of the litigation upon a proper showing of waste or irreparable loss.[1]

§ 206. Of Rents and Profits Outside of Jurisdiction of Court.

Courts, where they have jurisdiction of the parties, have appointed receivers to collect the rents and profits of real estate situate not only out of the jurisdiction of the court but in foreign countries.[1] Of course the court

remedy for such damages as he alleges he will sustain by the failure to appoint such receiver. Of this proposition there can be no doubt. It then remains to determine whether such remedy existed in favor of the appellee."

1 Barfield v. Barfield, 72 Ga. 668; Callanan v. Shaw, 19 Iowa 183; Nash v. Meggett, 89 Wis. 486, 61 N. W. 283.

1 Horton v. White, 84 N. C. 297. In an action to quiet title against executors, brought by a successor in interest of a purchaser who received possession under a sale of real estate and deed made by the executors pursuant to a power in the writ to sell and convey without an order of court, the executors can not, while their disputed title and right of possession are undetermined, maintain a cross complaint in equity against the plaintiff and the purchaser, for an accounting of the rents and profits and the appointment of a receiver. Bennallack v. Richards, 125 Cal. 427, 58 Pac. 65.

1 Houlditch v. Lord Donegal, 8 Bligh 344; Bunbury v. Bunbury, 1 Beav. 336; Barkley v. Lord Reay, 2 Hare 308; Smith v. Smith,

has no power to enforce its orders or decrees outside of its own jurisdiction, but where it has jurisdiction of the persons it may often obtain a compliance with such orders through its power to punish disobedience by contempt proceedings.[2] The court, however, will not appoint a person as receiver in such cases who is not within its jurisdiction or subject to it,[3] nor when to make the appointment would be a useless proceeding.[4]

§ 207. Receivership Over Annuities.

A receiver will be appointed where necessary to preserve the rights of an annuitant, or other parties to the litigation.[1] The effect of the appointment in such circum-

10 Hare App. 71; Duder v. Amsterdamsch Trustees Kantoor (1902), 2 Ch. 132.

A receiver has been appointed to collect an annuity in another state. Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666.

2 Langford v. Langford, 5 L. J. Ch. (N. S.) 60.

Courts frequently pass upon litigation affecting property outside of the territorial jurisdiction of the court where they have jurisdiction of the parties. Their orders and decrees are enforceable by means of contempt proceedings. In this connection see: Allen v. Allen, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213; Vail v. Jones, 31 Ind. 467; Fuller v. Horner, 69 Kan. 467, 77 Pac. 88; Noble v. Grandin, 125 Mich. 383, 84 N. W. 465; Fall v. Fall, 75 Neb. 104, 121 Am. St. Rep. 767, 106 N. W. 412, 113 N. W. 175; Gartrell v. Stafford, 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732; Rochester etc. Land Co. v. Roe, 8 App. Div. 360, 40 N. Y. Supp. 799; Chase v. Knickerbocker Phosphate Co., 32 App. Div. 400, 53 N. Y. Supp. 220; Mead v. Brockner, 82 App. Div. 480, 81 N. Y. Supp. 594; Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. Supp. 995; Buel v. Baltimore etc. R. Co., 24 Misc. Rep. 646, 53 N. Y. Supp. 749; Kirdahi v. Basha, 36 Misc. Rep. 715, 74 N. Y. Supp. 383; Reading v. Haggin, 58 Hun 450, 12 N. Y. Supp. 368; House v. Lockwood, 40 Hun 532; Sloan v. Baird, 162 N. Y. 327, 56 N. E. 752; Johnston v. Wadsworth, 24 Ore. 494, 34 Pac. 13; Chapman v. Pittsburg etc. R. Co., 26 W. Va. 299; note to 58 Am. St. Rep. 541. But see Carpenter v. Strange, 141 U. S. 87, 35 L. Ed. 640, 11 Sup. Ct. 960.

3 Carron Iron Co. v. Maclaren, 5 H. L. C. 416; Houlditch v. Lord Donegal, 8 Bligh 344.

4 Mercantile Inv. Co. v. River Plate Trust (1892), 2 Ch. 303.

1 Probasco v. Probasco, 30 N. J. Eq. 108.

A receiver may collect an annuity in another state. Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666.

Where annuities are chargeable

stances is to sequester the rents and profits of the property in controversy.[2] But there should be an absence of any other legal remedy in order to warrant an appointment of a receiver in such cases.[3]

Thus where a power of distress was given by the statute to enforce an annuity which was a charge on land, the appointment of a receiver was refused.[4]

But where such power of distress or other similar legal remedy does not exist, the court may appoint a receiver.[5]

Where, however, the instrument creating the annuity also makes provision for the appointment of a receiver to collect it, the appointment of the receiver becomes a matter of course.[6]

§ 208. Effect of Statutory Provisions Upon Appointment in Ejectment and the Like.

Undoubtedly where the statutory provisions are explicit allowing receivers to be appointed in ejectment or other actions relating to the recovery of real property, such statutory provisions are ample authority for the appointment of receivers in circumstances in which receivers had not been customarily appointed. Several innovations in that line have been observed in statutory provisions, but such cases are generally so specific that no question

against real estate against which there are several equitable mortgages, a receiver of the rents and profits will be appointed on the application of the mortgages where none of the mortgages are in possession. Dalmer v. Dashwood, 2 Cox 378.

An annuitant is entitled to have a receiver appointed over the benefice upon an interlocutory application, made for that purpose, previous to the hearing of the cause. Pattersby v. Homan, 2 Ir. Ch. Rep. 232.

2 Hayden v. Shearman, 2 Ir. Ch. Rep. 137.

3 Taylor v. Emerson, 4 Dv. & War. 117; Sankey v. O'Maley, 2 Mol. 491; Beamish v. Austen, Ir. R. 9 Eq. 361; Kelly v. Butler, 1 Ir. Eq. 435.

4 Sollory v. Leaver, L. R. 9 Eq. 22.

5 Pease v. Fletcher, 1 Ch. D. 273; Mason v. Westoby, 32 Ch. D. 206; Re Prytherch, 42 Ch. D. 590.

6 Cradock v. Scottish Provident Institution, W. N. 1893, 146.

arises as to the power of the court to make the appointment although, as is the case with all legislative action, language is sometimes employed which needs a decision of a court to give a judicial meaning to it.[1]

Some confusion has been found in several instances on account of the statutory provisions reciting a number of specific instances in which receivers may be appointed and ending with a clause permitting the appointment of receivers. The effect of such statutes was considered in the forepart of our subject.[2] They are generally provisions substantially giving power to appoint receivers to courts of law or providing for the appointment of receivers in special proceedings. Such statutes in order to make it clear that they are not attempting to take away any of the powers of a court of equity to appoint a receiver, a power which is necessarily inherent in a court of equity, end with a clause which permits the appointment of a receiver "in all other cases where receivers have heretofore been appointed by the usages of courts of equity"[3] or a clause of the same substantial import.

1 In Oehme v. Rucklehaus, 50 N. J. L. 84, 11 Atl. 145, a statute provided that in an action in which the right to real estate was in controversy, the court or any judge thereof may make an order for the protection of the property in controversy from waste, destruction, or removal beyond the jurisdiction of the court upon satisfactory proof being made of the necessity for such order. The court, in construing its meaning, said: "No authority has been cited, and none is known to the court which holds that the appropriation of the rents of real estate is within the meaning of the words 'waste or destruction of real estate.' The law courts exercised the right to prohibit waste in ejectment suits before the passage of this statute, but the right of a law court to take charge of the real estate in controversy, through the intervention of a receiver, has never been recognized in our practice. It would of necessity imply the right to exercise equitable powers, which do not inhere in the common law courts, and which, in my judgment, the legislation referred to has not bestowed."

2 See § 21, supra.

3 Bateman v. Superior Court, 54 Cal. 285.

The question has arisen under statutes of that character whether the appointment of a receiver in an action of ejectment is authorized under the clause allowing appointments in accordance with the usages of courts of equity, "in the absence of specific authority in the statute," and it is held that the appointment of a receiver in an action of ejectment before judgment is not permissible in the absence of those exceptions to the rule which have been discussed in this subdivision.[3] The rule in this

[3] The statute construed in Smith v. White, 62 Neb. 56, 86 N. W. 930, is perhaps typical of the provisions of statutes in a large number of states. It was § 266 of the Code of Civil Procedure which provided as follows: "A receiver may be appointed by the Supreme Court, or the District Court, or by the judge of either, in the following cases: First, in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of any party to the suit, when the property or fund is in danger of being lost, removed or materially injured. Second, in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt. Third, after judgment, or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal. Fourth, in all other cases provided for by special statutes. Fifth, in all other cases where receivers have heretofore been appointed by the usages of courts of equity."

The suit was in the form usual in actions of ejectment, setting up ownership of the property in controversy. Plaintiff claimed his title under a sheriff's deed resulting from a mortgage foreclosure, to which defendant was not a party, defendant being in possession under a prior unrecorded deed from the mortgagor. Plaintiff sought a receiver of the rents and profits, which the court refused. The court held that the appointment of a receiver if sustainable was so under the 5th subdivision mentioned above. In so holding the court said: "It seems clear that this subdivision was not intended to confer any additional authority upon the court, but to make it plain that the preceding subdivisions, providing for the appointment of receivers in particular cases, were not exclusive, and did not attempt to, and, indeed, could not, take from the court the equitable jurisdiction given by the constitution to appoint receivers where the usages of courts of equity had heretofore authorized their appointment. Or, differently

respect is clear that all that is meant by a clause of this character is a mere declaration that in addition to the circumstances specified in the statute, the powers of a court of equity in respect to appointing receivers as determined by usage are not impaired by the statute and that in fact such powers could not be impaired if the efficacy of courts of equity are not to be interfered with and their constitutional functions as chancery courts not abrogated.[4]

stated, the fifth subdivision is declaratory of a power already existing under the constitution. (Bateman v. Superior Court, 54 Cal. 285.) It therefore follows that unless the case at bar is one where 'receivers have heretofore been appointed by the usages of courts of equity' the order complained of is erroneous and should be reversed." After reviewing cases in which receivers had been appointed, the court continued: "While reported cases may be found in which courts of equity, in actions in the nature of ejectment, have appointed receivers in aid of actions at law, an examination discloses that such appointment is based upon some statute expressly authorizing it, or that some very exceptional conditions, such as fraud, etc., are shown to exist. It may therefore be safely stated as the rule sustained by the weight of authority that the usages of courts of equity do not authorize the appointment of a receiver in ejectment cases before judgment. So carefully does the law in this state guard the rights of a defendant in possession, that he is entitled to have a jury twice say that his possession is wrongful before he can be ousted. It may therefore be safely stated as the rule in this state that the court will not appoint a receiver in an action of ejectment before judgment. Not only is the foregoing rule based upon right reason, but it is supported by authority. (State v. District Court of Second Judicial District, 13 Mont. 416, 34 Pac. 609; Sengfelder v. Hill, 16 Wash. 355, 58 Am. St. Rep. 36, 47 Pac. 757; Bennallack v. Richards, 125 Cal. 427, 58 Pac. 65; Emerson's Appeal, 95 Pa. St. 258.) Whether there may be authority to appoint a receiver in an action of ejectment after judgment is a question not presented in this case, and will not be considered."

[4] The Supreme Court of California in passing upon a statute similar to the one construed by the Nebraska court, supra, also held that a receiver could not be appointed in an action of ejectment. Bateman v. Superior Court, 54 Cal. 285.

In the above case the court in construing the meaning of the subdivision which allowed receivers to be appointed "in all other cases where receivers have heretofore been appointed by the usages of courts of equity," said: "We think the sixth subdivision of the Code

§ 209. Questions Relating to the Procedure.

Where the complaint setting up the facts which are urged as a basis for the appointment of a receiver are met by an answer or affidavits denying the same or denying the plaintiff's ownership of the property, the court will not ordinarily appoint a receiver.[1] And likewise

of Civil Procedure was but declaratory of the equity jurisdiction conferred upon the District Courts by the former constitution, and was intended to include all cases not previously enumerated, in which a court of equity would have appointed a receiver. If the sixth subdivision had been omitted from the section, the District Courts would have had power to appoint receivers in 'cases where receivers had heretofore been appointed by the usages of courts of equity'; because by art. 6, § 69 the late constitution, the District Court had jurisdiction in 'all cases in equity.' This power was recognized in La Societe Francaise, etc. v. District Court, 53 Cal. 495. Throughout the opinion in that case it is assumed that the sixth subdivision of § 564 of the code was intended to include only the suits in which (upon the pleadings, or upon appropriate showing by affidavit or other proofs) it has been the usage of courts of equity to appoint a receiver. If it had been intended to confer the power to appoint an officer of that character in an action at law for the recovery of the possession of real property, it is not credible that the Legislature would not have said so in terms, since it is apparent that it was their purpose to specify all cases, whether at law or equity, in which receivers could be appointed. The five subdivisions containing such specifications are followed by the sixth which provides for the appointment where 'receivers have heretofore been appointed by the usages of courts of equity,' which expression we conceive to be the equivalent of that employed in the third subdivision of the 143rd section of the former Practice Act—'such cases as are in accordance with the practice of courts of equity jurisdiction.' Either of these expressions simply means, that in addition to the particular instances mentioned in the preceding subdivisions, the appointment should be made by the District Court, as a Court of Equity, in the other suits in which the power would have been employed had there been no statute on the subject, and can not be construed as authorizing the appointment in an action at law."

1 A preliminary injunction or receivership will not be granted upon the ground that the complainant is the owner of the property and business sought to be reached in the action, the legal title of which is in defendant, where the facts set up in the answer and affidavits amount to a denial of such ownership, and the case is not within any of the exceptions to the general rule denying such relief under such circum-

where the party seeking the appointment of a receiver has no interest in the property, the court will refuse to make the appointment.[2]

A receiver of the rents and profits will not be appointed so as to affect the interest of purchasers if they are not made parties.[3] Nor will a receiver be appointed in such circumstances unless the person in possession is a party to the action and before the court.[4]

A person who is not a party to the suit, although claiming certain real property which is under a receivership, is not entitled to be heard on an order to show cause why a conditional order for the appointment of the receiver should not be made permanent. His remedy is to remove the receiver as to the lands which he claims to own.[5]

It has been held that the court may, instead of appointing a receiver, direct that the tenant in possession pay an occupation rent.[6]

An order appointing a receiver over real property should clearly designate the particular property over which he is appointed so as to avoid any uncertainty as to the extent of the authority of the receiver over the rents and profits.[7]

stances. Guild v. Meyer, 56 N. J. Eq. 183, 38 Atl. 959.

Where charges of mismanagement and appropriation of profits not constituting an exclusion of plaintiff shown by affidavits are met by counter-affidavits denying the charges and setting up a claim of a balance due defendant from the plaintiff and an agreement for arbitration, it was held that a receiver would not be appointed. Milbank v. Revett, 2 Meriv. 405.

2 Gartrell v. McCrary, 144 Ga. 249, 86 S. E. 932.

3 Lumsden v. Fraser, 1 Myl. & Cr. 589.

4 A receiver of the rents and profits of real property will not be appointed unless the person in possession is a party to the action and before the court. Mays v. Wherry, 3 Tenn. Ch. 34.

5 Creed v. Moore, 4 Ir. Eq. 684.

6 Porter v. Lopes, 7 Ch. D. 359.

7 Crow v. Wood, 13 Beav. 271.

A receiver appointed to take charge of property, particularly real estate, should ordinarily be directed to hold, care for, and

An equitable interest in real property may be effectually conveyed to a receiver by the holder of the same even though the title stands in the name of another.[8]

Where the order appointing the receiver and authorizing him to take possession of certain real estate is void, he will become liable to the owner for the rents and profits collected by him from the property.[9]

§ 210. Appointment of Receiver Pending Appeal.

Where the plaintiff in litigation over the title to real estate has been defeated and has taken an appeal from the decree in the main case, a receiver will not be appointed for the rents and profits at his instance pending the appeal on the ground that he was defeated because of the erroneous admission of oral testimony over a written contract since to do so would in effect nullify the solemn decree of the trial court adjudging the title to be in defendant.[1]

§ 211. Effect of Termination of Receivership Upon Real Property Covered by It.

Where the real property over which a receiver has been appointed has not been disposed of during the receivership or assigned to the receiver upon a termination of the receivership the property becomes subject to

preserve it until the issues in the action are finally determined. Boothe v. Summit Coal Mining Co., 63 Wash. 630, 116 Pac. 269.

Where the litigation concerns some specific property it is proper in appointing the receiver to specifically describe the property in the order of appointment. Havemeyer v. Supreme Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

8 Where a judgment debtor had an equitable interest in certain real estate, the title to which was in the name of another, who was, in fact, a mortgagee, a conveyance of the property by the debtor and his wife to the receiver was effective to convey such equitable interest. Maples v. O'Brien, 116 N. Y. Supp. 175.

9 Bowman v. Hazen, 69 Kan. 682, 77 Pac. 589.

1 Corbin v. Thompson, 141 Ind. 128, 40 N. E. 533.

In this connection see discussion of receiverships pending appeals in separate subdivision.

the lien of a judgment and execution against it in the same manner as if there had been no receivership.[1]

§ 212. Whether the Appointment of Receiver Prevents Running of Statute of Limitations.

Inasmuch as the application for the appointment of a receiver does not prejudice the action[1] nor indicate what view of the litigation will be taken by the court at the trial[2] it is apparent that such an appointment does not affect the title of either litigant to the property. The primary object of the appointment, as has been shown before, is the preservation of the property or of the rents and profits, from destruction or waste pending the litigation. The appointment of the receiver, of course, results to the benefit of the party ultimately prevailing in the litigation, but until such determination the property is in the custody of the court although the title thereto is not changed. Hence it is held that the appointment of a receiver does not operate to interrupt the running of the statute of limitations as far as it concerns the subject matter of the litigation[3] and as applied to real estate the same rule is held to be applicable and thus the operation of the statute of limitations is not interrupted pending the receivership litigation.[4]

§ 213. On Breach of Covenants.

A receiver may be appointed in litigation between a covenantor and covenantee where the allegations show

1 Montgomery v. Merrill, 18 Mich. 338.

1 Hugnenin v. Basley, 13 Ves. 107.

2 Fripp v. Chard Ry. Co., 11 Hare 264.

3 The mere appointment of a receiver does not affect running of limitations. Cain v. Seaboard Air Line Ry., 138 Ga. 96, 74 S. E. 764.

Payments by a receiver of a debtor are not effective to toll the statute of limitations. Shelby Nat. Bank v. Hamrick, 162 N. C. 216, 78 S. E. 12.

The appointment of a receiver or the existence of a receivership does not interrupt prescription of claims against the corporation to which the receiver was appointed. Taylor v. Vossburg Mineral Springs Co., 128 La. 364, 54 So. 907.

4 Anonymous, 2 Atk. 15.

the necessity of a receivership for the preservation of the property pending the litigation. Such cases occur where one party sues the other, who is in possession, to compel specific performance of the covenant.[1] And likewise where irreparable damages will result from the breach of the covenant, the court may interfere by appointing a receiver of the property.[2]

3. Receiverships in Actions Between Vendors and Purchasers.

§ 214. In Suits to Set Aside Conveyances on Ground of Fraud.

The courts always look with favor toward the appointment of a receiver in a case where fraud is alleged or shown. Hence in a suit to set aside a conveyance of real property on the ground that it was obtained by fraud or undue influence practiced upon the plaintiff where a showing is made by the bill and answer raising a strong likelihood of plaintiff prevailing in the action the court will appoint a receiver.[1] On the other hand where it appears

1 Free v. Hind, 2 Sim. 7. Metcalf v. Archbishop of York, 6 Sim. 225; Shakel v. Duke of Marlborough, 4 Madd. 463. See also subdivision respecting leases.

2 Riches v. Owen, L. R. 3 Ch. 821.

1 Mitchell v. Barnes, 22 Hun (N. Y.) 194; Huguenin v. Baseley, 13 Ves. 105; Lloyd v. Parsingham, 16 Ves. 59; Stilwell v. Williams, 6 Madd. 49 (affirmed under the name of Stilwell v. Wilkins, Jac. 282); Mordaunt v. Hooper, Amb. 311; Woodyatt v. Gresley, 8 Sim. 187.

A receiver may be appointed to take charge of the property of a non-resident pending a suit by a foreign corporation to rescind a contract and restore the property, which has been placed in escrow. Loaiza v. Superior Court, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, 24 Pac. 707.

A receiver is properly appointed to take charge of property transferred by a failing debtor in fraud of creditors. Bomar v. Means, 53 S. C. 232, 31 S. E. 234.

Property in the hands of a receiver appointed in an action by judgment creditors in aid of their executions to set aside certain transfers by the debtor as fraudulent, at the time of his discharge, pursuant to a decree adjudging that the only relief plaintiffs could obtain was the removal of the transfers as an obstruction to the enforcement of their executions, and that the appointment of a receiver was improper, should be re-

that the property is being properly cared for by the defendant, who is solvent and capable of responding for all of the rents and profits received during the pendency of the litigation, the court may properly refuse to appoint a receiver.[2] Where, however, the showing made by the

turned to the transferees, and not turned over to the sheriff holding the executions. Home Bank v. J. B. Brewster & Co., 33 App. Div. 330, 53 N. Y. Supp. 867.

The appointment of a receiver of the property of a debtor will not be set aside where the debtor does not deny the allegations in the bill charging that specified deeds of trust were made with the intent to hinder, delay, and defraud creditors and secure a fictitious debt, and the trustee does not deny that he knew of such fraudulent intent. Lyle v. Commercial Nat. Bank, 93 Va. 487, 25 S. E. 547.

A receiver may be appointed in an action by a judgment creditor to set aside a fraudulent conveyance of his land, even though the judgment debtor had only an equity of redemption in the land, where the fraudulent grantee is in possession of the land and receiving the rents thereof. Freeman v. Stewart, 119 Ala. 158, 24 So. 31.

And where the grantor was a person of weak intellect and the grantee was insolvent, the court appointed a receiver in a suit to set aside a conveyance alleged to have been procured by fraud and undue influence. Mitchell v. Barnes, 22 Hun (N. Y.) 194.

An injunction may properly be granted and receivers appointed in an action involving the fraudulent character of a deed by the executor and sole heir of a decedent, to a sister of the latter in settlement of an alleged debt due to such sister, where there is evidence warranting a judge in finding that no such indebtedness ever really existed. Brown v. Stanley, 105 Ga. 469, 30 S. E. 656.

Where the vendor seeks a rescission and the purchaser's acts are liable to cause a loss to the plaintiff, a receiver is properly appointed. Cook v. Andrews (1897), 1 Ch. 266.

2 A receiver pendente lite will not be appointed in an action to set aside conveyances of real property as fraudulent, where it appears that the buildings and improvements on the property are properly kept and cared for by the defendant, and that he is solvent and capable of responding for all rents or profits received during the pendency of the action, especially if he offers to enter into a bond to the plaintiffs in such sum, with such conditions, and with such sureties as the court may designate, to account for such rents and profits. Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088.

A mere showing, in a suit to avoid a conveyance for want of mental capacity of deceased grantor, of a probability of plaintiffs succeeding, and likelihood of injury to the property, or loss of rents and profits, if left in defendant's possession, is not sufficient

complainant in his suit to set aside the conveyance amounts to a mere suspicion of fraud, the court will refuse to appoint a receiver.[3] Where the character of the property is of such a nature that it is necessary to keep it in operation, such as a mine, where the showing in a suit to rescind the purchase upon the ground of fraudulent representations is of the character mentioned above, the court will appoint a receiver pending the litigation.[4]

§ 215. As Between Vendor and Purchaser in General.

Sometimes the court is asked to appoint a receiver in behalf of the owner of real estate where he has executed a contract of sale to a purchaser, and delivered possession under the contract, and there is a default in the payments. The action in such case is based upon the plaintiff's right to rescind the contract by reason of nonpayment, or to have the property sold in payment of the remaining unpaid purchase money, coupled with proof showing insolvency of the purchaser or waste or other inadequacy of security.[1]

to warrant the appointment of a receiver pendente lite. Thomas v. Timonds, 179 Iowa 509, 159 N. W. 881.

3 George v. Evans, 4 Y. & C. Ex. 211.

4 Gibbs v. David, L. R. 20 Eq. 373.

1 Gunby v. Thompson, 56 Ga. 316; Worrill v. Coker, 56 Ga. 666; Tufts v. Little, 56 Ga. 139; Chappell v. Boyd, 56 Ga. 578; Jordan v. Beal, 51 Ga. 602; Collier v. Sapp, 49 Ga. 93; Phillips v. Eiland, 52 Miss. 721.

A receiver of rents and profits may be appointed in an action to foreclose a contract for the sale of land where the land affords inadequate security for the amount due, and is rapidly depreciating in value. Smith v. Kelley, 31 Hun (N. Y.) 387.

A vendor who has sold land upon a credit to one who has given notes signed, as trustee, for the payment of the purchase money in two equal annual instalments, is not entitled to have a receiver, upon failure to pay one of the instalments when due, where it does not appear that the purchaser or his cestui que trust is less solvent than at the time of the purchase. Tumlin v. Vanhorn, 77 Ga. 315, 3 S. E. 264.

In a suit to recover the purchase price of land, a receiver is properly appointed where the purchaser is in possession committing waste and threatening to continue doing

But relief will not be granted if it appears that the insolvency of the purchaser was known to the vendor when the contract was made,[2] or where the plaintiff's right of recovery is fully denied, or the amount of this indebtedness is in dispute.[3]

so, such as threatening to cut down and remove timber. McCaslin v. State, 44 Ind. 151.

A receiver will be appointed in behalf of a vendor, as against a vendee who has obtained possession, and refuses to pay the purchase money. Payne v Atterbury, (Mich.) Har. 414.

And also where real estate has been sold and the purchaser is permitting the property to go to waste and thus lessening the vendor's security. This, of course, is based upon vendor's right to a lien for the unpaid purchase money. Gibbs v. David, L. R. 20 Eq. 373; Smith v. Kelley, 31 Hun (N. Y.) 387; Phillips v. Eiland, 52 Miss. 721.

Where, on application for a receiver of property sold under a vendor's execution for purchase money, it appeared that the claim of the vendee's wife was filed after the second entry of levy made on the fi. fa., the fi. fa. is properly admitted in evidence over objection that there were two entries of levy thereon and no showing of the disposition of the first entry. Young v. Germania Sav. Bank, 133 Ga. 699, 66 S. E. 925.

But a receiver should not be appointed by vendors to recover the purchase money where there is no evidence of waste. Collins v. Richart, 14 Bush (Ky.) 621.

2 Jordan v. Beal, 51 Ga. 602.

A bill by a vendor, charging the insolvency of the purchaser, and the deterioration in value of the land, but not showing that the purchaser was less able to pay when the debt matured than when it was incurred, or that the deterioration is due to the purchaser's waste or mismanagement, makes no case for the appointment of a receiver, of the rents and profits of the purchased premises, or for an injunction against transferring obligations taken for the rent. Tumlin v. Vanhorn, 77 Ga. 315, 3 S. E. 264.

3 Where no insolvency is shown and the amount of the indebtedness is in dispute, the court will not appoint a receiver. Hughes v. Hatchett, 55 Ala. 631.

Where one is personally in possession of premises under a contract for the sale thereof, the court will not, in an action to recover the possession of said premises, appoint a receiver pendente lite. La Bau v. Huetwohl, 60 Hun 407, 15 N. Y. Supp. 491.

It has been held, however, that a receiver pendente lite will not be appointed in an action to recover possession of real estate from one in possession under a contract of sale. Guernsey v. Powers, 9 Hun (N. Y.) 78.

See Boehm v. Wood, 2 Jac. & W. 236. In that case it was uncertain to which of two parties an estate belonged because, although the plaintiff who was vendor, had sold it to the defendant who, however, objected to the title. If his objec-

So also where a purchaser of a leasehold was let into possession before paying all of the purchase money and while he was in default in his payments, the vendor was obliged to pay the rent and taxes to avoid a forfeiture, a receiver may be appointed upon application of the vendor.[4]

§ 216. Effect Where Insolvency of Purchaser Alleged.

The insolvency of a defendant in a legal proceeding frequently gives rise to an equitable remedy on behalf of the plaintiff which often is analogous to that of an equitable sequestration. But something more than the fact of mere insolvency is required although the fact of insolvency, coupled with other facts tending to show a fraudulent disposition on the part of the defendant, or a course of conduct which will result in a waste or depreciation of the subject matter of the litigation, will be frequently sufficient ground for the appointment of a receiver. These same principles obtain in respect to the appointment of a receiver in litigation between vendors and purchasers.[1] In

tions were well founded, the estate belonged to the vendor, otherwise to the purchaser. In these circumstances the court appointed a receiver of the property. The case of Gibbs v. David, L. R. 20 Eq. 373, was also to the same effect.

4 Cook v. Andrews (1897), 1 Ch. 266.

It is good ground for the appointment of a receiver of land where the decree below declares the applicant to have a lien on the land for the payment of the purchase money, that there are taxes due and unpaid which are about to be enforced by a sale of the land, unless the party in possession will pay the taxes in a reasonable time. Darusmont v. Patton, 72 Tenn. (4 Lea) 597.

1 The owner of land who has contracted to sell it can not maintain a bill to cancel the contract and recover the land and to have a receiver appointed to take charge of the property, merely on the ground that the purchaser is insolvent, where it does not appear that he became insolvent after making the contract of purchase. Jordan v. Beal, 51 Ga. 602.

The appointment of a receiver was refused where the plaintiff had sold land, giving only a bond for title, and had subsequently transferred the purchaser's notes given for the purchase price, and had been sued on his indorsements of them, even though the purchaser had become insolvent. Williams v. Stewart, 56 Ga. 663.

other words a receiver will not be appointed in cases of this character merely on the ground that one of the parties is insolvent without a showing that there is danger of loss in respect to the subject matter.[2]

So also a receiver will not be appointed at the suit of trustees on the ground that one to whom they sold land failed to pay a large part of the purchase money and is insolvent but remains in possession of the property receiving its profits where an order of resale of the premises directed by the court remains unexecuted by them and the defendant has not been heard in reference to the application.[3]

The fact that a receiver has been appointed over the property of the purchaser will not affect the right of the vendor to enforce his contract by means of declaring a forfeiture and the fact that the legislature has given an additional remedy to the vendor will not deprive him of his equitable remedy upon failure of the purchaser to make his payments.[4]

2 A receiver may be appointed to enforce a vendor's lien where there is danger of loss through the purchaser's insolvency or otherwise. Hughes v. Hatchett, 55 Ala. 631.

A receiver and injunction may properly be granted in behalf of a vendor, where the purchaser has been put into possession without paying anything toward the purchase money, is allowing the premises to deteriorate, and has gone into bankruptcy. Tufts v. Little, 56 Ga. 139; Gunby v. Thompson, 56 Ga. 316.

Vendor may have receiver appointed where he still has the legal title and has given a bond for title and the vendee is insolvent and committing waste and he is seeking to sell the property and apply the proceeds to the purchase price. McCaslin v. State, 44 Ind. 151.

3 Anderson v. Cecil, 86 Md. 490, 38 Atl. 1074.

4 Tower v. Detroit Trust Co., 190 Mich. 670, 157 N. W. 367. In the above case the court had appointed a receiver over the corporation defendant which has agreed to purchase certain property but made default in its payments. The receivership was not created in a suit respecting the contracts, but the vendor filed a petition in the receivership praying, among other things, that the contracts be declared forfeited. The Chancellor refused to so declare. The appellate court said:

"It is argued in defense of the

action of the trial court in refusing relief, that petitioner failed to comply with the provisions of Act 200 of the Laws of 1911, providing a method of forfeiting land contracts. It is conceded by petitioner that he did not comply with the terms of that act in forfeiting the contract, because he brought himself within its proviso. The act provides a mode for forfeiting land contracts without the aid of court proceedings, and contains the following proviso:

" 'Provided further, that this act shall not be held to debar the vendor or his proper representatives or assigns from enforcing the forfeiture of said contract through proper procedure in a court of chancery, nor to debar proceedings to recover possession of said premises in any manner now authorized by law or through summary proceedings, provided said contract by its terms so allows.'

"A fair construction of this act seems to be that the legislature undertook to and did provide an additional method, whereby land contracts could be forfeited without the aid and expense of a court proceeding. There is nothing in the act which supports the view that the act is mandatory or exclusive with respect to the added remedy, but there is express language in the proviso which leads to the conclusion that it was intended to be elective with the vendor. In other words, the act in effect says to the holder of a defaulted land contract, if you desire to forfeit your contract, here is an additional method of doing so, by which you can accomplish it without the aid of court proceedings. Or, if you choose, you may pursue one of the existing remedies. Petitioner chose one of the existing remedies, and we think he was well within his rights in so doing, inasmuch as the contract in question makes provision for declaring a forfeiture of the contract by giving notice thereof.

"* * * *

"But counsel for the receiver argue, in substance, that to maintain the status quo will not prejudice the rights of the petitioner, but will materially assist the receiver in disposing of the assets of the vendee on a sale thereof. The petitioner executed these contracts with the Chippewa Construction Company, and the record shows that he has not only complied with all the terms of the contract which were incumbent upon him to perform, but that he has borne with the defaults of the vendee longer than he contracted to. When the time finally arrived for payment in full, no payment was tendered. There is no showing that the receiver is in any position financially to tender it, or, if it can, that it will. The inferences are very strong that the vendee is insolvent. Unless we are entirely to overlook the petitioner's rights under the contract for the purpose of augmenting the value of the assets of the vendee upon a sale thereof, some relief must be granted him.

"It is urged that equity abhors forfeitures, and that equity will not enforce a forfeiture, and petitioner is charged with being unwilling to do equity, although he is asking it. This court not infrequently goes beyond the strict terms of the contract to enforce equities between parties, and an

§ 217. Vexatious Legal Proceedings for Purposes of Delay.

In one case[1] a receiver was appointed on behalf of the vendor because of vexatious legal defenses and proceedings made without merit for the purposes of delaying the fruits of the judgment. The plaintiff had alleged that he sold the land, receiving one-half of the purchase price, and sought and recovered judgment for the balance. Upon levying execution, the purchaser's wife claimed the land on the ground that she had paid the amount received by plaintiff, which was all that the land was worth; that after much delay the claim was decided against the wife, and on again attempting sale, plaintiff was met by another frivolous claim by the wife's brother pretending to hold title under deeds from the husband and wife; that these parties colluded to delay the plaintiff with a view to keeping the rents and profits, and that the purchaser boasted that he would retain possession without paying.

§ 218. Upon Disagreement Between Vendors Upon Partitions Between Them.

Where lands, which are in part subject to executory contracts of sale of separate parcels, are partitioned, each parcel of the common estate covered by a contract of sale may be treated as a distinct estate and partitioned in severalty, subject to the conditions of the contract, and, if the interested parties can not agree in respect to whom

illustration of that is the recent case of Northern Michigan Building & Loan Association v. Fors, 155 N. W. 736. If the receiver, in answer to the petition, were tendering payment to make good the default at this time, or if it were able to express some hope and ability to make payment in the near future, this court might see fit to still grant the defendant the privilege of making payment upon the contract, but such is not the case. Defendant is simply asking that the contract be not forfeited, because its equity therein will assist in making a sale of its other assets. The statement of counsel that a court of equity will not enforce a forfeiture under any conditions is sufficiently answered by the recent case of Donnelly v. Lyons, 173 Mich. 515, 139 N. W. 246."

1 Chappell v. Boyd, 56 Ga. 578.

payments shall be made, the court, in aid of the final judgment of partition, may appoint a receiver under a code provision which permits the appointment of a receiver in an action between parties jointly interested in any property or fund.[1]

§ 219. Upon Enforcement of Vendor's Lien.

Where the vendor is seeking to enforce his vendor's lien and there is danger of loss from the purchaser's insolvency or otherwise, a receiver may be appointed.[1] In all cases of this character affecting real property, it is, however, essential that there should be an absence of an

1 In the event that the interested parties can not agree as to whom payments made from time to time under the contracts of sale shall be made, the court may, in aid of the final judgment in partition, appoint a receiver for that purpose under the provisions of section 564 of the Code of Civil Procedure. Rich v. Smith, 26 Cal. App. 775, 148 Pac. 545.

1 Hughes v. Hatchett, 55 Ala. 631.

Civ. Code Prac., § 298, provides that, on motion of any party to an action showing that he has a lien on any property, the right to which is involved in the action, and that the property is in danger of being lost, removed, or materially injured, the court may appoint a receiver to take charge of the property. Section 299 provides for the appointment of a receiver of mortgaged property at the instance of the mortgagee for the same reasons, and further provides for a receiver if the property is probably insufficient to discharge the mortgage debt. Under these provisions it was held that a receiver will not be appointed at the instance of the vendor, who has a lien for the purchase price, where the property is in no danger of being materially injured, though it may not be sufficient to satisfy the debt. Murray v. Murray, 124 Ky. 426, 30 Ky. Law Rep. 286, 99 S. W. 301.

The appointment of a receiver in an action to enforce a vendor's lien has been refused upon the ground that the vendor has no right to anything other than a sale of the property to satisfy the unpaid portion of the purchase price and the purchaser is entitled to the possession until such sale takes place. Morford v. Hamner, 3 Baxt. (Tenn.) 391.

On the other hand it has also been held that after a decree allowing a vendor to sell land to satisfy the unpaid portion of the purchase price, where the purchaser appeals and pending the appeal fails to pay the taxes, a receiver will be appointed. This is for the purpose of making the judgment effective. Darusmont v. Patton, 4 Lea (Tenn.) 597.

adequate remedy outside of the appointment of a receiver, and the averments in respect to the matter should not be vague and uncertain.[2] It has been held, however, that where the vendor has placed the purchaser in possession, reserving a lien for the purchase money, the court will not, in a suit to enforce the lien, appoint a receiver since the lien attaches to the land and not to the rents and profits, even though the purchaser is insolvent and the land is merely adequate to meet the indebtedness. A receiver might, however, be appointed upon a showing of waste.[3]

§ 220. Receiver Takes Property Subject to Existing Vendor's Liens.

In accordance with the general principles applicable to all liens, a receiver is in no better position than the party over whom he has been appointed receiver. He takes the property subject to the right of the vendor to assert his vendor's lien and he can not obtain title without compliance with the contract of sale.[1]

[2] Where the filing of a lis pendens will operate so as to prevent a transfer of real property the title to which is in litigation, a receiver will not be appointed since there is in such circumstances an adequate remedy at law. Gregory v. Gregory, 33 N. Y. Super. Ct. R. 1; Spokane v. Amsterdamisch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088.

[3] Collins v. Richart, 14 Bush (Ky.) 621.

Under statutory provisions authorizing the appointment of a receiver in foreclosure where property is in danger of being lost or materially injured, in a suit to foreclose certain liens on personal property and crops and a vendor's lien on certain land, it was held that a petition containing averments of a vague and general character are insufficient to warrant an ex parte appointment of a receiver. Arnold v. Meyer, (Tex. Civ.) 198 S. W. 602.

[1] A receiver of a corporation who takes possession of property purchased, but not paid for, by the corporation, takes it subject to the right of the sellers to have the property sold for their payment, and so a proceeding by the sellers to assert their privilege in that respect can not be stayed until liquidation of the receivership. In re Receivership of Augusta Sugar Co., 134 La. 971, 64 So. 870.

The receiver of a corporation has the same right which it had to perfect title to property in its pos-

§ 221. Receiverships in Suits for Specific Performance.

In an action for specific performance where there is danger of loss from waste, insolvency, or other perils to the property cognizable by the rules relating to receiverships, a receiver will be appointed pending the litigation.[1]

session under a contract with the vendor that title should not pass to it until the property was paid for. Moore v. Mercer Wire Co., (N. J.) 15 Atl. 305.

Where an order of the court requires a purchaser of lands to give security for the application of the rents and profits to the payment of the purchase price, or on his failure to do so directs that a receiver of the rents and profits be appointed, a further condition of the order restraining him from transferring in any manner any obligation for the rents is onerous and should not be made. Tumlin v. Vanhorn, 77 Ga. 315, 3 S. E. 264.

A receiver for corporation can not compel the vendor, under an executory contract with the corporation for the purchase of land, to deliver possession without payment of the purchase price in accordance with the contract. Continental Trust Co. v. Brown, (Tex. Civ. App.) 179 S. W. 939.

In a suit by receiver of federal court to enforce vendor's lien on property sold under a decree rendered in a federal court, he should not be required to procure title papers, making description of property sold more definite than that in deed conforming to decree of federal court. McClintic v. Hechmer, (W. Va.) 92 S. E. 653.

[1] A receiver was appointed in a suit for specific performance. Reade v. Hamlin, 62 N. C. (Phill. Eq.) 128; Munns v. Isle of Wight Ry. Co., L. R. 5 Ch. App. 414.

McCaslin v. State, 44 Ind. 151.

In an action for specific performance of a contract for sale of land, under which defendant was to retain the land for a certain time and pay plaintiff half the crops, plaintiff asked for a receiver, and subsequently filed a separate petition for such appointment, on the ground that defendant threatened to convert grain grown. Both appeared, and a continuance was granted, pending which defendant prepared to thresh the grain under threat to convert it, and plaintiff applied, during vacation, for the appointment of a receiver. It was held that the court had power to appoint this receiver on the application in vacation. Wilson v. Hays, 139 Mo. App. 513, 123 S. W. 540.

But under a contract between father and son that in consideration of the son cultivating the father's land until the latter's death, it would be given to the son, the father having outlived the son, it was held, in an action for the specific performance by the son's widow, that the farm would not be placed in the hands of a receiver. Walters v. Walters, 132 Ill. 467, 23 N. E. 1120.

In Hyde v. Warden, 1 Ex. D. 309, the plaintiff in a suit to enforce specific performance of an agreement to lease a farm was ap-

In a suit for specific performance instituted by the vendor, if the property is an inadequate security for the balance of the purchase money and the purchaser is insolvent, a receiver will be appointed upon the same sort of a showing in which one would be appointed in an ordinary foreclosure proceeding.[2] And in an action to compel a conveyance from the heirs of a deceased person, many of whom are minors, it is proper to appoint a receiver in whom the legal title may be vested for the purpose of

pointed receiver pending his appeal from a judgment in favor of the defendant.

In one case of specific performance a receiver was appointed because the purchaser was managing the land in a manner contrary to the usual course of husbandry. Osborne v. Harvey, 1 Y. & C. C. C. 116.

And where by a post-nuptial settlement between husband and wife the rights of a purchaser from the husband were being jeopardized, a receiver was appointed at his application upon the court being satisfied that he would probably obtain a decree for specific performance. Metcalf v. Pulvertoft, 1 Ves. & B. 181.

In George v. Evans, 4 Y. & C. 211, the court refused to appoint a receiver in a suit by a beneficiary to set aside a purchase made by his trustee from him on the ground that there was no showing that the property was likely to be damaged by the defendant and that the facts set forth in the bill merely raised a suspicion of unfair dealing on the part of the trustee.

A vendee may procure the appointment of a receiver pending a suit for specific performance of a contract to convey where through fraud the vendor is in possession. Dawson v. Yates, 1 Beav. 301.

A vendor may obtain the appointment of a receiver in an action of specific performance of a contract of purchase on a showing of the insolvency of the vendee and that he is about to convey his property to trustees for the benefit of creditors. Hall v. Jenkinson, 2 Ves. & B. 125.

On the refusal of one who has contracted to purchase property to complete the purchase because of not being satisfied with the title, a receiver may be appointed pending the determination of the sufficiency of the title. In this case the property had large ornamental grounds which required considerable care and expense to maintain, besides insurance. Boehm v. Wood, 2 Jac. & W. 236.

A receiver and manager of a hotel business may be appointed in a suit for specific performance of a contract for the sale of the lease, furniture, and good will of the business, but he can take no chattels other than those which would pass by an assignment of the lease. Poole v. Downes, 76 L. T. N. S. 110.

2 Phillips v. Eiland, 52 Miss. 721.

carrying the judgment into effect.[3] Where there is no such default as entitles the vendor to sell the property, the order appointing the receiver should be revoked since the receivership is merely incidental to the main action.[4]

The same class of relief by the appointment of a receiver in a proper case is, of course, accorded the purchaser in a suit to compel performance by the vendor. Thus where the vendor has fraudulently obtained repossession of the property, a receiver was appointed at the instance of the purchaser in a suit for specific performance.[5]

A receiver will be appointed over property in the hands of a vendor at the suit of a purchaser who has completely performed his contract of purchase upon the principle that in such a case the purchaser holds the entire beneficial interest in the property and the vendor holds it simply as trustee for him.[6] A receiver was appointed in one case for the purpose of applying the rents and profits in payment of the interest and costs awarded a purchaser upon failure of the vendor to make title.[7]

§ 222. Receivership in Aid of Judicial Sales.

A receiver will be appointed at the instance of a purchaser at a judicial sale on a bill alleging fraudulent conveyances by the judgment debtor of the estate so sold for the purpose of defeating plaintiff's title.[1]

If the judgment debtor after a judicial sale continues in possession of the property and uses it, the purchaser may have a receiver appointed where the defendant is insolvent and waste is likely to occur.[2]

3 Scadden Flat etc. Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440.

4 Jones v. Boyd, 80 N. C. 258.

5 Dawson v. Yeates, 1 Beav. 301.

6 Mead v. Burke, 156 Ind. 577, 60 N. E. 338.

7 Hill v. Kirwan, 1 Hog. 175.

1 Mays v. Rose, Freem. Ch. (Miss.) 703.

2 Hill v. Taylor, 22 Cal. 191. See also Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600.

And a purchaser at a sheriff's sale who is entitled to the pos-

And where defendant in possession of land sold at a sheriff's sale obtained possession through fraud, and the rents and profits are in danger of being lost by reason of the insolvency and fraudulent actions of the defendant, a receiver may be appointed.[3]

But a receiver will not be appointed to collect the rents and profits of land sold at a judicial sale for the time between the sale and its confirmation by the court since the purchaser is not entitled to them. And a receiver will not be appointed in such a case where an appeal from the order of confirmation has in effect suspended the sale.[4]

And executors who have placed a purchaser of the property in possession under a sale and deed made by them and permitted him to make large improvements thereon can not, while refusing to report the sale to the court for confirmation, invoke the aid of a court of equity to compel an accounting of rents and profits or to place the property in the hands of a receiver.[5]

§ 223. Receivership Over the Rents and Profits.

Where the contract of sale does not reserve to the vendor any right to the crops or rents and profits to apply upon the purchase price, the right of the vendor to enforce his vendor's lien will be limited to the land itself, and in such circumstances the court will not appoint a receiver of the rents, at least not until the property has been sold under a decree,[1] although receiv-

session may have a receiver appointed to take possession of a crop thereon and harvest the same where the judgment debtor is insolvent. Corcoran v. Dall, 35 Cal. 476.

A receiver may be appointed upon the application of a purchaser at a sheriff's sale pending litigation. McFadden v. Nolan, 15 Phila. 187.

3 Mays v. Rose, Freem. Ch. (Miss.) 703.

4 Pearson v. Gillenwaters, 99 Tenn. 446, 63 Am. St. Rep. 844, 42 S. W. 9.

5 Bennallack v. Richards, 125 Cal. 427, 58 Pac. 65.

1 Morford v. Hammer, 62 Tenn. (3 Baxt.) 391.

Where, pending a bill to foreclose a vendor's lien, the land

§ 224. The Rule as Applied to Personal Property.

Unless reservations of title, amounting to a conditional sale are made in a sale of personal property, the seller ordinarily has no such interest in the property as entitles him to the appointment of a receiver.[1] But where the litigation is in respect to an executory sale of a stock of merchandise which the buyer refuses to accept, it is proper to appoint a receiver to take charge of and sell the goods, since to do so is a step reasonably calculated to protect both litigants and insure a fair sale.[2] Likewise where there is reasonable ground to apprehend that pending the litigation the property, which is the subject matter of the litigation, may be disposed of

be in effect to hold that any creditor may obtain a receiver over personal property, before judgment, to secure the payment of any simple and unsecured debt. Neither our statute nor the policy of our laws contemplates any such remedy." Golden Valley Land etc. Co. v. Johnstone, 21 N. D. 101, Ann. Cas. 1913B 631, 128 N. W. 691.

In Hendrix v. American Freehold etc. Co., 95 Ala. 313, 11 So. 213, a receiver was appointed ex parte of a growing crop upon a showing that defendants, after they had mortgaged the land to plaintiff, had conveyed it to another party for the purpose of defrauding plaintiff out of the rents and profits of the land, and that upon a foreclosure of the mortgage plaintiff had bid in the land for its reasonable value, but nevertheless there remained a deficiency.

1 The seller of a stock of goods upon condition that they shall not be removed from town, and that the proceeds of sales shall be turned over to him until the balance of the purchase price is paid, has, in the absence of an express reservation of title, no such interest therein as to entitle him to a receiver upon the failure of the purchaser to comply with the agreement as to proceeds, though the latter is insolvent. Steele v. Aspy, 128 Ind. 367, 27 N. E. 739.

That he may by stipulation retain title is well settled, but it must be plain and express. Winchester Wagon Works & Mfg. Co. v. Carman, 109 Ind. 31, 58 Am. Rep. 282, 9 N. E. 707; Hodson v. Warner, 60 Ind. 214.

2 Swisher v. Dunn, 89 Kan. 412, 131 Pac. 571, 45 L. R. A. (N. S.) 810, 131 Pac. 571.

In an action to enforce specific performance of a parol agreement to sell certain personal property, a receiver was appointed upon a showing of imminent danger of loss. Taylor v. Eckersley, 2 Ch. D. 302, 5 Ch. D. 740.

fraudulently or in such a manner as to make futile any judgment which may be recovered in respect to it, the court is justified in appointing a receiver.[3]

§ 225. Equitable Lien for Purchase of Personalty.

An equitable lien for the price of personalty may be enforced, even though the property be in the hands of a receiver, as the receiver takes the title burdened with the equities to which it was subject when in the hands of the debtor.[1]

But a seller of goods, who reserved title to the same, by filing purchase money notes with the receiver of the corporation which had been the purchaser, waived a right

3 Ellett v. Newman, 92 N. C. 519.

Under Burns's Ann. St. 1901, § 1236, which provides that a receiver may be appointed where it is shown that the property in controversy is in danger of being lost or materially injured, or where, in the discretion of the court, it may be necessary to secure ample justice to the parties, where a complaint in an action by administrators for the appointment of a receiver showed that during the lifetime of decedent defendant, by fraud and undue influence, had obtained possession of certain notes belonging to said decedent and purporting to be indorsed by the latter, that the indorsements were forged, that no consideration was received for the notes; and that defendant was wholly insolvent, and, if not restrained, would collect and sell the notes and convert the proceeds, the appointment of a receiver was warranted. Sallee v. Soules, 168 Ind. 624, 81 N. E. 587.

On application of the seller of goods in an action to rescind a sale for fraud, the court may appoint a receiver, where the goods are in the hands of a sheriff, to secure the payment of mortgages, even though the mortgagees are solvent. Exchange Bank v. H. B. Claflin Co., 100 Ga. 640, 28 S. E. 439.

A receiver will be appointed to take possession of property pendente lite in a replevin suit only under circumstances requiring summary relief or where there is imminent danger of loss without adequate remedy at law, but not ordinarily where title is in dispute until there has been a determination of the title or the plaintiff at least establishes a reasonable probability of his ultimate success in establishing title. The question is addressed to the discretion of the court. Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537.

1 Arkansas Cypress Shingle Co. v. Meto Valley Ry. Co., 97 Ark. 534, 134 S. W. 1195.

to reclaim the property and have his claim allowed as a preferred claim, the property having been sold by the receiver.[2]

4. Receiverships at Instance of Landlord or Tenant.

§ 226. Circumstances in Which Receiver Appointed.

Where a person is clothed with title and possession, such as are conferred by a lease in writing, and is in the possession and enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff in such a case must show a clear right or a *prima facie* one with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere.[1] Thus a receiver has been appointed to take possession and hold the rents and profits until final decree in a suit by a landlord against an insolvent tenant who is allowing the land to deteriorate.[2] But where the landlord has an adequate remedy at law, a receiver will be refused.[3]

2 Gordon Hollow Blast Grate Co. v. Zearing (Ark.), 198 S. W. 97.

1 Chicago, etc., Mining Co. v. United States Petroleum Co., 57 Pa. St. 83; Burton v. Pepper, 116 Miss. 139, 76 So. 762. See Wilson v. Wilson, 2 Keen 249; Charrington & Co. v. Camp (1902), 1 Ch. 387; Levey v. Callingham (1908), 1 K. B. 79.

In an action by a landlord to enforce his lien for rent, where other persons claim an interest in the property, which consists of live stock, farm produce and materials, the appointment of a receiver is proper. Smith v. Dayton, 94 Iowa 102, 62 N. W. 650.

Under St. 1913, § 2787, subd. 1, a receiver may be appointed, in an action by the landlord, to cancel a farm lease, where he shows substantial breaches by the tenant, including the selling of live stock and grain, without the knowledge of the owner, who was entitled to share in the proceeds of such sales, and who had originally equipped the farm with stock. Baker v. Bohnert, 158 Wis. 337, 148 N. W. 1093.

Possession of leased premises will not be awarded a landlord by the appointment of a receiver without notice. Burton v. Pepper, 116 Miss. 139, 76 So. 762.

2 Hunter v. Bowen, 137 Ga. 258, 73 S. E. 380.

3 Where the crops were severed from the soil and became personal property, claim and delivery would be a plain, speedy, and adequate remedy, and the receiver will not be appointed. Montana Ranches

§ 227. Receivership Over Growing Crops.

Receiverships are more apt to arise in litigation between a landlord and tenant where the relation arises over a growing crop than in other circumstances for the simple reason that the existence of such growing crops in connection with friction between the parties is liable to give rise to what might be termed receivership facts. Thus where by the terms of a crop lessee the landlord and tenant are tenants in common of the crop and the tenant denies the right of the landlord to any part of the crop and threatens to sell the crop, a receiver may be appointed where in addition it is shown that the tenant is insolvent.[1] But where by the terms of the lease the rent is not paid by way of a share in the crop but in the shape of a money rental and no lien is reserved upon the crops, a receiver will not be appointed to irrigate and cultivate the crops even though the tenant has failed to perform the conditions of the lease and is insolvent.[2] The mere fact that the landlord is entitled to a share in the crop without any other showing will not entitle the landlord to the appointment of a receiver to take possession of a growing crop.[3] Courts, however, are reluctant to appoint a receiver over growing crops unless it be shown that the tenant is doing or threatening to do some act in respect to the crop or the leased premises which will tend to destroy the property or if the landlord has

Co. v. Dolan, 53 Mont. 397, 164 Pac. 306.

Where the statutory remedy to collect for rent and supplies to tenant is ample a receiver will not be appointed to administer matured crops. Barfield v. Dwight, 146 Ga. 824, 92 S. E. 633.

A receiver will not be appointed where the only necessity shown is that there was danger that the crops would be removed and sold to innocent purchasers and the proceeds converted; and it was not shown that defendant threatened or intended to act in that manner. Montana Ranches Co. v. Dolan, 53 Mont. 397, 164 Pac. 306.

1 Baughman v. Reed, 75 Cal. 319, 7 Am. St. Rep. 170, 17 Pac. 222.

2 Ibbetson v. Peairson, 7 Cal. App. 261, 94 Pac. 252.

3 Williams v. Green, 37 Ga. 37.

a lien upon the crop that the security upon which his lien operates is being impaired, or destroyed.[4]

§ 228. Combined Lease and Sale Contract.

Even though a lease of a dairy farm contained provisions for the sale of cows therein on installments the fact that the tenant failed to meet the installments is not ground for the appointment of a receiver even though the tenant is insolvent since he has an adequate remedy at law. That is true even though the tenant was alleged to have placed the cows elsewhere with a view to selling them.[1]

§ 229. Deed of Trust to Secure Advances to Tenants.

Where a tenant gives a deed of trust upon growing crops and various personal property used in his plantation operations to secure the landlord for advances to be made for the purposes of managing the crop, he can not refuse to make the advances and then in a suit to foreclose the deed of trust obtain the appointment of a receiver to plant and harvest the crop, even though the tenant may be a man of limited means and practically insolvent. In such circumstances the tenant should have had an opportunity to expend the funds and manage the business in the absence of a showing that he had a fraudulent intent of misappropriating the funds or abandoning the property and especially so where he had been a tenant for several years previously and had been spending money advanced for similar purposes by the landlord.[2]

§ 230. Breach of Covenants of Lease.

The fact that a tenant has breached the covenants of his lease is not ground for the appointment of a receiver

4 Burton v. Pepper, 116 Miss. 139, 76 So. 762.
1 Davis v. Kemp (Ala.), 77 So. 745.
2 Burton v. Pepper, 116 Miss. 139, 76 So. 762.

since in such circumstances the landlord has an adequate remedy at law to regain possession of the property.[1]

But where the purchaser of a leasehold was placed in possession before paying the whole of the purchase money and thereafter made default and the vendor was obliged to pay the rent and taxes in order to prevent a forfeiture of the lease, a receiver was appointed at the instance of the vendor.[2]

§ 231. Status of Receiver of Landlord in Relation to the Property.

A receiver of a landlord, who had mortgaged the premises, is not an assignee of the lease and an action for rent should be brought in the name of the landlord and not that of the receiver.[1]

§ 232. Receivership Determined Upon Conditions at Time of Application.

The question whether a receiver will or will not be appointed at the instance of a landlord in litigation with his tenant is determined by the circumstances and conditions existing at the time of the application and not by conditions which may exist later on. The legality of the appointment will be determined by the facts existing at the time of the appointment.[1]

§ 233. Duration of the Receivership.

Where a receiver is appointed for the purpose of enforcing and preserving a lien for rent, the receiver should be discharged upon the payment of the rent charge which forms the basis of the litigation.[1]

1 Burton v. Pepper, 116 Miss. 139, 76 So. 762.

But in a suit by the landlord to recover the land under a provision in the lease for re-entry for breach of covenant, a receiver may be appointed over the rents and profits pending the litigation. Gwatkin v. Bird, 52 L. J. Q. B. 263.

2 Cook v. Andrews (1897), 1 Ch. 266.

1 Noble v. Brooks, 224 Mass. 288, 112 N. E. 649.

1 Burton v. Pepper, 116 Miss. 139, 76 So. 762.

1 Patterson v. Northern Trust Co., 132 Ill. App. 208 (judgment

5. *Receiverships Affecting Leases.*

§ 234. Receivers to Collect Rent.

We have seen that in an action to foreclose a mortgage or other lien upon real property, either because the lienor may be entitled to the rent as additional security for his lien or because it is necessary to use the income of the property to repair waste already committed or to preserve the property pending the result of the litigation, a receiver may be appointed *pendente lite* to collect the rent of the property involved in the action. Such a receiver while in performance of his functions is entitled to the protection and assistance of all orders that the receivership court has power to make.[1] Conflicting claims as to the rent are to be decided in the receivership proceedings themselves or in actions commenced with the consent of the receivership court.[2] If such a receiver resorts to litigation to enforce his rights he is bound, as other litigants, by statutory requirements concerning pleadings.[3] Though the tenant may have claims arising before the appointment of the receiver of such a nature that they could be set-off against claims for rent, they

affirmed in 230 Ill. 334, 82 N. E. 837, and 231 Ill. 22, 121 Am. St. Rep. 299, 82 N. E. 840).

1 Reid v. Middleton, Turn. & R. 455.

2 Where a mortgage is made subsequent to and with notice of a lease that gives the landlord a lien upon the rents due from subtenants, the landlord is entitled to rents collected by a foreclosure receiver. Mellon v. St. Louis Union T. Co., 225 Fed. 693, 140 C. C. A. 567. A stipulation in a lease of personal property that the rental of the personalty shall be paid from the rents of real property upon which the personalty is to be used does not deprive the lessor of the personalty from collecting his rent from other sources when a receiver has been appointed to collect the rent of the realty. J. M. Overall Furniture Co. v. Superior Court, 36 Cal. App. 745, 173 Pac. 176. A tenant who has paid rent in advance contrary to the binding effect of the filing of a notice of lis pendens may be compelled to pay again. Gaynor v. Blewett, 82 Wis. 313, 33 Am. St. Rep. 47, 52 N. W. 313.

3 Everett v. Sglobiski, 125 N. Y. Supp. 455.

can not be so used against rent accruing after the appointment unless they arise from contracts to which the lienor was privy and to which he consented.[4] Where a lease is taken subject to a mortgage the rights of the lessee continue until there is a change of ownership by foreclosure and the foreclosure receiver is bound by the terms of the lease.[5] Conflicting claims as to whether or not a lease is part of the receivership estate are to be settled in the receivership proceeding or in a separate action brought with consent of the receivership court.[6]

§ 235. Receiver of a Lessee.

It may of course happen that the person whose estate a receiver is appointed to administer is a lessee and that it may become the duty of the receiver to take possession

4 Farmers' Loan, etc., Co. v. Northern Pac. R. Co., 58 Fed. 257.

When a lessee contracts with the lessor to make certain repairs at his own expense on condition that he is to be reimbursed from the rents, and the contract was made with the consent of the mortgagor, the lessee can recoup against the foreclosure receiver. Thomson Estate v. Washington Inv. Co., 146 Pac. 617.

5 Busbe v. Wolff, 171 N. Y. Supp. 253.

6 James Everards' Breweries v. Wohlstadter, 177 App. Div. 862, 164 N. Y. Supp. 899. This was an action to foreclose a mortgage on a leasehold and to have it declared that a certain "renewal" lease was subject to the mortgage. Pending the term of the lease the landlord had regained possession in summary proceedings based on failure to pay rent. The proceedings had been undefended and no notice had been given to the mortgagee. Immediately thereafter a new lease was given to the wife of the lessor and the possession of the premises, the husband continuing the business therein conducted, under her name. On an appeal from an order vacating a receivership that had been created on the commencement of the action, it was held that the showing of fraud was sufficient to warrant the continuance of the receivership until the issue could be determined on a full trial.

Downs v. Gunther, 128 Md. 626, 98 Atl. 138. This was a proceeding, instituted in the receivership court, on petition of the receiver of an insolvent corporation, to have the respondent, an officer of the corporation, ordered to assign to the receiver a certain lease that he claimed as his own, and to have him enjoined from collecting rents from subtenants. On the hearing of an order to show cause, the matter was decided against the receiver and the decision sustained on appeal.

of the leased property as an asset of the estate. The important special point to be observed in this regard is that a chancery receiver is not, merely by virtue of his appointment, an assignee of the lease. In considering an argument based upon a provision of a lease to the effect that an assignment thereof without the consent of the lessor would give the lessor the right to claim a forfeiture of the lease the United States Circuit Court of Appeals,[1] in holding that such a provision is not applicable to an involuntary assignment produced by operation of law, said: "There has been no assignment whatever, either voluntary or involuntary, of the lease. The chancery receivers are not assignees of the lease. By their appointment they acquired no title. They only obtained a right to the possession of the property as officers of the court." The receiver is merely a custodian of the property, representing the possession and authority of the court, and is not liable under the terms of the lease.[2]

The lease contract is in the nature of an executory contract of the owner of the estate. The receiver may adopt or reject it.[3] He is entitled to a reasonable time in which to form a decision.[4] He may hold possession during such reasonable time as is necessary for investigation to determine which policy will be for the best interests of the receivership estate;[5] and in the

1 Durand & Co. v. Howard & Co., 216 Fed. 585, 132 C. C. A. 589; citing Keeney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60, and Stokes v. Hoffman House, 167 N. Y. 554, 53 L. R. A. 870, 60 N. E. 667.

2 Pennsylvania Steel Co. v. New York City Ry. Co., 190 Fed. 609; Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Bell v. American Protective League, 163 Mass. 558, 47 Am. St. Rep. 481, 28 L. R. A. 452, 40 N. S. 857; Nelson v. Kalkhoff, 60 Minn. 305, 62 N. W. 335; see De Wolf v. Royal Trust Co., 173 Ill. 435, 50 N. E. 1049; People v. National Trust Co., 82 N. Y. 283.

3 See, § 34, supra.

4 Sunflower Oil Co. v. Wilson, 142 U. S. 313, 322, 35 L. Ed. 1025, 12 Sup. Ct. 235; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787.

5 United States Trust Co. v. Wabash W. R. Co., 150 U. S. 287,

meantime may use the property in such way as may best serve the interests of the estate.[6] What is a reasonable time for this purpose depends entirely on circumstances and is a question of fact,[7] though mere lapse of time may be sufficient to imply an adoption.[8] A formal or express adoption is not necessary, but an adoption may be implied from the conduct of the receiver in respect to the property.[9] In this respect, as in all other matters, the receiver is under the dominion and direction of the court. He is bound by any express limitations in the orders of the court setting forth his powers.[10] If he decides to reject the lease, the lessor is entitled to a hearing by the court and an order to show cause in the matter should be issued as to why the lease should not be rescinded.[11]

37 L. Ed. 1085, 14 Sup. Ct. 86; Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 58 Fed. 257; Carswell v. Farmers' Loan & Trust Co., 74 Fed. 88, 20 C. C. A. 282; Empire Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415; New York, P. & Q. R. Co. v. New York, L. E. & W. R. Co., 58 Fed. 268; Park v. New York, L. E. & W. R. Co., 57 Fed. 799; Clyde v. Richmond & D. R. Co., 63 Fed. 21; Dayton Hydraulic Co. v. Felsenthall, 54 C. C. A. 537, 116 Fed. 961; Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 49 Am. St. Rep. 943, 31 L. R. A. 593, 32 S. W. 1097.

6 Fisher v. Columbia Nat. Bank, 54 Ind. App. 558, 103 N. E. 119; Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 689; Nelson v. Kalkhoff, 60 Minn. 305, 62 N. W. 335; Welch v. Central San Cristobal, 6 Porto Rico (Fed.) 310; Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 49 Am. St. Rep. 943, 31 L. R. A. 593, 32 S. W. 1097

7 Fisher v. Columbia Nat. Bank, 54 Ind. App. 558, 103 N. E. 119.

8 Easton v. Houston & T. C. R. Co., 38 Fed. 784; De Wolf v. Royal Trust Co., 173 Ill. 435, 50 N. E. 1049, reversing 72 Ill. App. 411; Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179, affirming 62 Ill. App. 318.

9 Central Trust Co. v. Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235; Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250; Fisher v. Columbia Nat. Bank, 54 Ind. App. 558, 103 N. E. 119; Moore v. Higgins, 53 Hun 629, 5 N. Y. Supp. 895, 2 Silvernail 298.

10 Kansas City Pipe Line Co. v. Fidelity Title & Trust Co., 217 Fed. 187, 133 C. C. A. 181.

11 Welch v. Central San Cristobal, 6 Porto Rico 310; Berwind-White Min. Co. v. Boringuer Sugar Co., 7 Porto Rico 172.

When the receiver abandons the lease, he is liable only for a reasonable rent of the premises during the time he was in possession,[12] if any rent has become due in the meantime;[13] circumstances may, however, render the amount reserved in the lease a reasonable amount for the receiver to pay.[14] When the receiver elects to adopt the lease he is liable for the full rent reserved in the lease unless, of course, other terms are made with the lessor.[15] The burden of showing that the receiver has elected to adopt the lease is on the lessor.[16] Although there may not be an express adoption, if the receiver holds possession during the full balance of the term of the lease, he is liable for the full rent as prescribed by the lease.[17]

12 Atkinson & Co. v. Aldrich-Clisbee Co., 248 Fed. 134. In this case it is also held that where there was a claim against the receiver for damages to the leased premises, the claim must be disallowed as an expense of the receivership where the evidence did not show what damage had been caused during the receivership and what damage had been caused during the occupancy of the owner of the estate. Fisher v. Columbia Nat. Bank, 54 Ind. App. 558, 103 N. E. 119.

The reason for this is that he does not become an assignee of the term and is not liable on the covenants of the lease. Bell v. American Protective League, 163 Mass. 558, 47 Am. St. Rep. 481, 28 L. R. A. 452, 40 N. E. 857; Welch v. Central San Cristobal, 6 Porto Rico (Fed.) 310.

13 Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309.

14 Frank v. New York, L. E. & W. R. Co., 122 N. Y. 197, 25 N. E. 332; Stoepel v. Union Trust Co., 121 Mich. 281, 80 N. W. 13. Thus, where the lessor demands an immediate surrender or adoption of the lease and several months are allowed to elapse before the receiver determines his policy in the matter, the receiver may be required to pay full rent for the period occupied by him. Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 58 Fed. 257.

15 Peoria, etc., R. Co. v. Chicago, etc., R. Co., 127 U. S. 200, 32 L. Ed. 110, 8 Sup. Ct. 1125; Thomas v. Peoria, etc., R. Co., 36 Fed. 808; Brown v. Toledo, etc., R. Co., 35 Fed. 444; Martin v. Black, 9 Paige (N. Y.) 641, 38 Am. Dec. 574; Woodruff v. Erie R. Co., 93 N. Y. 609.

16 Fisher v. Columbia Nat. Bank, 54 Ind. App. 558, 103 N. E. 119.

17 Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250; Morrison v. Blackall, 68 Ill. App. 504.

Rent accruing before the appointment of the receiver, unless secured by some contract lien upon the property, or protected by forbearance to enforce a right of re-entry, is an unsecured claim against the estate and ranks with other claims of like character on distribution. But rent accruing after the appointment is an expense connected with the administration of the estate and has such priority as may be accorded claims against the receiver himself.[18]

18 Prenatt v. Messenger Printing Co., 250 Pa. St. 406, 95 Atl. 564. In this case the leased property was certain machinery absolutely essential to the continuance of the business. The appellate court quotes with approval from the opinion of the trial court as follows: "There can be no doubt that the retention and use of these machines by the receiver for a period of one year and eight months enabled him to continue the publication of a daily paper, thereby conserving the principal value of the plant by keeping it a living institution. This is one insolvent institution whose market price peculiarly depended upon its being a going business. While it is true that the preferred rent claim of these two machines, about $3100, being the amount due them as the cost of continuing the business, leaves only about $550 for general creditors, it is equally true that there would not have been a penny for general creditors, except for the marketability of this insolvent plant, which marketability was preserved or created by the use of these two indispensable machines."

In Ball v. Improved Property Holding Co. of N. Y., 247 Fed. 645, the rent was in arrears when the receiver was appointed and took possession. The lessor obtained an order of court permitting him to dispossess the receiver. Receiver's certificates were issued to represent money borrowed to pay the accrued rent and through the forbearance of the lessor the receiver remained in possession. On the question of the priority of the certificates over the claim for rent accruing during the receivership, the Circuit Court of Appeals, reversing an order made by the District Court, says: "Among the creditors of a receiver we see no reason why either the lessors or the certificate holders should enjoy a priority unless some such was established by the court. . . . We recognize no difference in equity between the rent due before the insolvency which was secured by the right of re-entry and which the certificates paid, and that due afterwards which was equally secured, and which the lessors forebore to assert by re-entry. It is true that under Durand & Co. v. Howard & Co., 216 Fed. 585, 132 C. C. A. 589, the claim for rent due before the insolvency was held not to be preferred in distribution, but that case rested upon the

Since property in the possession of a receiver is in *custodia legis*, the lessor can not enter and distrain for rent after the appointment of the receiver. This is upon the theory that the receivership proceedings constitute an equitable execution upon the property which is the subject of the receivership.[19]

When the receiver rejects the lease, the lessor has a claim against the estate, ranking as that of an unsecured creditor, for any damage he may suffer; the damage to be measured by the rent reserved for the balance of the term or the difference between that amount and the rent that the lessor is able to obtain from some other tenant.[20]

Where the lessor, before the appointment of the receiver, had broken the terms of the lease and thereby

waiver of the existing forfeiture involved in asking the court to compel the receiver to exercise his option to affirm or reject. The lessors did not do so here and theirs was a claim upon which they could have re-entered. . . . The consideration advanced by each class of creditors, the lessors and certificate holders, was for the essential preservation of the estate, since without it the best asset would have been lost. Each was a debt strictly within the powers of a court of equity which may pledge a part of the assets for the preservation of the rest; each was as much an operating expense as the other."

See also, Prince v. Schlesinger, 116 App. Div. 500, 101 N. Y. Supp. 1031; Welch v. Central San Cristobal, 7 Porto Rico (Fed.) 205; Lockport Felt Co. v. United Box Board, etc., Co., 189 Fed. 767.

19 The above rule is based upon the common-law rule to the effect that a landlord can not distrain upon goods on which an execution levy has been made, and as against a receiver, a lessor is not protected by a statute that gives him the right to restrain for one year's rent after levy of execution or an assignment for the benefit of creditors. Grayson v. Richard H. Aiman, Inc., 252 Pa. St. 461, 97 Atl. 695; the lessor's right is protected where the statute, giving a preference to the landlord's claim, in enumerating the circumstances under which the preference is given, contains the expression, "other causes." Franz Realty Co. v. Welsh, 86 N. J. Eq. 228, 98 Atl. 387.

A lessor's right to pledge rents is limited to one year after the appointment of a receiver of the lessee under a statute limiting that right to one year after the failure or death of the lessee. I. Trager Co. v. Cavaroc Co., 124 La. 611, 50 So. 598.

20 In re Mullings Clothing Co., 252 Fed. 667; Quincy, etc., R. Co.

given the lessor the right to claim a forfeiture and to retake the property, the lessor may pursue his rights against the receiver. He must, however, seek his relief either in the receivership proceedings or in an action brought with the consent of the receivership court.[21] A notice to quit served upon the lessee before the appointment of the receiver is binding upon the latter;[22] but after the appointment, service of notice on an officer of the lessee corporation is of no avail, nor is service upon the receiver or ouster of the receiver without permission of the court effective.[23] The right to claim a forfeiture because of default on the part of the lessor may be waived or lost, as against the receiver, and can not be revived until there has been some default on his part.[24]

With the consent and in pursuance of an order of the court, the receiver may sell the lease. A sale, or assignment, by the receiver, being involuntary and produced by operation of law, is not in violation of a provision against assignment in the lease.[25] The purchaser is of

v. Humphrey's, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787; Chicago Fire Place Co. v. Tait, 58 Ill. App. 293; Woodland v. Wise, 112 Md. 35, 76 Atl. 502.

21 Odell v. H. Batterman Co., 223 Fed. 292, 138 C. C. A. 534; Palys v. Jewett, 32 N. J. Eq. 302. See also, Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Durand & Co. v. Howard & Co., 216 Fed. 585, 132 C. C. A. 589.

22 Woodward v. Winchill, 14 Wash. 394, 44 Pac. 860.

23 Commercial Trust Co. v. L. Wertheim Coal Co., 88 N. J. Eq. 143, 102 Atl. 448.

24 Long delay in claiming the forfeiture may amount to a waiver. Commercial Trust Co. v. L. Wertheim Coal, etc., Co., 88 N. J. Eq. 143, 102 Atl. 448.

Procuring an order of court directing the receiver to make his election between adoption and rejection within a certain period may constitute a waiver. Durand & Co. v. Howard & Co., 216 Fed. 585, 132 C. C. A. 589.

Seeking to enforce a lien for the rent may constitute a waiver. Blank v. Independent Ice Co., 153 Iowa 241, 43 L. R. A. (N. S.) 115, 133 N. W. 344.

25 Zwietusch v. Luehring, 156 Wis. 96, 144 N. W. 257.

Where the lease grants also an option to purchase the receiver may sell the option. Blank v. Independent Ice Co., 153 Iowa 241, 43 L. R. A. (N. S.) 115, 133 N. W. 344.

For a general discussion as to the rights arising out of sales of

course bound by the covenants of the lease,[26] and by the conditions of the notice of sale and the bill of sale.[27]

§ 236. Receiver of Lessor.

A receiver may be appointed to administer the estate of a lessor. Such a receiver is not an assignee of the lease and must distrain in the name of the person entitled to the rent,[1] unless by assignment or attornment a right in himself has been created.[2] Payment of rent to a receiver will constitute an attornment,[3] and tenants who have once attorned to a receiver can not thereafter question the validity of his appointment nor his right to possession.[4] A supposed tenant may resist attornment on the score that he has the right to purchase the property.[5] In the management of this asset of the estate, as in all other matters, the receiver acts under the authority and direction of the court and in the event of doubt as to the extent of his rights and obligations under the terms of the lease, he should seek an adjudication by the court upon the subject.[6]

the assets of the receivership see the subject Sales.

26 Zwietusch v. Luehring, 156 Wis. 96, 144 N. W. 257.

27 The notice of sale and the bill of sale may be open to construction by the court; and, if so, the fact that they were given by a receiver may lead to a different conclusion from that which might be reached if they had been given by the lessor. Schwartz v. Cahill, 175 App. Div. 68, 161 N. Y. Supp. 750.

1 Hughes v. Hughes, 3 Bro. C. C. 87, 1 Ves. Jr. 161.

2 Evans v. Mathias, 7 El. & Bl. 590; White v. Smale, 22 Beav. 72; Jolly v. Arbuthnot, 4 De Gex & J. 224.

3 Brown v. O'Connor, 2 Hogan 77.

4 Albany City Bank v. Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

5 Bydon v. Innes, 5 W. W. & A. B. (Victoria Eq.) 189; Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606.

6 Where the lease contains numerous restrictions as to the use of the property and a relief as to such restrictions would constitute a valuable asset to the receivership and such restrictions are governed by other paragraphs of the lease and other acts of the parties, the question should be presented to the court for adjudication. Holmes v. Dowie, 177 Fed. 182, 100 C. C. A. 390.

§ 237. Receiver as Lessor or Lessee.

The receiver of an estate may enter into lease contracts in his own name either as lessor or lessee. His acts in this regard must receive the permission or ratification of the court and contracts made without this sanction are not binding upon the estate.[1] The chief practical difficulty in this matter is with reference to the term of the contract. It is only under exceptional circumstances that such contracts can remain in force after the tenure of the receiver has ceased and in most cases just how long the receiver will remain in authority is uncertain. However, a court that has once authorized a receiver to make a lease contract for a certain term may afterwards amend the contract by shortening the term, if it appears that, as originally made the contract will extend beyond the continuation of the receivership; and in so doing may

Where the receiver has no knowledge of material facts and circumstances affecting the validity of the lease, his acceptance of the rents reserved under the lease will not constitute an acceptance of the lease. Groveland Imp. Co. v. Farmers' Supply Co., 25 Wash. 344, 87 Am. St. Rep. 755, 65 Pac. 529.

1 Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96; Simmons v. Allison, 118 N. C. 761, 24 S. E. 740; Farmers' Loan & Trust Co. v. Eaton, 51 C. C. A. 640, 114 Fed. 14; Neale v. Bealing, 3 Swanst. 304; Roberts v. Armstrong, 1 Wall. 27, note; Wynne v. Newborough, 1 Ves. Jr. 164.

In Shreve v. Hankinson, 34 N. J. Eq. 413, it was held that a receiver could without a special order to that effect, execute a lease of a farm for one year, where the order appointing the receiver gave him authority to let the property from time to time. In this connection see also, Duffield v. Elves, 11 Beav. 590.

In Berwind-White, etc., Co. v. Barinquen Sugar Co., 6 Porto Rico (Fed.) 454, the property involved was a sugar plantation. The court refused to permit the receiver to lease except on condition that the receiver should supervise the operation of the property and have the right to cancel the lease on reasonable notice if the property did not net sufficient to pay current interest to bondholders. It must, however, be noted that the property in question constituted the business of the receivership.

An application for an order directing a receiver, appointed in creditors' proceedings, to make a lease binding on an infant remainderman, has been refused. Gibbons v. Howell, 3 Madd. 469.

See, also, Kimball v. Waldemar Co. et al., 169 App. Div. 239, 154 N. Y. Supp. 415; Steanmer v.

make such compensation to the lessee for damages as may be just. Such a lease may, however, remain in force after the termination of the litigation.[2] Because of this limitation upon the receiver as to the term of any contract he may make, a receiver is not bound by stipulations as to renewal occurring in a lease contract belonging to the estate, unless he is estopped by reason of expenditures made by the lessor upon the strength of the renewal clause;[3] and, if, as receiver of a lessor, he holds over, he is regarded as a tenant at will rather than as one holding from year to year.[4] A receiver desiring to lease out property of the estate is not bound to accept the highest bid.[5] A receiver, either as lessor or lessee, has generally the same rights and is subject to the same liabilities as other parties making such contracts with reference to matters connected with the performance of the contracts.[6]

French, 13 Ir. Eq. 161; Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554, 38 L. Ed. 819, 14 Sup. Ct. 915; Garlington v. McKibben, 99 Ga. 128, 24 S. E. 873.

2 Farmers' Loan & Trust Co. v. Eaton, 114 Fed. 14, 51 C. C. A. 640; Shreve v. Hankinson, 34 N. J. Eq. 413; Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96; Stanley v. National Union Bank, 115 N. Y. 122, 22 N. E. 29; Shaw v. Shaw, 51 Tex. Civ. 55, 112 S. W. 124.

3 Coy v. Title Guarantee & Trust Co., 198 Fed. 275.

4 Dietrich v. O'Brien, 122 Md. 482, 89 Atl. 717.

Where a receiver holds over for a short time after the expiration of the term, and then sells personalty on the premises to a purchaser who continues in possession for a short time while disposing of his purchase, paying rent for the time he actually holds, there is not such an uninterrupted continuance of the holding as to make the purchaser liable for a year's rent. Kyle v. Gadsden, etc., Supply Co. (Ala.), 76 So. 951.

5 Knott v. Receivers of Morris Canal, etc., Co., 4 N. J. Eq. 423; Berwind-White, etc., Co. v. Berniquen, etc., Co., 6 Porto Rico (Fed.) 454.

6 Pennsylvania Steel Co. v. New York City Ry. Co., 188 Fed. 680; Bodman v. Murphy, 35 Md. 154; Balfe v. Blake, 1 Ir. Ct. Rep. 365.

A receiver of a leasehold who sublets a portion of the business is not liable for damages nor for improvements to his tenant if the latter is evicted by the superior landlord. Kimbark v. Waldemar Co., 169 App. Div. 239, 154 N. Y. Supp. 415.

He may institute forcible detainer proceedings. McKeag v. Pirie, 134 Ill. App. 652.

A receiver may terminate the tenancy upon notice in the same

After the creation of the receivership the owner can not make a lease binding upon the receiver even though such a lease may create liabilities as between himself and the party with whom he contracts.[7]

manner as an individual lessor. Doe. Marsack v. Read, 12 East 58.

Rent wrongfully paid to a receiver may be offset against future rents. Grant v. Buckner, 172 U. S. 232, 43 L. Ed. 430, 19 Sup. Ct. 163.

[7] Thornton v. Washington Sav. Bank, 76 Va. 432.

CHAPTER XI.

MORTGAGES, PLEDGES, MECHANICS' AND OTHER LIENS.

1. *Mortgages on Real Property.*

a. General View of the Subject.

§ 238. Scope of Treatment of Subject.

The use of the auxiliary remedy of a receivership in connection with litigation affecting real property covered by a mortgage has been allowed from a very early time, courts of equity, in this regard, exercising their inherent jurisdiction, without the aid of statute.[1] To the practicing attorney it will immediately occur that its use in this connection is primarily in aid of a suit brought by a first mortgagee to foreclose the mortgage; and, since the time when the Common Law view of a mortgage—that such an instrument is, in law, what it is in form, a conveyance of the title—began to be displaced by the now prevalent view—that a mortgage is simply security for a debt and grants to the mortgagee only a lien on the property covered thereby—such has been its primary and probably its most extensive use. There are other instances, however, in which the remedy is employed in actions relating to such property. It is, for instance, at times an important aid to a junior mortgagee, either in collecting his debt or in protecting his rights.[2] It frequently happens that the real property, or a portion thereof, of an insolvent or bankrupt debtor is mortgaged and this property will be involved in a general receivership created to take charge of such debtor's affairs.[3] It is the purpose

1 Grant v. Phoenix Mut. L. Ins. Co., 121 U. S. 105, 30 L. Ed. 905, 7 Sup. Ct. 841; United States Trust Co. v. New York, etc., R. Co., 101 N. Y. 478, 5 N. E. 316; Hollenbeck v. Donnell, 94 N. Y. 342.

2 See, post, § 253.

3 See, post, § 255.

of this chapter to set forth the principles and rules that have governed courts of equity, acting under the later theory of a mortgage, in all of these phases of the question. It will be necessary first, however, to set forth briefly the law as applied under the Common Law view of a mortgage. This presentation will be brief because the matter is now largely of a historical interest only; it is necessary because, in some respects, the practices under the former view have had important effects upon the development and growth of the law under the later view. The rules that govern with reference to property owned by corporations,[4] public utilities,[5] and mining companies[6] are discussed in separate chapters. Questions that relate exclusively to procedure are also set forth in a separate chapter.[7]

§ 239. Receivers Under Common Law View.

As intimated above, courts operating under the Common Law originally held that a mortgage following its form, was literally a conveyance of the title. It contained a defeasance back; the mortgagor could recover the title by performing a certain condition; but, until the condition was performed, the mortgagee owned the property. He was therefore legally entitled to the possession with all of its incidents, including the right to the rents and profits.[1] If wrongfully kept out of the possession he could recover it by an action in ejectment at law. In these circumstances an action to foreclose a mortgage was really an action to foreclose, or shut off, the right of the mortgagor to redeem. While courts of equity, in which such actions were maintained, found many occasions to come to the

4 See chapter devoted to Corporations.

5 See chapter devoted to Public Utilities.

6 See chapter devoted to Mines.

7 See chapter regarding Procedure in General.

1 Gilman v. Illinois and Miss. Tel. Co., 91 U. S. 603, 23 L. Ed. 405; Callanan v. Shaw, 19 Iowa 183.

relief of mortgagors on equitable grounds, and, perhaps, even deny the "strict foreclosure" sought by the mortgagee, the action, nevertheless, maintained its general character and purpose.

We have seen in earlier chapters dealing with the general principles that govern courts of equity in the use of their power to create receiverships, that, in this phase of their activities, as in all other matters coming within their exclusive jurisdiction, such courts are governed by the rule that equitable relief will not be granted to a party who has a plain, speedy, and adequate remedy at law, reaching the same purpose.[2] Since the Common Law mortgagee, if not actually in possession and if wrongfully denied possession, could use his legal remedy of ejectment to put himself in a position where he could himself do all that an equitable receiver could do in his behalf, we would expect courts of equity to refrain from assisting him, in an action for foreclosure, with a receivership. And such was the rule—courts of equity would not create receiverships to aid foreclosure suits of mortgagees who failed or were unwilling to use their legal remedy.[3] A burdensome duty of accounting was placed upon mortgagees in possession and they were therefore reluctant to urge their rights in this regard; but the courts, seldom, if ever, departed from the strict rule.[4] If there was any peculiar circumstance that prevented a mortgagee from exercising his legal right to possession, then the rule failed, because the reason for it failed, and a receiver might be appointed;[5] and it has been held that, under certain circumstances, a receiver might be appointed in an equitable proceeding brought in aid of a mortgagee's action to enforce possession.[6]

2 See section 8.

3 Berney v. Sewell, Jac. & W. 647; Sturch v. Young, 5 Beav. 557.

4 Sturch v. Young, 5 Beav. 557.

5 Ackland v. Gravenir, 31 Beav. 482.

6 McLean v. Presley's Admr., 56 Ala. 211; Brasted v. Sutton, 30 N. J. Eq. 462.

Under this view of a mortgagee's rights, then, there were only two actions in which, usually, a receivership might be successfully sought: (1) A foreclosure action brought by a junior mortgagee, and (2) an action for redemption brought by a mortgagor against a mortgagee in possession.

A junior mortgagee, being barred from urging, at law, his right to possession by the superior right thereto of a prior encumbrancer, could not, when foreclosing in equity, be denied a receivership for the same reason for which the first mortgagee was denied this aid. As against a mortgagor in possession, a junior mortgagee was held, practically, to be entitled to a receivership as a matter of course and he did not have to show that his security was inadequate.[7] As against a prior mortgagee in possession, however, he could not obtain a receiver, unless he could show fraud, or waste, or some other similar equitable ground; and if, on his application, as against the mortgagor, a receiver was appointed, the latter's possession was without prejudice to the rights of a prior encumbrancer whenever they might be asserted.[8]

In an action for redemption, brought by a mortgagor against a mortgagee in possession, the former could not have a receiver without showing fraud or waste. If the mortgagee declared that he had not been fully paid, a receiver would not be appointed, because the court would not attempt to settle the account on the hearing of the application for a receiver.[9]

The above rules were those that developed in the practice of courts of equity acting under what was assumed to be their inherent powers. In England, where the Common

7 Ackland v. Gravenir, 31 Beav. 482; Aikins v. Blain, 13 Grant. Ch. (Ont.) 646.

8 Fairfield v. Irvine, 2 Russ. 149; Davis v. Duke of Marlborough, 2 Swanst. 137.

9 Codrington v. Parker, 16 Ves. Jr. 469; Berney v. Sewell, 2 Jac. & W. 629.

Law meaning and effect of a mortgage still largely prevails, the practice has in later years been largely affected by statute.[10]

Under the Common Law view, a mortgagee who was so situated that he could not legally take possession of the mortgaged property and in whose favor a receiver in foreclosure might, therefore, be appointed, as above indicated, was said to hold an "equitable mortgage." Since his position in this regard was very similar to what has been held to be the position of a mortgagee under what we have called the later, or prevalent view of a mortgage, namely, that the instrument is intended merely as security and grants, not the title, but a lien only—we will hereafter speak of a mortgage, considered under this view, as an equitable mortgage. It is to be remembered, however, that this expression is now commonly used in an entirely different sense, namely, to designate an instrument, which, though not in the form of a mortgage, is intended to be and is treated as a mortgage. A grant, bargain, and

10 23 and 24 Vict. Ch. 145, §§ 11-32 (1860). Judicature Act of 1873. Conveyancing and Law of Property Act of 1881.

See Halsbury's Laws of England, Mortgage, §§ 131 et seq. An interesting intimation of the development of the practice of courts in this matter is given in the opinion of Judge Lindsay in the case of Douglass v. Cline, 75 Ky. (12 Bush) 608. He says, in part: "But since the change in our rules of civil procedure, which allows equitable defenses to be interposed in actions at law, it has been almost universally conceded that the mortgagee in a strict mortgage can not, without the consent, express or implied, of the mortgagor, recover possession of the mortgaged premises in an action at law. A defense in the nature of a bill for redemption enables the mortgagor to compel a transfer of the cause to the equity side of the docket, where the mortgagee can demand only such relief as a court of equity will afford. Hence, mortgages are now treated in this state as mere securities; and, although, strictly speaking, the mortgagee is invested with the legal title, he holds it only in pledge, and the mortgagor is considered, both at law and in equity, the real owner of the property."

sale deed intended to be only security for an obligation is an instance of such an equitable mortgage.[11]

b. Receiverships on Behalf of First Mortgagees in Foreclosure of Equitable Mortgages.

§ 240. General Principles Applicable.

We come now to the discussion of the rules and principles that have guided courts of equity in considering the question of receiverships in litigation affecting real property covered by an equitable mortgage. As above indicated the primary use, in this connection, of this auxiliary equitable remedy has been in aid of the first mortgagee, as against the mortgagor, in actions to foreclose the mortgage and that is the first branch of the subject which we will discuss.

In the opening chapters we set forth the general grounds and circumstances in which a receiver is appointed and the general principles applicable.[1] The general grounds, circumstances, and principles there set forth are applicable in all kinds of litigation. Hence they are applicable in the present matter and all that we have to do now is to translate these general rules into terms that fit the special circumstances and conditions connected with foreclosure suits.

Some of these rules are merely incidental to the main questions involved and are applicable without any such translation.

Thus, where the court is of the opinion that the plaintiff is entitled to have a receiver appointed to take charge of the property or fund in litigation but nevertheless feels that the plaintiff could be made secure in respect to the outcome of the litigation in the event of his recovery by the furnishing of a bond by the defendant to secure any

11 Flagg v. Mann, 2 Sumn. (U. S. C. C.) 486, Fed. Cas. No. 4847.

1 See chapter II.

such recovery, it is within the discretion of the court to make an order refusing to appoint a receiver upon condition that defendant furnish such a bond.[2] So, in foreclosure suits, it has often been held that, with reference to the assistance that a receivership would render a plaintiff, the defendant might, by furnishing a properly conditioned bond, forestall the appointment of a receiver.[3]

Another general principle of the law of receivership is that it is essential that there shall be at the time of the appointment a suit pending in which relief other than the mere appointment of the receiver is sought.[4] In order to authorize the appointment of a receiver it is an indispensable rule that the party petitioning for such an appointment must show to the court that there is a reasonable probability that he will ultimately prevail in the litigation.[5] These rules naturally apply to foreclosure suits and in that connection may be stated in practically the same terms.[6] A statement inclusive of the last two

2 See section 15.

3 Durant v. Crowell, 97 N. C. 367, 2 S. E. 541; Cortelyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478.

Where there were outstanding executions against the land and the mortgagor offered to pay the claims on which such executions were founded it was error to appoint a receiver: Etna Steel & Iron Co. v. Hamilton, 137 Ga. 232, 73 S. E. 8.

4 See section 14.

5 See section 12.

6 Appointment of a receiver before commencement of the foreclosure suit is invalid; nevertheless, as against parties appearing on a hearing for the confirmation of the acts of the receiver, and not objecting to the validity of his appointment, an order of confirmation is binding and conclusive. Anderson v. Riddle, 10 Wyo. 277, 68 Pac. 829.

Where there is a conflict of allegations as to a default in the payment of the obligation, the merits of this question can not be determined on a hearing of a motion for a receiver. Beecher v. Marquette & P. Rolling Mill Co., 40 Mich. 307.

A landlord agreed to make advances to a tenant and received a deed of trust as security therefor. The landlord failed to make the advances as contracted for and the tenant remained in possession. In an action to foreclose the deed of trust the landlord claimed that the deed covered advances that had actually been made the preceding year. A receivership was denied on the ground that the conduct of

propositions is the following: The plaintiff must show that he has a clear right to the property itself or that he has some lien upon it, or that the property constitutes some special fund to which he has a right to resort for the satisfaction of his claim.[7]

Where it does not appear that any advantage will be gained by the appointment of a receiver,[8] or where it is difficult to see how the order appointing a receiver could result in benefit to any one except the receiver,[9] a receiver will not be appointed; and, if a receiver is appointed in such circumstances, the making the appointment will be reversed by the appellate court.[10]

the parties appeared to amount to a rescission of the deed. Burton v. Pepper, 116 Miss. 139, 76 So. 762.

In the face of a strong showing for the necessity of taking steps for the preservation of the property involved, crops on leasehold land, a receiver was appointed to hold the property pending a decision as to the real effect of the mortgage. Graham v. Consolidated Naval Stores Co., 57 Fla. 418, 48 So. 743.

Where the court had never acquired jurisdiction of the action, the appointment of a receiver was absolutely void and subject to collateral attack. Thurber v. Miller, 11 S. D. 124, 75 N. W. 900.

An appeal from a decision in another suit, in which decision it had been held that the property belonged to the United States was pending; it was held that a receiver should not be appointed. Eastern Trust & Banking Co. v. American Ice Co., 14 App. D. C. 304.

Conflicting claims of several mortgages to the rent can not be adjudicated on the hearing of a motion to appoint a receiver. Putnam v. Henderson, Hull & Co., 49 App. Div. 361, 63 N. Y. Supp. 250.

Impeachment of the mortgage may be ground for denying the motion to appoint a receiver. Leahy v. Arthur, 1 Hogan 92.

A denial by the mortgagee that he held assets in his hands sufficient to cancel the debt was held sufficient ground for removing the objection to the appointment of a receiver. Kerchner v. Fairley, 80 N. C. 24.

Reasonable probability that the plaintiff asking for a receiver will ultimately succeed in obtaining the general relief sought for by his suit must appear. Warren v. Pitts et al., 114 Ala. 65, 21 So. 494.

7 See section 6.

8 See section 13.

9 Manhattan Life Ins. Co. v. Hammerstein Opera Co. et al., 180 App. Div. 69, 167 N. Y. Supp. 245.

10 Eastern Trust & Banking Co. v. American Ice Co., 14 App. D. C. 304.

§ 241. Preservation of the Property as Security as an Essential Ground.

The matters just mentioned are really only incidental to the main question at issue when the propriety of appointing a receiver is being considered. Others of like import will be noticed later. Coming now to the vital point we find the general rule stated as follows: The plaintiff must show that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant.[1] Sometimes, especially under statutes, the rule is stated to be that it must appear that the property is "in danger of being lost, removed, or materially injured."

An equitable mortgage is merely security for a debt. It grants a lien upon the property mortgaged but the extent of the lien is measured by the amount of the debt. The mortgagee can not complain about what may be done with the property so long as it is not impaired in such a way as to make it hazardous security for his claim. "The right of a mortgagee to have a receiver take charge of the mortgaged property during the pending of the action to foreclose is founded upon the proposition that it is necessary to preserve or protect the interest of the mortgagee. His only interest is the lien of his mortgage, and its extent is measured by the amount of the debt for which the lien is security. The debt is the substantial thing. Unless the security for his ultimate payment is in some way endangered or impaired, he can not be prejudiced."[2]

1 See section 6.

2 The above quotation is from Title Ins. & Trust Co. v. California Development Co., 164 Cal. 58, 127 Pac. 502.

See, also: Meyer v. Thomas, 131 Ala. 111, 30 So. 89; Davis v. Alton J. & P. Ry. Co., 180 Ill. App. 1.

§ 242. Indispensable Grounds or Conditions for the Appointment of a Receiver.

In view of this situation of the mortgagee, we find that the above mentioned general rule for the appointment of receivers is held to mean that there are two indispensable grounds, or conditions, the existence of which a mortgagee must show before he can have a receiver appointed in foreclosure. These grounds are: (1) That the mortgaged property will not, on a foreclosure sale, sell for an amount sufficient to pay his claim, with accrued interest and costs of suit; and (2) that there is no person who can be effectively held liable for any deficiency judgment that it might be necessary to render.[1] The existence of these conditions must be properly proved.[2]

At least a very strong probability of the inadequacy of the security must be properly proved.[3] The inadequacy

1 Cone v. Combs, 18 Fed. 576, 5 McCrary 651; Strain v. Palmer, 159 Fed. 628, 86 C. C. A. 618; Albritton v. Lott-Blacksher Commission Co., (Ala.) 52 So. 653; Skidmore v. Stewart, (Ala.) 75 So. 1; Williams v. Robinson, 16 Conn. 517; Planter's Oil Mill v. Carter, 140 Ga. 808, 79 S. E. 1120; First National Bank v. Gage, 79 Ill. 207; Glennon v. Wilcox, 159 Ill. App. 42; Callanan v. Shaw, 19 Iowa 183; Brown v. Chase, Wall. (Mich.) Ch. 43; Whitehead v. Wooten, 43 Miss. 523; Wolf v. Ward, 104 Mo. 127, 16 S. W. 161; Veerhoff v. Miller, 30 App. Div. 355, 51 N. Y. Supp. 1048; Astor v. Turner, 2 Barb. (N. Y.) 444; Sea Ins. Co. v. Stebbins, 8 Paige (N. Y.) 565; Quincy v. Cheeseman, 4 Sandf. Ch. (N. Y.) 405; Graybill v. Heylman, 139 App. Div. 898, 123 N. Y. Supp. 622; Ogden v. Chaffant, 32 W. Va. 559, 9 S. E. 879.

2 The appointment may be based upon the complaint alone, if its allegations are sufficient and it is verified. Sherman v. Wichner, (S. D.) 152 N. W. 700.

The appointment may be based upon a verified petition used as the basis for a motion to appoint even though the complaint is not verified. Cowell v. Gnatzig, 178 Ill. App. 482.

3 Lindsay v. American Mtge. Co., 97 Ala. 411, — So. —; Moritz v. Miller, 87 Ala. 331, — So. —; Planters' Oil Mill v. Carter, 140 Ga. 808, 79 S. E. 1120; Ruprecht v. Henrici, 113 Ill. App. 398; Callanan v. Shaw, 19 Iowa 183; Williams v. Williams's Assignee, 7 Ky. Law Rep. 448; Blondheim v. Moore, 11 Md. 365; Rabinowitz v. Power, 131 App. Div. 892, 115 N. Y. Supp. 266; Warner v. Gouverneur's Exrs., 1 Barb. (N. Y.) 36; Shotwell v. Smith, 3 Edw. (N. Y.) Ch.

must relate to the petitioning mortgagee's indebtedness without any reference to subsequent encumbrances. An allegation that the property is not worth the amount of all aliens against it is not sufficient.[4] The burden of proof is on the petitioner and the presumption is that the security is adequate.[5] The inadequacy must be a present condition, existing at least at the time of the hearing and not a threatened one, merely possible or even likely to come into being.[6] The proof must be competent and, if by affidavit on motion, must be in proper form.[7] If a strong case is made by a showing of equitable causes for

588; Degener v. Stiles, 53 Hun. 637, 6 N. Y. Supp. 474; Quincy v. Cheeseman, 4 Sandf. (N. Y.) Ch. 405; Rogers v. Southern Pine Lumber Co., 21 Tex. Civil App. 48, 51 S. W. 26; Pullan v. Cincinnati & C. A. L. R. Co., 4 Biss. 35, Fed. Cas. No. 11461.

4 Warner v. Gouverneur's Ex'rs, 1 Barb. (N. Y.) 36.

5 Brown v. Chase, Walk. Ch. (Mich.) 43.

6 Jackson v. Hooper, (Ala.) 18 So. 254; Vila v. Grand Island, etc., Storage Co., Neb., 110 Am. St. Rep. 400; Laune v. Hauser, 58 Neb. 663, 79 N. W. 555.

7 Cone v. Combs, 18 Fed. 576, 5 McCrary 651; Burlingame v. Parce, 12 Hun (N. Y.) 144; New York Building Loan, etc., Co. v. Begly, 75 App. Div. 308, 78 N. Y. Supp. 169, 71 N. Y. Ann. Cas. 473.

The rental value may be taken as evidence of the value of the property as security. Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588.

An allegation that the value is inadequate, in the absence of some facts indicating the value or of a statement of the value, is a mere conclusion and is insufficient. Locke v. Klunker, 123 Cal. 231, 55 Pac. 993; Title Insurance & Trust Co. v. California Development Co., 164 Cal. 58, 127 Pac. 502; Bank of Woodland v. Stephens, 144 Cal. 659, 79 Pac. 379; Sherman v. Wichner, S. D., 152 N. W. 700.

An affidavit of plaintiff's attorney to the effect that the attorney had been informed by plaintiff that there was extreme doubt as to the adequacy of the security is insufficient. Sickels v. Canary, 8 App. Div. 308, 40 N. Y. Supp. 948, 75 N. Y. St. Rep. 34.

An affidavit of the plaintiff that he knew the value and that the property was meager security was held insufficient, though it contained additional averments to the effect that a recent street assessment of $225 was unpaid, that there was litigation over the property and that the rents were being paid to some other person than defendant by tenants who were in possession. Murphy v. Hoyt, 93 Ill. App. 313.

An averment that the property is insufficient to pay the debt, not denied, was held sufficient. 2 Neb. (unofficial) 523, 89 N. W. 388.

a receivership in addition to the two indispensable grounds, the court may give somewhat less attention to the question of the inadequacy of the security and the rule relating to the proof thereof may be relaxed.[8]

In regard to the second indispensable ground, it is sometimes stated that the rule requires a showing that the mortgagor or the person liable for a deficiency judgment is insolvent. It is apparent, however, that this statement of the rule is made simply in view of the special circumstances of the case, it happening that there is a person liable for a deficiency judgment and that such a judgment might be enforced if he had the means to meet it. On the other hand, the mortgage might stipulate that the mortgagee should look entirely to the security for payment of his debt and that a deficiency judgment should not be rendered against the mortgagor nor any one else. In such a case a showing of the existence of the second indispensable ground is not required.[9] Again it might happen that the person liable for a deficiency judgment is out of the jurisdiction of the court so that a personal money judgment could not be rendered against him. A showing of this fact would establish the existence of this second condition for the appointment.[10] But where there is a person present and liable for a deficiency judgment

[8] Oldham v. First Nat. Bank, 84 N. C. 304; Cortleyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478; Winker v. Magdeburg, 100 Wis. 421, 76 N. W. 332.

In the face of conflicting testimony as to the value of the security the general state of the real estate market may be taken into account. Cohn v. Bartlett, 182 App. Div. 245, 169 N. Y. Supp. 604.

See also Broad, etc., Bank v. Larsen, 88 N. J. Eq. 245, 102 Atl. 265.

[9] Mahon v. Crothers, 28 N. J. Eq. 567; Land Title and Trust Co. v. Kellogg, 73 N. J. Eq. 524, 68 Atl. 80.

[10] Gale v. Carter, 154 Ill. App. 478; Collins v. Gross, 51 Wash. 516, 99 Pac. 573.

In this latter case, evidence tending to show that the defendant had moved out of the jurisdiction was given but was perhaps not very conclusive. However in other respects the case was a strong one. In view of the bearing of a possible liability for a deficiency judgment upon the question of receiverships in foreclosure actions and the bearing

then the rule is satisfied only by a showing of his insolvency by sufficient and proper proof.[11] It need not, however, be proved directly, but may be shown circumstantially, the case, in other respects, being a strong one.[12] The fact that the payment of the debt is guaranteed by a responsible endorser or otherwise does not bar the mortgagee's right to a receiver.[13]

§ 243. Necessity for Showing Conditions, or Grounds, Additional to the Indispensable Grounds.

The question arises as to whether or not, in a foreclosure action, in order to obtain the appointment of a receiver, it is necessary for the plaintiff to show reasons for requesting this equitable relief in addition to the inadequacy of the security and the difficulty of realizing on a deficiency judgment. The general rule, as first stated above,[1] expressly requires that the circumstance that furnishes the ground for the appointment shall have been

of the defendant's insolvency, or irresponsibility, in this connection, the circumstances of this case show that there may be a possibility that the "property" will be "removed" (see second statement of the general rule, supra, § 341), even if it is real property.

11 Myers v. Estell, 48 Misc. 372; Sea Ins. Co. v. Stebbins, 8 Paige (N. Y.) 565; Morris v. Branchaud, 52 Wis. 187, 8 N. W. 883.

Where a receiver was appointed without a showing of insolvency and without taking that question into account as a ground for the appointment and a deficiency sale occurred, a balance of rents in the hands of the receiver was distributed to the mortgagor and not toward payment of the deficiency judgment. Southern Bldg. & Loan Assn. v. Carey, 114 Fed. 288, 52 C. C. A. 174.

A failure to show insolvency defeated the appointment on a foreclosure of a trust deed, even though the defendant denied the existence of the trust. Hamburgh Mfg. Co. v. Edsall, 7 N. J. Eq. 298.

12 Broad, etc., Nat. Bank v. Larsen, 88 N. J. Eq. 245, 102 Atl. 265; Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124.

The value of the mortgaged property is not to be considered in determining this question. Durant v. Crowell, 97 N. C. 367, 2 S. E. 541.

13 Buck v. Stuben, 63 Neb. 273, 88 N. W. 483; Cohn v. Bartlett, 182 App. Div. 245, 169 N. Y. Supp. 604.

1 See, supra, § 341.

caused by some delinquency, or failure of duty, on the part of the defendant. And even as set forth in the second statement there is an implication that such must be the situation.[2] As to the inadequacy of the security, it is evident that such a condition might arise through no fault of the defendant.[3] When the mortgage is executed the valuation of the security is made by the respective parties.[4] It has been said that when the mortgagee takes his security with full knowledge of its value and if he takes an inadequate security it is his own fault.[5] Even if the defendant is insolvent, and though this situation may be ascribed to his own conduct, it does not necessarily follow that his continued possession will result in loss to the mortgagee. He may still be doing his full duty toward his creditor.[6]

Additional equitable grounds would be such conduct on the part of the defendant as would cause or would have a tendency to cause the loss, removal, or injury of the property and they might well be summed up under the general head of waste. Such waste might lie in general carelessness and mismanagement in handling the property; failure to keep up repairs; failure to restore burned improvements, especially if the defendant had received insurance; permitting taxes, interest on prior encumbrances, or even interest on the debt sued on to accumulate, removal of products and appropriating the income to personal uses to the detriment of the mortgagee; similar

2 A general allegation that the defendant would, if left in possession pendente lite, injure the property, is insufficient. Arnold v. Meyer (Tex. Civ. App.), 198 S. W. 602.

3 If the inadequacy of the security is due to a general depreciation in land values it may not warrant the appointment. Horner v. Dey, 61 N. J. Eq. 554, 49 Atl. 154; Barkley v. Reay, 2 Hall 308, 67 Eng. Rep. (Reprint) 127.

4 Norfor v. Busby, 19 Wash. 450, 53 Pac. 715.

5 Conover v. Grover, 31 N. J. Eq. 539; Cortleyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478.

6 Warren v. Pitts et al., 114 Ala. 65, 21 So. 494; Twitty v. Logan, 80 N. C. 69; Rollins v. Henry, 77 N. C. 467.

misappropriation of the rents; or, generally, any fraud toward the mortgagee.[7] Certain acts, having the appearance of waste, may, however, be held not to constitute equitable waste.[8] To constitute equitable waste the acts complained of must be of such a character as to cause or threaten such deterioration in the value of the property as to affect its worth as security for the debt.[9] In some cases it has expressly been held that some showing of waste is necessary to warrant the appointment of a receiver.[10] In many cases, though the decisions may not have been expressly based on that ground, waste was shown.[11]

7 James Everard's Breweries v. Wohlstadter, 177 App. Div. 862, 164 N. Y. Supp. 899.

8 Failure to insure the property where the mortgage does not place that duty on the mortgagor is not equitable waste. Ferguson v. Dickinson (Tex. Civ.), 138 S. W. 221; so, where the mortgage gives the mortgagee the right to mortgage the property and add the costs to the debt, Planters' Oil Mill v. Carter, 140 Ga. 808, 79 S. E. 1120; or where the rates are prohibitive, Eureka Mining, etc., Co. v. Lewiston, etc., Co., 12 Ida. 472, 86 Pac. 49.

9 Union Mutual L. Ins. Co. v. Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90; Title Ins. & Trust Co. v. California Development Co., 164 Cal. 58, 127 Pac. 502; Lawton Mill, etc., Co. v. Farmers, etc., Bank (Okla.), 164 Pac. 670.

10 Warren v. Pitts et al, 114 Ala. 65; 21 So. 494; Dubois v. Bowles, 30 Colo. 44, 69 Pac. 1067; Adair v. Wright, 16 Iowa 385; Paine v. McElroy, 73 Iowa 81, 34 N. W. 615; Squire v. Hewlett, 141 Mass. 597, 6 N. E. 779; National Fire Ins. Co. of Hartford v. Broadbent, 77 Minn. 175, 79 N. W. 676; Burton v. Pepper, 116 Miss. 139, 76 So. 762; Brown v. Erb-Harper-Rignay Co., 48 Mont. 17, 133 Pac. 691; Cortleyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478; Cheever v. Rutland & B. R. Co., 39 Vt. 653; Phoenix Mut. L. Ins. Co. v. Grant, 3 MacArthur (10 D. C.) 220.

11 Grant v. Phoenix Mut. L. Ins. Co., 121 U. S. 105, 30 L. Ed. 905, 7 Sup. Ct. 841; First National Bank of San Francisco et al. v. Detroit Trust Co. et al., 248 Fed. 16; American Nat. Bank v. Northwestern Mut. Life Ins. Co., 89 Fed. 610, 32 C. C. A. 275; Elmira Mechanics' Soc. of New York v. Stanchfield, 160 Fed. 811, 87 C. C. A. 585; Jackson v. Hooper, 107 Ala. 634, 18 So. 254; Davis v. Alton, etc., Ry. Co., 180 Ill. App. 1; Ortengren v. Rice, 104 Ill. App. 428; Gale v. Carter, 154 Ill. App. 478; Harris v. United States Savings, etc., Co., 146 Ind. 265, 45 N. E. 328; Stetson v. Northern, etc., Co., 101 Iowa 435, 70 N. W. 595; New-

It has been said: "The object of a court of equity in appointing a receiver of mortgaged property pending foreclosure is either to preserve the corpus of the estate from deterioration or to sequester the rents and profits to make good an anticipated deficiency."[12] Where the purpose of the receivership is the first one stated in the above quotation, the undoubted rule is that the applicant must show equitable grounds for the appointment, in addition to the two indispensable grounds, to wit, inadequacy of the security, and insolvency of the defendant. We have two interesting instances of this understanding of the rule in cases just cited.[13] But when we come to the ques-

port, etc., Bridge Co. v. Douglass, 12 Bush (Ky.) 673; Woolley v. Holt, 14 Bush (Ky.) 788; Mayfield v. Wright, 107 Ky. 530, 54 S. W. 864; Bailey v. Bailey, 10 Ky. Law Rep. 793, 10 S. W. 660; Collins v. Richart, 14 Bush (Ky.) 621; Donnelly v. Butts, 137 Minn. 1, 162 N. W. 674; Farmers' Nat. Bank v. Backus, 64 Minn. 43, 66 N. W. 5; Marshall, etc., Bank v. Cody et al, 76 Minn. 112, 78 N. W. 978; Lowell v. Doe et al., 44 Minn. 144, 46 N. W. 297; Mahon v. Crothers, 28 N. J. Eq. 567; Brasted v. Sutton, 30 N. J. Eq. 462; Chetwood v. Coffin, 30 N. J. Eq. 450; Cortleyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478; James Everard's Breweries v. Wohlstadter, 177 App. Div. 862, 164 N. Y. Supp. 899; Post v. Dorr, 4 Edw. (N. Y.) Ch. 412; Hollenbeck et al. v. Donnell, 94 N. Y. 342; Hyman v. Kelly, 1 Nev. 179; Meridian Oil Co. v. Randolph, 26 Okla. 634, 110 Pac. 722; Roberts v. Parker, 14 S. D. 323, 85 N. W. 591; Collins v. Gross, 51 Wash. 516, 99 Pac. 573; Dunlap v. Hedges, 35 W. Va. 287, 13 S. E. 656.

12 27 Cyc. 1622—Mortgages.

13 First National Bank of San Francisco et al. v. Detroit Trust Co. et al., 248 Fed. 16.

In the above case the mortgagor was a lumber company and part of the mortgaged property was a large tract of timber land. The company was heavily involved and unable to operate. It was unable even to finance the necessary safeguarding of its property against fire. It was shown that logging operations on the property could be conducted to advantage and that the company could not finance the work. It was shown that logs already down and lying on the ground would rot if not cared for and that the company could not finance this detail of its business. A receiver was appointed and authorized to enter into an extensive logging contract. This contract was upon the same terms and conditions upon which it was stipulated, in the first mortgage, the company might make such a contract. It was held that a third mortgagee could not complain because it had taken its mortgage

tion of sequestering the rents and profits of the mortgaged property through the appointment of a receiver there is a difference of opinion among the authorities and the statement that the main object is to preserve the corpus of the estate from deterioration or sequester the rents and profits in anticipation of a deficiency judgment is not altogether accurate. Of course a receiver placed in general charge of mortgaged property will have the duty of collecting the rents and profits, if there are any. But it is to be also noticed that there is a difference between an order directing a receiver to collect the rents and profits, or appointing one simply to make such collections, and an order determining what shall be done with the money collected.[14] As to the questions, what is the necessary showing to warrant the appointment of a receiver of rents and profits, and what is the proper distribution of the money collected by such a receiver, some courts have expressly stated that there is a conflict among the decisions. The existence of such a conflict is evidenced also by a dissenting opinion in an interesting case from Kentucky.[15] In this case the mortgagor was an insolvent railroad company. A receiver had been appointed to

with a knowledge of the terms of the first mortgage and it was in no worse position than if the contract had been made by the company under that mortgage. It was urged that an earlier decision mitigated against the appointment of the receiver but the court held that, in the case referred to, "the appointment had not been made by virtue of any of the established general principles of equity, which when alleged to exist, would authorize a court of equity to appoint a receiver." It is apparent from the nature of the argument of the opinion that the court would not have justified the appointment in the absence of a showing of equitable waste.

In Meridian Oil Company v. Randolph, 26 Okl. 634, 110 Pac. 722, the debt was a large one and the mortgagor, the oil company, had been producing and disposing of oil without using the income to pay the debt, contrary to a stipulation in the mortgage. It is evident that the order appointing the receiver was based upon the showing of inequitable waste.

14 Garretson Inv. Co. v. Arndt, 144 Cal. 64, 77 Pac. 770.

15 Douglass v. Cline et al., 12 Bush (Ky.) 608.

operate the road. There were outstanding claims for wages of mechanics and laborers for services rendered before the appointment. The majority of the court ruled that these claims should be paid out of money in the hands of the receiver in preference to the claim of the mortgage. In the majority opinion it is said: "They [mortgagees] have a perfect right in equity to have the property protected while they are prosecuting their actions to enforce their mortgages and against the general unsecured creditors of the mortgagors they may possibly have the equitable right to have the fund raised by the receiver held for their security. But this last, not being a legal or contract right, the chancellor is not bound to enforce it in any and all contingencies. He can in proper cases attach to its enjoyment reasonable conditions and may do so either by the order appointing the receiver or by an order made subsequent to the appointment." A dissenting opinion was filed by Judge Cofer in which he observed: "I have been unable to find a single case, and do not believe one can be found, except in the State of New Jersey, where the equitable doctrine respecting receivers in aid of junior mortgagees never obtained, in which an equitable mortgagee has been refused a receiver when he was able to show that the mortgaged property was probably an insufficient security and that the mortgagor was insolvent;" and, "the sole object of appointing a receiver is to intercept the rents and profits and apply them on the debt."

In all cases it is held that the only security granted by the mortgage is the corpus of the property. As to the rents and profits there are three lines of cases: (1) cases in which it is held that the mortgagee can not secure, through a receiver, even an equitable lien upon the rents and profits, which, as incidents of the ownership and right of possession, are held to belong to the mortgagor, or his grantee, until the ownership is

changed as a result of the foreclosure; (2) cases in which it is held that, by showing equitable waste, the mortgagee, through a receiver, may acquire an equitable lien upon the rents and profits, but only for the purpose of restoring the waste that had been committed by the mortgagor, who had been collecting the rents, or preserving the property pending the suit; the balance, if any, remaining in the hands of the receiver to belong to the mortgagor, or his grantee, and not to apply toward a deficiency; (3) cases holding that, without showing equitable waste, the mortgagee could, through a receiver, acquire an equitable lien on the rents and profits and have them applied toward his debt.[16]

[16] It is to be observed that in most of the cases the courts were operating under a statute to the effect that "a mortgage on real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale" (Mills' Ann. Code Colo. 261). It is universally held, however, that such a statute simply means that the Common Law view of a mortgage is abolished and a mortgage is to be treated simply as an equitable mortgage; and all the courts profess to be deciding in accordance with what they deemed to be the rights of an equitable mortgage as developed in the practice of courts of equity. It is to be observed also that Federal courts probably considered themselves to be bound by what they considered to be the interpretation of state statutes made by state courts.

Instances of the first line of cases are the following: Guy v. Ide, 6 Cal. 99, 65 Am. Dec. 490; Wagar v. Stone, 36 Mich. 364; "The legislature, in depriving him of the means of enforcing possession, intended thereby also to cut off and deprive him of all rights which he could have acquired in case he obtained possession before acquiring an absolute title"; and, "We do not overlook the fact that a contrary doctrine has been held elsewhere under a similar statute."

Union Mut. L. Ins. Co. v. Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90—following interpretation of Mich. statute by Mich. courts.

Couper v. Shirley, 75 Fed. 168, 21 C. C. A. 288—following state interpretation of state statute, and later distinguished where application for receiver was made on grounds of equitable waste. (See note 12, supra, First National Bank of San Francisco et al. v. Detroit Trust Co. et al, 248 Fed. 16.)

Norfor v. Busby, 19 Wash. 450, 53 Pac. 715—calls attention to conflict of opinion on the question.

Instances of the second line of

§ 244. Effect of Statutory Provisions on the Subject.

There are in most, if not all, of the states statutes relating to the matter both of appointing receivers generally

cases are the following: American Nat. Bank. v. Northwestern Mutual, etc., Co., 89 Fed. 610, 32 C. C. A. 275.

Elmira. Mechanics' Soc. v. Stanchfield, 160 Fed. 811, 87 C. C. A. 585—both of the above following state interpretation of state statute.

Marshall & Ilsley Bank v. Cody, 76 Minn. 112, 78 N. W. 978; Farmers' Nat. Bank v. Backus, 64 Minn. 43, 66 N. W. 5; Donnelly v. Butts, 137 Minn. 1, 162 N. W. 674; Lowell v. Doe et al., 44 Minn. 144, 46 N. W. 297—appeal from an order appointing a receiver; question as to whether showing of equitable waste was necessary, not decided because such showing was made; question of distribution of rents not decided because not yet raised. Philadelphia Mtge. & Trust Co. v. Oyler, 61 Neb. 702, 85 N. W. 899; Gerber v. Heath et al., 92 Wash. 519, 159 Pac. 691. Action by second mortgagee; grantee of mortgagor, who had not assumed the mortgage in possession; showing of delinquent taxes and unpaid interest; receiver appointed by consent; thereafter first mortgagee intervened; first mortgagee purchased on sale for enough to cover his claim and taxes; order granting funds in hands of receiver to second mortgagee reversed on ground that they belonged to grantee of mortgagor.

Instances of the third line of cases are the following: Warner v. Gouverneur's Executors, 1 Barb. (N. Y.) 36. The decision is based upon what the court considered to have become the established rule in the courts of equity of New York State, although it was unable to see that the rule was logical, considering that it had been based upon a supposed analogy between the rights of an equitable mortgagee and those of a mortgagee holding a Common Law mortgage.

Hollenbeck et al. v. Donnell, 94 N. Y. 342: Rule is not based upon the mortgagee's right to possession, as under a Common Law mortgage, but upon an analogy between the rights of an equitable mortgagee and those of a vendee of real property in an action for specific performance. The mortgagee had a right to the rents and profits on default and a court of equity, considering that to be done which ought to be done could appoint a receiver and make his right to the rents date back to the commencement of the action. It was remarked, in the opinion, that the case was a strong one on account of the showing of equitable waste. Lofsky v. Maujer, 3 Sandf. Ch. (N. Y.) 69. Whole object of the receivership is to divert unpaid rents from the mortgagor to the mortgagee, the latter, as against the former, having a legal right to them after the mortgage debt falls due. Post v. Dorr, 4 Edw. Ch. (N. Y.) 412. Vice Chancellor McCann doubted the validity of the rule but inasmuch as the assignee in bankruptcy of the mortgagor was a party at the time of the appoint-

and of appointing receivers in foreclosure suits in particular. It would be impracticable in this work, intended for general use in the different states, to attempt to discuss in detail the various statutory provisions as to receivers.[1] Some of these provisions, together with their effect upon the question as to the showing necessary to warrant the appointment of a receiver in a foreclosure action, are disclosed in the decisions and to that extent we will here discuss the matter.

A statute commonly found is to the effect that a mortgage on real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale. This statute has generally been held to be merely declaratory of the fact that, in the jurisdiction in which the statute controls, the Common Law view of a mortgage has been abolished and that the rights of a mortgage are those only of an equitable mortgagee.[2]

A statute, whether referring to receivers generally or to foreclosure cases in particular, to the effect that a receiver may be appointed where it appears that there is danger that the property may be lost, removed, or materially injured, has been held to be merely declaratory of the general rule.[3]

ment of the receiver and had made no objection the assignee was bound by the order appointing and could not complain of a distribution of the rents to the mortgagee. Hyman v. Kelly, 1 Nev. 179; Myers v. Estell, 48 Miss. 372.

Perhaps there is a fourth line of cases holding that, on a showing of equitable waste, a receiver may be appointed to preserve the corpus of the property and "hold the rents and profits for the satisfaction of the debt." See Grant v. Phoenix L. Ins. Co., 121 U. S. 105, 30 L. Ed. 905, 7 Sup. Ct. 841; Kountze v. Omaha Hotel Co., 107 U. S. 378, 27 L. Ed. 609, 2 Sup. Ct. 911.

1 See § 21.

2 See § 243, note 15 thereunder, supra. See, also: Fifth National Bank v. Pierce, 117 Mich. 376, 75 N. W. 1058; Collins v. Gross, 51 Wash. 516, 99 Pac. 573.

3 Douglass v. Cline, 12 Bush (Ky.) 608. Where such has been the holding we have felt at liberty

A receiver may be appointed, either in the absence of a special statute, or in the presence of one, such statute being held not to be exclusive, if there is a statute authorizing the appointment of a receiver "in all cases where receivers have heretofore been appointed by the usages of the court of equity."[4]

A statute, frequently found, is to the effect that a receiver may be appointed where it appears that the conditions of the mortgage have not been performed and that the property is probably inadequate security. Such a statute has been held to dispense with the necessity for showing the insolvency of the mortgagor and equitable waste in order to warrant the appointment of a receiver on foreclosure and also to give the mortgagee an equitable lien upon the rents and profits after default even though he might not otherwise be entitled to them.[5] Such a statute, however, is not mandatory upon the court as to the appointment.[6]

As might be expected, interesting instances of statutory construction appear in the decisions covering this matter.[7]

to use the decisions in support of propositions laid down in preceding sections though they were devoted to discussion of the rules laid down by courts of equity operating under their inherent powers. Ferguson v. Dickinson (Tex. Civ. App.), 138 S. W. 221.

4 Hollenbeck v. Donnell, 94 N. Y. 342; De Barrera v. Frost, 33 Tex. Civ. App. 580, 77 S. W. 637.

5 Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414; La Societe Francaise, etc., v. Selheimer, 57 Cal. 623; Leader Pub. Co. et al. v. Grant Trust & Savings Co., 182 Ind. 651, 108 N. E. 121; Schultz v. Stiner et al., 97 Kan. 555, 155 Pac. 1073; Havana State Bank v. Dikeman et al., 98 Kan. 222, 157 Pac. 1177; Waldron v. First Nat. Bank, 60 Neb. 245, 82 N. W. 856; Morris v. Linton, 62 Neb. 731, 87 N. W. 958; Roberts v. Parker, 14 S. D. 323, 85 N. W. 591; Sherman v. Wichner, 35 S. D. 436, 152 N. W. 700.

6 Douglass v. Cline, 12 Bush (Ky.) 608. A dissenting opinion in this case holds that the word "may" in the statute means "must," or "shall." See § 243, supra. Woolley v. Holt, 77 Ky. (14 Bush) 788.

7 Morris v. Linton, 62 Neb. 731, 87 N. W. 958; Roberts v. Parker, 14 S. D. 323, 85 N. W. 591. In Collins v. Gross, 51 Wash. 516, 99 Pac. 573, it was held that, although, as had been held in Norfor

§ 245. Effect of Stipulations in the Mortgage.

It is a common practice to insert in mortgages stipulations designed to affect, either directly or indirectly, the right of the mortgagee to have a receiver on foreclosure. These stipulations are so varied in form and language that it is impossible to give any general description of them or to lay down, under the decisions, any general rule as to their effect. All that can be done is to give a running comment on some of the rulings that appear in the reports, so that, in any particular case, the practitioner, having in view a careful analysis of the wording of the stipulation, may find, not a precedent, but an impression as to the point of view from which a court would examine it.[1] Declarative statements in the text are not intended to be statements of a general rule but only of the purport of the decisions in the cases cited.

A stipulation to the effect that, upon default, the mortgagee may enter and take possession of the mortgaged property, gives him an action at law to recover possession, as under a Common Law mortgage, and he can not have a receiver on foreclosure.[2]

A stipulation that the mortgagor shall remain in possession until foreclosure bars the right to a receiver of rents and profits pendente lite.[3]

v. Busby, 19 Wash. 450, 53 Pac. 715 (see § 243, supra) an earlier statute had been repealed as to that portion of it that permitted the appointment of a receiver on the grounds that there had been default and the security was inadequate by a later statute declaratory of the fact that a mortgage was to be considered simply an equitable mortgage (see above, in this section), it had not been so repealed as to that portion which permitted a receiver to be appointed on a showing that the property was in danger of being lost, removed, or injured.

1 Lyng v. Marcus, 118 N. Y. Supp. 1056. See, also, Douglass v. Cline, 12 Bush (Ky.) 608.

2 Eastern Trust & Banking Co. v. American Ice Co., 14 App. (D. C.) 304.

3 Chadbourn v. Henderson, 2 Baxter (Tenn.) 460. See, also, Josey v. Smith (S. C.), 95 S. E. 133.

A stipulation in a mortgage that on default, a receiver or a receiver of rents and profits may be appointed may be contrary to the public policy of the state as shown by its statute, and therefore void.[4]

Neither a direct pledge of the rents and profits, nor a stipulation for a receiver of rents and profits on default, is binding upon a court so as to compel the appointment of a receiver under it alone.[5] Such a stipulation may however add force to a showing made on other grounds.[6] It

4 Couper v. Shirley, 75 Fed. 168, 21 C. C. A. 288; Thomson v. Shirley, 69 Fed. 484; Baker v. Varney, 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100. Such a stipulation is void because it seeks to give jurisdiction where none is given by law where there is a state statute stating the circumstances under which a court shall have power to appoint a receiver. See Hazeltine v. Granger, 44 Mich. 503, 7 N. W. 74.

Elgin City Banking Co. v. Hancock, 183 Ill. App. 23, 24; Schwarz v. Alexander, 178 App. Div. 641, 165 N. Y. Supp. 491.

5 Garretson Inv. Co. v. Arndt, 144 Cal. 64, 77 Pac. 770; Bank of Woodland v. Stephens, 144 Cal. 659, 79 Pac. 379.

Such a provision does not dispense with the necessity for verification of the moving papers. Daley v. Nelson, 119 Ill. App. 627.

Stipulation will not be enforced when it appears that the security is ample. Ætna Life Ins. Co. v. Broeker, 166 Ind. 576, 77 N. E. 1092.

Application can not be made upon the stipulation alone but only on a proper showing independent of the stipulation. Union Trust Co. v. Charlotte, etc., Co., 152 Mich. 568, 116 N. W. 379; Jarmulowsky v. Rosenbloom, 125 App. Div. 542, 109 N. Y. Supp. 968; Jarvis v. McQuaide, 24 Misc. Rep. 17, 53 N. Y. Supp. 97.

Stipulation not enforced when it is shown that there is probably ample security and responsible persons liable on deficiency. Eidlitz v. Lancaster, 40 App. Div. 446, 59 N. Y. Supp. 54. See, also, United States Life Ins. Co. v. Ettinger, 32 Misc. Rep. 378, 66 N. Y. Supp. 1.

Appointment is within the discretion of the court even in presence of the stipulation. New York Bldg., etc., Co. v. Begly, 75 App. Div. 308, 78 N. Y. Supp. 169; Brick v. Hornbeck, 19 Misc. Rep. 218, 43 N. Y. Supp. 301.

6 Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76, 64 N. E. 1085; Townsend v. Wilson, 155 Ill. App. 303; Leader Pub. Co. v. Grant Trust, etc., Co., 182 Ind. 651, 108 N. E. 121; Stetson v. Northern Inv. Co., 101 Iowa 435, 70 N. W. 595; Baier v. Kelley, 55 Misc. Rep. 368, 106 N. Y. Supp. 552; Fletcher v. Krupp, 35 App. Div. 586, 55 N. Y. Supp. 146; Browning v. Sire, 56 App. Div. 399, 67 N. Y. Supp. 798.

may even dispense with a showing of some of the grounds usually considered necessary to the making of the appointment.[7]

§ 246. Discretion of the Court.

It is not important to explain or try to resolve the apparent conflicts of opinion that we have noticed in the foregoing sections. There force is materially lessened when we consider the rule relating to the discretion to be exercised by courts of equity in applying this remedy in foreclosure suits. The rules concerning the discretion by which the power and conduct of equity courts in the creation of receiverships generally have been hedged about have been fully set forth in earlier portions of this text.[1] Nothing is necessary here but to say that what is there said in regard to the matter applies with equal force to the use of this remedy in litigation concerning mortgaged property, not only in foreclosure suits brought by first mortgagees, but in any sort of litigation affecting mortgaged property, as in any other kind of litigation.[2] As was said in a Kentucky case,[3] "It [the statute] does not deprive them [courts of equity] of their ancient and indisputable right to consider the circumstances of the particular case in hand and upon such consideration to grant

7 American Bridge Co. v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144; Ortengren v. Rice, 104 Ill. App. 428; Pringle v. James, 109 Ill. App. 100 (Insolvency); West v. Adams, 106 Ill. App. 114 (Insolvency); Lechner v. Green, 104 Ill. App. 442; Ball v. Marske, 202 Ill. 31, 66 N. E. 845; McLester v. Rose, 104 Ill. App. 433; Prussing v. Lancaster, 234 Ill. 462, 84 N. E. 1062; Handman v. Volk, 30 Ky. Law Rep. 818, 99 S. W. 660 (Inadequacy); Land Title & Trust Co. v. Kellogg, 73 N. J. Eq. 524, 68 Atl. 80; Butler v. Frazer, 57 N. Y. Supp. 900; Sage v. Mendelson, 89 App. Div. 137, 85 N. Y. Supp. 1008; Pizer v. Herzig, 121 App. Div. 609, 106 N. Y. Supp. 370; Whitehead v. Wooten, 43 Miss. 523.

1 See, supra, § 10.

2 First Nat. Bank of San Francisco et al. v. Detroit Trust Co. et al., 248 Fed. 16; Ridgely v. Abbott Quicksilver Mining Co., 16 Cal. App. 773, 117 Pac. 1036; New York Bldg., etc., Co. v. Begly, 75 App. Div. 308, 78 N. Y. Supp. 169, 11 N. Y. Ann. Cas. 473.

3 Douglass v. Cline, 12 Bush (Ky.) 608.

or refuse this extraordinary relief as it may or may not be unconscientious for the mortgagee to ask it."

§ 247. Property Affected by the Receivership.

The general rule of course is that the receivership can extend only to the property covered by the mortgage.[1] But it might happen that the mortgaged property is so situated with reference to other property that the receiver can not effectively take possession of the former without also controlling the latter. In such a case the receiver's possession is extended over the entirety and the court makes proper provision for protecting the rights of the owners of the property not covered by the mortgage.[2]

In the application of the general principle important questions of detail interpretation necessarily arise.

Operating receivers may be appointed, especially if stipulated for in the mortgage, to carry on the business of the mortgagor conducted on the mortgaged property; and the proceeds of the receiver's operations may be considered as covered by the mortgage.[3]

1 Noyes v. Rich, 52 Me. 115; Central Trust Co. v. Worcester Cycle Mfg. Co., 114 Fed. 659; Staples v. May, 87 Cal. 178, 25 Pac. 316.

Wormser v. Merchants' Nat. Bank, 49 Ark. 117, 4 S. W. 198.

2 Hotel property, containing furniture not covered by the mortgage and not owned by the mortgagor. The receiver was ordered to pay rent for the furniture. Sherman v. Wichner, 35 S. D. 436, 152 N. W. 700, 701.

Money coming into the hands of an operating receiver and not covered by the mortgage was ordered to be paid to a judgment creditor. California Title Ins. & T. Co. v. Consolidated Piedmont, etc., Co., 117 Cal. 237, 49 Pac. 1.

3 First National Bank of San Francisco et al. v. Detroit Trust Co., 248 Fed. 16 and cases cited; Lowell v. Doe, 44 Minn. 144, 46 N. W. 297; Truman v. Redgrave, L. R., 18 Ch. Div. 547.

Claims for unpaid current expenses incurred prior to the foreclosure may be paid from funds arising from the receiver's operations, especially if the claims remained unpaid because interest on the mortgage and the cost of improvements for the benefit of the mortgagee had been paid. See, also, Merrell v. Pemberton, 62 Ga. 29. A business will not be begun if steps thereto had not been taken prior to foreclosure. See,

We have seen that there is a difference of opinion among authorities as to whether or not the rents and profits from mortgaged property may be counted as covered by the mortgage so as to be placed under the control of a receiver.[4] But even where the rents are covered by the mortgage, either because the mortgage pledges the rents, or because the mortgage stipulates that the mortgagee may have the rents after default, or because the doctrine of the jurisdiction is that the rents equitably belong to the mortgagee after default, the mortgagee can secure the rents, the mortgagor being in possession, only through the medium of a receiver, and then he can secure only such rents as accrue and remain unpaid after the receiver takes possession, having been appointed in proper proceedings and on proper showing.[5] If no conflicting equities intervene, the mortgagee's right to the rents may date back to the commencement of the action without reference to the time of the appointment of the receiver.[6] The receiver's rights to the rents may be defeated by a valid assignment of them made prior to his taking proper steps to secure them.[7] The defendant mortgagor is not prejudiced by the fact that the receiver-

also, Lincoln Trust Co. v. Missouri Water, Light & Traction Co., 151 Mo. App. 322, 131 S. W. 889.

4 See, supra, § 243, and note 15 thereunder. See, also, Moncrieff v. Hare, 38 Colo. 221, 7 L. R. A. (N. S.) 1001, 87 Pac. 1082; Title Ins. & Trust Co. v. California Development Co., 164 Cal. 58, 127 Pac. 502; Ortengren v. Rice, 104 Ill. App. 428; Continental Ins. Co. v. Reeve, 149 App. Div. 835, 134 N. Y. Supp. 78; Ray v. Henderson, 110 Ill. App. 542; affirmed 210 Ill. 305, 71 N. E. 579.

5 Southern Bldg. & Loan Assoc. v. Carey, 114 Fed. 288, 52 C. C. A. 174; Hook v. Bosworth, 64 Fed. 443, 12 C. C. A. 208; Argall v. Pitts et al., 78 N. Y. 239; Lofsky v. Maujer, 3 Sandf. Ch. (N. Y.) 69, 76; Mutual Life Ins. Co. v. Belknap, 19 Abb. N. C. (N. Y.) 345; Jermain v. Hendricks, 100 N. Y. 279, 3 N. E. 193; Rosenthal v. Slutnik, 175 App. Div. 970, 162 N. Y. Supp. 143.

6 Havana State Bank v. Dikeman, 98 Kan. 222, 157 Pac. 1177; Douglass v. Cline, 12 Bush (Ky.) 608.

7 Bank of Woodland v. Heron, 120 Cal. 614, 52 Pac. 1006.

ship is made to include property for which rent has been paid in advance.[8]

If the mortgage does not expressly cover rents, issues, and profits, the receivership does not extend to crops harvested from the mortgaged property before foreclosure.[9] As against the mortgagor, under a mortgage covering the rents and profits, the receivership covers a crop growing on the land at the time of the appointment;[10] but, as against a tenant without actual knowledge of the stipulation, the receivership extended only to so much of the crop as covered the rent, where the mortgage did not, as to an accompanying affidavit and as to recordation, conform to the statute covering crop mortgages.[11]

Except as special statutes covering the matter may otherwise provide, a debtor's homestead may be mortgaged, and, if mortgaged, will be governed by the same rules in regard to a receivership on foreclosure as govern in the case of any other property; though, in reference to the homestead, courts, because of the unusual hardship caused by a receivership over property so situated, exact a much stronger showing of the necessity for the receivership than in the case of other property.[12]

8 Thompson v. Hemenway, 218 Ill. 46, 109 Am. St. Rep. 239, 75 N. E. 791; Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 68 L. R. A. 146, 101 N. W. 417.

9 Locke v. Klunker, 123 Cal. 231, 55 Pac. 993.

10 Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414.

11 Scott v. Hotchkiss, 115 Cal. 89, 47 Pac. 45. See White v. Griggs, 54 Iowa 650, 7 N. W. 125; Myton v. Davenport, 51 Iowa 583, 2 N. W. 402.

12 Cone v. Combs, 18 Fed. 576, 5 McCrary 651; Callanan v. Shaw, 19 Iowa 183; Lowell v. Doe et al, 44 Minn. 144, 46 N. W. 297; Marshall etc. Bank v. Cody, 75 Minn. 241, 77 N. W. 831; Chadron Loan etc. Assoc. v. Smith, 58 Neb. 469, 76 Am. St. Rep. 108, 78 N. W. 938; Nash v. Meggett, 89 Wis. 486, 61 N. W. 283; Wisconsin Nat. Loan etc. Assn. v. Pride, 136 Wis. 102, 116 N. W. 637.

§ 248. Persons Other Than Mortgagor, Affected by Receivership.

A foreclosure suit, instituted for the purpose of collecting the mortgaged debt, is of course directed primarily against the mortgagor and any other person who may be liable for the debt. A variety of circumstances arise, however, because of which other persons, who are not concerned in any way with the debt, are interested in or affected by the receivership. The rights of junior mortgagees and other creditors of the mortgagor, who may or may not have liens upon the mortgaged property, will be discussed in later sections of this chapter. We are here concerned only with persons not so situated with reference to the property.[1] Such persons are, generally, either in possession of the property either by themselves or their tenants, or have a claim upon the rents by assignment or otherwise.

A person in possession of real property can not be disturbed in his possession unless he is made a party to the action or proceeding. If the person in possession of mortgaged property is a tenant of the mortgagor he can not be disturbed in his possession by a receivership created on foreclosure unless he is made a party and then he may simply be ordered to attorn to the receiver unless it is made to appear that his continued possession is liable to be detrimental to the property as security for the debt.[2]

1 A mortgagor who has sold the property has not an interest in the question of a receivership that will entitle him to resist the appointment. Wall Street Fire Ins. Co. v. Loud, 20 How. Pr. (N. Y.) 95. After the appointment of a receiver, the plaintiff may dismiss parties not indispensable or not interested in the matter of the receivership. Grove v. Grove, 93 Fed. 865. See, also, Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860; Harbottle v. Central Coal & Coke Co. (Ark.), 203 S. W. 1044.

2 Burton v. Pepper, 116 Miss. 139, 76 So. 762; Huston v. Canfield, 57 Neb. 345, 77 N. W. 763; Sea Ins. Co. v. Stebbins, 8 Paige (N. Y.) 565; Shotwell v. Smith, 3 Edw's. Ch. (N. Y.) 588, 589; American Mtg. Co. v. Sire, 103 App. Div. 396, 92 N. Y. Supp. 1082.

Where a mortgagee is not entitled to the rents until after the appointment of a receiver,[3] a tenant who has paid rent in advance can not be dispossessed.[4] A person who, having knowledge of the mortgage and of the inability of the mortgagee to pay, takes possession of the property may be compelled to pay rent to the receiver.[5] The fact that the receiver could have an action at law against the tenant for the rents is not a sufficient reason for denying the appointment.[6] A mortgage which in express terms pledges crops growing on the premises as part of the security will entitle the receiver to so much of the crops as covers the rent, but not to any more if it is not executed with the formalities required by statutes governing crop mortgages.[7] After a receiver has been appointed the mortgagor has no authority to accept a surrender, nor to vary the terms of a lease, nor to make a new one.[8]

If the person in possession is one who acquired possession before the filing of the notice of his pendens and is claiming adversely to the mortgagor he must be made a party before a receiver can be appointed and he can not be dispossessed unless it is shown that he could not be made to respond to a claim for the rents if it should be decided that the receiver was entitled to them.[9]

Until the mortgagee has secured a claim to the rents and profits and crops, either by contract right under the mortgage or by equitable right through a receivership, the mortgagor is at liberty to assign or sell these prop-

3 Rhinelander v. Richards, 184 App. Div. 67, 171 N. Y. Supp. 436.

4 Lawrence v. Conlon, 26 Misc. Rep. 44, 56 N. Y. Supp. 345; Moll v. McKeon, 35 Misc. Rep. 551, 71 N. Y. Supp. 1127; Derby v. Brandt, 99 App. Div. 257, 90 N. Y. Supp. 980; Fletcher v. McKeon, 71 App. Div. 278, 75 N. Y. Supp. 817.

5 Mutual Life Ins. Co. v. Spicer, 12 Hun (N. Y.) 117; Public Bank of New York v. London, 159 App. Div. 484, 144 N. Y. Supp. 561.

6 De Barrera v. Frost, 33 Tex. Civil App. 580, 77 S. W. 637.

7 Scott v. Hotchkiss, 115 Cal. 89, 47 Pac. 45.

8 Nealis v. Bussing, 9 Daly (N. Y.) 305.

9 Warren v. Pitts, 114 Ala. 65, 21 So. 494; Webber v. Ahearn, 155 App. Div. 892, 140 N. Y. Supp. 12.

erties to a third party. Such assignments and sales are governed by the same rules of law and equity as govern similar transactions generally. They may be made, however, under such circumstances concerning, on the part of the assignee or vendee, knowledge of the mortgage, or of a default, or of a suit pending, that they will not defeat the claim of the receiver to them.[10] A mere judgment creditor of the mortgagor is not entitled to complain of an order directing the receiver of rents and profits on foreclosure to apply the rents toward payment of taxes.[11]

§ 249. Time for Applying and Duration of Receivership.

An application for the appointment of a receiver may be made at any time before the sale on foreclosure or final decree of confirmation. If a receiver is appointed his power, unless sooner terminated,[1] will continue until such sale or decree; and, so far as his right to the rents and profits is concerned, it may, with due regard to any intervening equities and regardless of the time of the application or appointment, be made to date from the commencement of the action.[2]

Usually the mortgagee's interest in and lien upon the property ceases upon the sale and confirmation decree and a receiver appointed on behalf of the mortgagee pending foreclosure should at that time be discharged.[3] Ordi-

10 Strain v. Palmer, 159 Fed. 628, 86 C. C. A. 618; Elmira Mechanics' Soc. of New York v. Stanchfield, 160 Fed. 811, 87 C. C. A. 585; Anderson v. Riddle, 10 Wyo. 277, 68 Pac. 829.

Where, on foreclosure of a mortgage, a receiver has been appointed to take charge of the property, and there has been no accounting or settlement with such receiver, whether the mortgagor or other person is entitled to the rents and profits can not be determined in a collateral action, in which all the parties interested are not before the court. Esch v. White, 82 Minn. 462, 85 N. W. 238, rehearing denied 85 N. W. 718.

11 Elliott v. Magnus, 74 Ill. App. 436.

1 Balfour-Guthrie Inv. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370.

2 Schultz v. Stiner et al., 97 Kan. 555, 155 Pac. 1073; Havana State Bank v. Dikeman, 98 Kan. 222, 157 Pac. 1177.

3 Howard v. Tourbier, 98 Kan.

narily a receiver on behalf of the mortgagee as such will not be appointed pending the period of redemption where under the statute the debtor is entitled to the possession during that period.[4] There can be no purpose for a receivership on behalf of the mortgagee as such during such period except to collect the rents and profits and apply them toward any deficiency judgment that may have been entered in his favor; but if such a judgment has been entered and the mortgagee has a right, contractual or statutory, to the rents and profits, he may, on a proper showing, have a receiver appointed to preserve his rights.[5] Such a receiver will not be appointed if the property is in possession of a tenant who has paid rent

624, 160 Pac. 1144; Elgin City Banking Co. v. Hancock, 183 Ill. App. 23.

Where the full claim of the mortgagee was realized on foreclosure, and the property was bid in by the mortgagee under an agreement between the latter and the mortgagor, by which the mortgagor, unless the property should be redeemed, was to pay the interest and costs, and remain liable for the principal with interest, does not entitle the mortgagor, as against the owner of the equity of redemption, who is not a party to the agreement, to the continuance of the receiver, in order to raise money out of the rents to pay plaintiff, who would not have bid so much had it not been for the mortgagor's agreement. Judgment (1898) 78 Ill. App. 223, affirmed; Bogardus v. Moses, 181 Ill. 554, 54 N. E. 984.

Where the full claim of the mortgagee was realized from a foreclosure sale, the receiver need not be continued to pay a tax which the owner of the equity of redemption was not legally bound to pay until the period for redemption expired, though he could have paid it before. Judgment (1898) 78 Ill. App. 223; affirmed, Bogardus v. Moses, 181 Ill. 554, 54 N. E. 984.

4 West v. Conant, 100 Cal. 231, 34 Pac. 705; Sheeks v. Klotz, 84 Ind. 471; White v. Griggs, 54 Iowa 650, 7 N. W. 125.

5 Davis v. Newcomb, 72 Ind. 413; Ruprecht v. Muhlke, 225 Ill. 188, 80 N. E. 106; Fountain v. Walther, 66 Ill. App. 529; Ball v. Marske, 100 Ill. App. 389; affirmed, 202 Ill. 31, 66 N. E. 845; Hubbell v. Avenue Inv. Co., 97 Iowa 135, 66 N. W. 85.

A transferee of the equity of redemption who expressly agreed to pay all incumbrances can not object to the appointment of a receiver to collect rents during the redemption period, although no deficiency decree was rendered against the transferee, when he and the mortgagor are insolvent. Cowell v. Gnatzig, 178 Ill. App. 482.

in advance for the entire period.[6] Such a receiver is entitled only to the rents that accrue after his appointment.[7] Where, by statute, the rents and profits pending redemption belong to the owner of the equity of redemption, any surplus of rents remaining in the hands of a receiver will be distributed to such owner notwithstanding a stipulation in the mortgage to the contrary.[8] A receiver pending redemption is sometimes appointed in aid of a purchaser on foreclosure; but, if the right to such a receiver is based upon a statute, he will be appointed only on a showing and for a purpose in compliance with the statute.[9] A purchaser on foreclosure, who is entitled to possession and is compelled to sue in ejectment, may, on a proper showing, have a receiver appointed in aid of his suit.[10]

When an appeal is taken from an order confirming a sale on foreclosure, the mortgagee may, on a proper showing, have a receiver appointed pending the appeal.[11]

§ 250. Duties, Powers, and Liabilities of the Receiver.

The rules that apply generally to receivers with reference to their duties, powers, and liabilities apply to receivers appointed in foreclosure actions and but little change in the terminology of the general rules is necessary to make their application clear in this particular instance.[1]

The receiver derives his power, primarily, from the court, and his official action, duties, and responsibilities

6 Swan v. Mitchell, 82 Iowa 307, 47 N. W. 1042.

7 Rider v. Bagley, 84 N. Y. 461.

8 Elgin City Banking Co. v. Hancock, 183 Ill. App. 23, 24; Schaeppi v. Bartholomae, 217 Ill. 105, 75 N. E. 447, 1 L. R. A. (N. S.) 1079.

9 Hill v. Taylor, 22 Cal. 191; Howard v. Tourbier, 98 Kan. 624, 160 Pac. 1144.

10 American Freehold Land Mortgage Co. v. Turner, 95 Ala. 272, 11 So. 211.

11 Buck v. Stuben, 63 Neb. 273, 88 N. W. 483; Philadelphia Mortgage & T. Co. v. Goos, 47 Neb. 804, 66 N. W. 843; Sanford v. Anderson, 69 Neb. 249, 95 N. W. 632. See Adair v. Wright, 16 Iowa 385.

1 See §§ 41 et seq., supra.

are measured by the scope of the order which, after his qualification, constitutes him receiver, and such supplementary orders and directions as he may subsequently from time to time receive in the due administration of the estate or matters in controversy. His discretionary powers are limited, as a rule, to those acts which are incident to the scope of authority given to him. He is an officer of the court and not the agent of any party to the action.[2] Such orders of the court are not open to collateral attack unless they are absolutely void.[3] They are binding upon the parties at whose instance they are

[2] See §§ 41 and 59, supra.

Because a receiver appointed in mortgage foreclosure proceedings is the officer of the court, and not the agent of the mortgagee, the latter is not liable for his misapplication of funds received. Robinson v. Arkansas Loan & Trust Co., 74 Ark. 292, 85 S. W. 413.

If a mortgage creates a charge on the rents of the premises pledged, and provides that a receiver, in case of foreclosure proceedings, may be appointed and out of rent funds in his hands pay taxes, he has a right to do so. Boyd v. Magill, 100 Ill. App. 316.

A foreclosure action was dismissed on a stipulation entered into between plaintiff and defendant, to the effect that the action should be dismissed, and that the r e c e i v e r theretofore appointed should continue to collect the rents and pay all "accrued" taxes. Held, that the term "accrued" was equivalent to "to become due and payable," and it was proper for the receiver to pay the taxes on the land which accrued subsequent to the making of the stipulation, as well as those which had accrued prior thereto. Moyer v. Badger Lumber Co., 10 Kan. App. 142, 62 Pac. 434.

Where a receiver made repairs at the request of defendant, with knowledge that the rents and profits were insufficient to pay therefor, and before sufficient funds had been collected the proceedings were dismissed, defendant was not liable to the receiver for the deficiency. Cohen v. Feuerstein, 80 Misc. Rep. 398, 141 N. Y. Supp. 267.

Since the receiver is an officer of the trial court, the compensation of a receiver as costs on appeal, must be allowed by the trial court and not by the Supreme Court. McKenzie v. Coslett, 28 Nev. 220, 80 Pac. 1070.

In the absence of proof to the contrary, it can not be assumed that an order appointing a receiver in foreclosure conferred on him a greater authority than that usually conferred on receivers appointed pendente lite to preserve property until the determination of the action. Dow v. Nealis, 47 Misc. Rep. 153, 93 N. Y. Supp. 379.

[3] Thurber v. Miller, 11 S. D. 124, 75 N. W. 900; Davis v. Alton, J. & P. Ry. Co., 180 Ill. App. 1; White

obtained.[4] Acquiescence to the order of the court may bar the right to object to it or to have it vacated or ignored.[5] The order is res adjudicata as far as parties participating or having the right or duty to participate at the hearing are concerned so as to bar their right, in subsequent proceedings, to question the evidence on which it was made.[6]

The orders of the court appointing the receiver and stating his duties and powers should have due regard to the purpose of a receiver in a foreclosure action, namely, to protect the right of the mortgagee to obtain payment of his debt from the property, and they should not be too general.[7] To secure the enforcement of his rights the

v. Suggs, 56 Ind. App. 572, 104 N. E. 55; White v. First Nat. Bank, 56 Ind. App. 708, 104 N. E. 60; White v. Bradfute, 56 Ind. App. 708, 104 N. E. 123.

4 Where the appointment of a receiver of the rents and profits pending foreclosure is void, such receiver is not entitled to compensation or expenses from the estate, but should be paid, if at all, by the party who procured his appointment. Couper v. Shirley, 75 Fed. 168, 21 C. C. A. 288.

A contract of case made by a receiver, with the approval of the court, is binding on the mortgagee, although it is not a formal party thereto. Western Union Tel. Co. v. Boston Safe-Deposit & Trust Co., 112 Fed. 37, 50 C. C. A. 106; Boston Safe Deposit & Trust Co. v. Western Union Tel. Co., 112 Fed. 37, 50 C. C. A. 106.

Where the costs and expenses of the management of mortgaged property by a receiver, authorized by the court, exceed the proceeds of the property when sold, together with its earning, the court has power to render judgment for the deficiency against the complainant, at whose instance the receiver was appointed and continued. Chapman v. Atlantic Trust Co., 119 Fed. 257, 56 C. C. A. 61.

A mortgagee who obtains the appointment of a receiver pending litigation, is chargeable from the date of the possession of the receiver, and is liable to account accordingly. Land v. May, 73 Ark. 415, 84 S. W. 489; Teutonia Bank & Trust Co. v. Security Brewing Co., 137 La. 1046, 69 So. 833.

5 Lombard v. Wade, 37 Ore. 426, 61 Pac. 856; Conroy v. Polstein, 150 App. Div. 832, 135 N. Y. Supp. 419.

6 Storm v. Ermantrout, 89 Ind. 214; Land Title & Trust Co. v. Kellogg, 73 N. J. Eq. 524, 68 Atl. 80.

7 The receiver should not be given power to improve the property for the benefit of the holder of the certificate of sale. Standish v. Musgrove, 223 Ill. 500, 79 N. E. 161.

An order giving a receiver power to lease for a term not exceeding

receiver should seek the assistance of the court appointing him;[8] and persons having claims against the receiver should enforce them either in the receivership proceedings or in independent actions against him commenced with the approval of the court in which the proceedings are pending.[9]

An order of the court, even though erroneous, may serve to protect the receiver, at least so far as his acts and expenditures inure to the benefit of the property and the parties interested therein.[10] Before taking any step in connection with his management of the property, the receiver, for his own protection, should, however, seek an order of the court directing him what to do,[11] but even though he proceeds on his own judgment and exceeds the strict letter of the order appointing him the court may subsequently ratify his acts.[12]

a year, for such rentals "as he shall deem advisable and just," made without allowing to the mortgagor an opportunity to be heard, is too broad, since the receiver should not be given power to lease at will. Gooden v. Vinke, 87 Ill. App. 562.

Where the mortgage covers property used for business purposes, the court may authorize the receiver to carry on the business. Leader Pub. Co. v. Grant Trust & Savings Co., 182 Ind. 651, 108 N. E. 121.

The court has power to appoint a receiver whose duty it is to rent the property, if it is rentable; and the duty to rent implies authority to reduce rents at the expiration of existing leases, if such reduction is necessary to secure tenants and make the property productive; but it is improper for the court to reduce the rent during the pendency of an existing lease, without any showing that such reduction will be for the benefit of the mortgagor or the mortgagee. Northwestern Mut. Life Ins. Co. v. Burr, 60 Neb. 467, 476, 83 N. W. 663, 664.

A receiver should be authorized to make only such repairs as are strictly necessary to preserve the property. Kronenthal v. Rosenthal, 144 N. Y. Supp. 830; Schaefer v. Fanning, 170 N. Y. Supp. 849.

8 Van Pelt v. Russell (Ark.), 203 S. W. 267.

9 More et al. v. Lane et al. 37 N. D. 563, 164 N. W. 292.

10 Ball v. Improved Property Holding Co. of New York, 220 Fed. 637, 136 C. C. A. 245; Locke v. Klunker, 123 Cal. 231, 55 Pac. 993; Ruprecht v. Muhlke, 225 Ill. 188, 80 N. E. 106; Joslin v. Williams, 76 Neb. 594, 107 N. W. 837, 112 N. W. 343.

11 See § 55, supra.

12 Kronenthal v. Rosenthal, 144 N. Y. Supp. 830.

When he uses ordinary care and prudence, that is, the care and diligence which an ordinarily prudent man uses in handling his own estate, he has fulfilled the measure of his official duty and is not answerable for losses which occur to the property and assets in his charge.[13] Since his powers are limited by the terms of the order appointing him his liabilities are similarly circumscribed and he can not be held responsible for defective conditions arising through want of repair in the property which he was not authorized to remedy[14] nor for failure to perform a service not within the scope of his authorized powers.[15] A receivership can not displace vested liens upon the mortgaged property and if the receiver, even though acting under an order of court, seizes and disposes of property not covered by the mortgage or on which there is a prior lien, he may be held liable in conversion.[16]

The service imposed upon a receiver is a personal one and, as a rule, he can not delegate its performance to others; and, if he does so wrongfully or without warrant, his agents will not be entitled to compensation out of the estate.[17]

Neither the receiver nor any of his agents may be permitted, as such, to be interested in the property of the estate or to make any profit out of any transaction arising in the course of his administration.[18]

[13] See § 43, supra.

See, also, Continental Ins. Co. v. Reeve, 149 App. Div. 835, 134 N. Y. Supp. 78, and Barton's Exr. v. Ridgeway's Admr., 92 Va. 162, 163, 23 S. E. 226.

[14] Lichtenstein v. Belknap, 100 Misc. Rep. 468, 165 N. Y. Supp. 936; In re Fischer, 168 App. Div. 326, 153 N. Y. Supp. 1008.

[15] Dow v. Nealis, 47 Misc. Rep. 153, 93 N. Y. Supp. 379.

[16] Old Colony Trust Co. v. Medfield & M. St. Ry. Co., 215 Mass. 156, 102 N. E. 484; More et al. v. Lane et al., 37 N. D. 563, 164 N. W. 292.

[17] Niagara Life Ins. Co. v. Lincoln Mortgage Co., 175 App. Div. 415, 161 N. Y. Supp. 853; Schaefer v. Fanning, 170 N. Y. Supp. 849.

[18] See § 49, supra.

Elgin City Banking Co. v. Hancock, 183 Ill. App. 23, 24; Herrick v. Miller, 123 Ind. 304, 24 N. E. 111.

An attorney at law, who acted as attorney for the receiver, did

§ 251. Appointment Before Maturity of the Debt.

Generally a mortgagee can not seek the appointment of a receiver unless the entire debt is due and he is entitled to sue in foreclosure. Of course this right might arise through a stipulation in the mortgage to the effect that upon default in the payment of interest or any installment of principal or on default with reference to any other condition of the mortgage, the mortgagee might elect to consider the entire debt due. In exceptional cases, however, where a default was imminent and serious detriment to the security was threatened it has been held that a receiver might be appointed even though the debt was not due.[1] It happens more often, perhaps, than on default in payment of interest or part of the principal, the mortgagee may have the right to sue in foreclosure and ask for a receiver. He must, in any event, to be entitled to a receiver, make whatever equitable showing is required to be made in foreclosure for the whole debt; and whether the entire property or only a portion thereof will be placed under the receivership depends upon whether the property may be advantageously divided or is so situated that it must be sold as a whole, and whether or not the mortgage stipulates that the rents and profits shall be part of the security.[2]

not violate his trust by purchasing the properties on foreclosure of a mortgage which he himself owned. Kock v. Burgess, 176 Iowa 493, 156 N. W. 174.

A sale by a receiver on foreclosure of a trust deed is not invalid because the trustee was a stockholder in a corporation that purchased the property, although the trustee himself could not have been the purchaser. Powers v. Maytag-Mason etc. Co. (Iowa), 166 N. W. 723.

1 Mayfield v. Wright, 107 Ky. 530, 54 S. W. 864; Rose v. Bevan, 10 Md. 466, 69 Am. Dec. 170; Long Dock Co. v. Mallery, 12 N. J. Eq. 431.

2 Douglass v. Cline, 75 Ky. (12 Bush) 608; Quincy v. Cheeseman, 4 Sandf. (N. Y.) Ch. 405; Hollenbeck v. Donnell, 94 N. Y. 342; Bank of Ogdensburg v. Arnold, 5 Paige (N. Y.) 38; Morris v. Branchaud, 52 Wis. 187, 8 N. W. 883.

§ 252. Questions Relating to the Procedure.

We have seen that, as the practice of appointing receivers, either generally or in foreclosure actions, was developed in courts of equity acting under their inherent powers and without the aid of statutes, it was always recognized that there was a wide discretion to be exercised by the chancellor in deciding whether or not to make the appointment and that, even in the face of a strong equitable showing justifying the appointment, the matter resolved itself, in the last analysis, to the question whether or not the mortgagee could conscientiously ask for the relief. In this view of the matter the chancellor could grant the petition for the appointment on condition and could require a bond either from the receiver, conditioned that he would properly perform the duties of his office, or from the petitioner conditioned that he would pay all damages suffered by the defendant through the receivership if it should finally be made to appear that he was not entitled to it. This matter is now largely governed by statute, and statutory requirements as to the giving of bonds are mandatory.[1]

Likewise the chancellor might or might not require notice of the application for the appointment of a receiver to be given to defendant before hearing the motion, according as his discretion dictated. This matter is also now largely regulated by statute and the statutory requirements concerning notice are mandatory.[2] Stipu-

1 Stoff v. Erken, 172 Cal. 481, 156 Pac. 1033; Van Alan v. Superior Court, (Cal. App.) 174 Pac. 672.

An order appointing a receiver without bond should in its terms dispense with the requirements of the statute. Schoenecke v. Chicago Title & Trust Co., 178 Ill. App. 387.

Even though the trust deed being foreclosed provided for the appointment of a receiver, it is error to appoint a receiver without a bond being required of the complainant, if the order of appointment does not recite that in the opinion of the court a bond ought not to be required. Aevermann v. Rizek, 160 Ill. App. 648.

2 Belknap Sav. Bank v. Lamar Land & Canal Co., 28 Colo. 326, 64 Pac. 212.

lations relating to the matter of notice are frequently found in mortgages; they are not necessarily binding on the court but, if the showing for a receiver is based on other than the usual equitable grounds, are usually followed.[3]

Schoenecke v. Chicago Title & Trust Co., 178 Ill. App. 387.

A clause in a mortgage granting the mortgagee the right on default to enter the premises, take the rents and profits, and apply them on account does not pertain to a receiver; and a further clause merely giving the right to a receiver does not obviate the necessity for giving notice of the application. Straus v. Minkowski et al., 181 App. Div. 877, 169 N. Y. Supp. 442; Jarmulowsky v. Rosenbloom, 125 App. Div. 542, 109 N. Y. Supp. 968.

Citizens' Savings Bank v. Wilder, 11 App. Div. 63, 42 N. Y. Supp. 481.

Coleman v. Goodman, 37 Misc. Rep. 517, 75 N. Y. Supp. 973.

Dazian v. Meyer, 66 App. Div. 575, 73 N. Y. Supp. 328.

Conroy v. Polstein, 150 App. Div. 832, 135 N. Y. Supp. 419.

Fletcher v. Krupp, 35 App. Div. 586, 55 N Y. Supp. 146.

Where the mortgage was given by two tenants in common owning the property, and an application is made for the appointment of a receiver of the premises, it is not necessary to serve notice on a receiver appointed in supplementary proceedings of the property of one of the mortgagors, such receiver not being an adverse party within the statute requiring notice to be served on the adverse party. Grover v. McNeeley, 72 App. Div. 575, 76 N. Y. Supp. 559.

Where a receiver was properly appointed the court had authority on the death of such receiver to appoint a successor without further notice. Buchanan v. Berkshire Life Ins. Co., 96 Ind. 510.

Where the receiver did not do any act under his appointment, and on a hearing soon after the appointment was discharged, and the costs pertaining to his receivership were charged to plaintiff, the appointment of the receiver without notice to defendants was harmless. Wilkie v. Reynolds, 34 Ind. App. 527, 72 N. E. 179.

[3] Fletcher v. Krupp, 35 App. Div. 586, 55 N. Y. Supp. 146.

Even though a mortgage provides that a receiver may be appointed without notice, the court in its discretion may require notice to be given. Hawkins v. Maxwell, 156 App. Div. 31, 140 N. Y. Supp. 909.

Though the parties have stipulated that notice should be given, the court may appoint a receiver without notice, but either inability to give the notice or prejudice incidental to the delay should be shown. Woerishoffer v. Peoples, 120 App. Div. 319, 105 N. Y. Supp. 506.

A provision of a mortgage, that eight days' notice shall be given, does not apply to an application

The general rules, pointed out in a foregoing section,[4] that govern the chancellor in his choice of a person to be appointed receiver apply to the appointment of a receiver on foreclosure.[5]

We have seen that a mortgagee, seeking the appointment of a receiver, must show the existence of certain facts as an equitable foundation for his petition before he can expect it to be granted. Of course if he fails to make the necessary showing a receiver will not be appointed. But even where the showing might otherwise be deemed sufficient it may be offset by a showing of counter, or opposing equities on the part of the defendant and a receiver be denied.[6]

c. Receiverships on Behalf of Junior Mortgagees.

§ 253. Right of a Junior Mortgagee to a Receiver as Against the Mortgagor.

The preceding division of the chapter has set forth the rules and principles governing the use of a receivership on behalf of a first mortgagee in aid of an action to foreclose his mortgage. We now take up the question of receivership on behalf of junior mortgagees.

for a receiver on the ground of the inadequacy of the security. (1899) Putnam v. McAllister, 57 N. Y. Supp. 404; modified (1900), 49 App. Div. 361, 63 N. Y. Supp. 250.

Jarvis v. McQuaide, 24 Misc. Rep. 17, 53 N. Y. Supp. 97, 6 N. Y. Ann. Cas. 303.

Graybill v. Heylman, 139 App. Div. 898, 123 N. Y. Supp. 622.

[4] See, supra, § 62.

[5] The holders of a tax certificate covering premises involved in a foreclosure suit was appointed in Walker v. Fitzgerald, 69 Neb. 52, 95 N. W. 32.

Where a second mortgagee, who had been appointed receiver on foreclosure by the third mortgagee, commences proceedings on his own mortgage and applies for a receiver, a new receiver will be appointed in both actions, if objections are made to the propriety of the second mortgagee acting as receiver, notwithstanding there be no question as to his good faith. (1899) Putnam v. McAllister, 57 N. Y. Supp. 404; modified (1900), 49 App. Div. 361, 63 N. Y. Supp. 250.

[6] In Adair v. Wright, 16 Iowa 385, the Judge rendering the opin-

As far as the mortgagor is concerned, a junior mortgagee's right to have a receiver appointed in aid of his foreclosure are governed by the same rules and principles

ion stated that in his opinion the appointment of a receiver in foreclosure proceedings where the defendant was in the volunteer military service of the government was in violation of the spirit and intendment of the Act of the Legislature exempting property of such volunteers from sale under deeds of trust, mortgages and judgments.

A defense of usury sworn to only on information and belief will not be regarded as against a stipulation for a receiver in the mortgage itself. Knickerbocker Life Ins. Co. v. Hill, 2 Hun (N. Y.) 680, 5 Thomp. & C. 694; McKellar v. Rogers, 20 Jones & S. (N. Y.) 360. (See same case on appeal, 109 N. Y. 468, 17 N. E. 350.)

In Hesse v. Ledesma, 7 Porto Rico Fed. 521, a mortgage foreclosure had been instituted by the first mortgagee, who was a German non-resident. The World War had just started. Our country was not yet a participant. The complainant, who also was a German non-resident and held a second mortgage upon the property, sought an injunction against the foreclosure proceedings and the appointment of a receiver upon the ground that the money markets had become so strained that it was impossible for him to meet the mortgage situation and that the sugar crop upon the mortgaged property would be ready for harvesting within sixty days, whereas if the foreclosure took place all creditors other than the first mortgagee would be wiped out, there being no right of redemption under the laws of Porto Rico but that a receivership would preserve the property for all creditors. The holder of a second mortgage appeared and admitted the allegations in the bill. The court, speaking through Judge Hamilton, in passing upon the question, said: "One reason given for denying the equity of the bill is that it is a bill for a receivership, and that there is no such ground of equity jurisdiction. This is true. A receivership is merely incidental to a suit to enforce an equity. It is not itself an equity. If the bill is to be construed as one in which the court must take charge of property in order to work through a receiver, so that profits may be derived which would pay off the complainant as well as defendant, Westphaling, then it must be dismissed for want of equity. A Court of Chancery can not go into business. It can not, on the ground of hardship, take possession of an enterprise and appoint a receiver to run it for the benefit of those in interest, merely because the managers have been unsuccessful in running it themselves. A receivership exists only as incident to a suit under some recognized head of equity jurisprudence. Although the bill is entitled one for a receivership, however this does not control. No matter how it is entitled, if it presents an equitable case in its recitals, it may be sustained. In much the same manner

as are applicable to the rights of a first mortgagee in that regard. In regard to a showing of the inadequacy of the security, however, the junior mortgagee has to show

it is argued that the bill, even upon its own statements, presents merely a case of hardship, and that this is not a ground for equity jurisdiction. The complainant, however, says that the bill is drawn so as to come under the equitable remedy for accident. Accident is a ground of equitable jurisdiction. It is usually grouped with fraud and mistake but it has its own particular rules.

"Originally the field of accident in equitable jurisprudence was much larger than at present. It is one of the oldest heads of equity jurisdiction. At present the jurisdiction is based upon the plaintiff's conscientious right to relief and the impossibility of obtaining an adequate remedy at law. 2 Pom. Eq., §§ 824, 825. It is, of course, true of this as of every other head of equity jurisdiction that the complainant must not himself be proximately the cause of the alleged accident. It has been repeatedly held that equity will not, any more than law, relieve a tenant against such accidents as the destruction of the leased property where he has not covenanted that his liability ceases in such event. Whatever might have been the rule before the doctrine was fully developed, equity does not now embrace every case in which an unexpected result has been produced by accident, or even every kind of misfortune, despite the dictum of Lord Coke, 4 Inst. 84. As a party could in such case have protected himself by a covenant in the contract, he should not apply to the court to do for him what he did not do for himself. The result is due to his own negligence and not to an accident.

"The head of accident generally comes up in connection with forfeitures in contracts and with defective executions of powers. No case has been cited analagous to the present, where the complainant alleges that he has been prevented from exercising his right to redeem a second mortgage by the sudden occurrence of war between Germany and England, which has practically cut off all communication between him and his principals in Germany. This bill does not state the grounds as fully as could be desired, and it may be that further amendment is needed in the way of furnishing proper allegations, but in effect the complainant says that he has the right as a second mortgagee to redeem from the first mortgage and has been prevented by the present unparalleled situation from obtaining money therefor, which he could otherwise have obtained. It may very well be that a parallel case has seldom arisen, and that therefore there is no precedent to be cited. It is not perceived, however, that this can make any difference. The declaration of war by great powers is a human event and can hardly be called an act of God. Nevertheless, so far as concerns the rights of suitors, it is something coming

only that the security is inadequate to pay his debt after it has paid the debts secured by prior mortgages. It might very well happen, therefore, that a junior mortgagee might be able to make a showing of inadequacy when a prior mortgagee could not. Moreover, since waste, to be equitable waste and constitute ground for the appointment of a receiver on foreclosure, must be such as to endanger the value of the mortgaged property as security, waste need not be so extensive to endanger the security of a junior mortgagee as to have a similar effect upon the rights of a senior encumbrancer. Failure to keep up the interest on a prior mortgage debt may constitute equitable waste as against a junior mortgagee.[1]

within the definition of an accident, as 'an unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right which it would be a violation of good conscience for the latter person, under the circumstances to retain.' 2 Pom. Eq. Jur., § 823. It is perfectly true that Westphaling is not responsible for the situation, that it is an accident to him as much as it is to the complainants; nevertheless, under the allegations of the bill, the condition, and hence the rights, of the respective parties, have been changed by the occurrence. It would seem, therefore, that, apart from the question of amendment of form, the bill has equity."

1 A junior mortgagee is entitled to subject the rents where a receiver is appointed upon his application, whether or not the appointment was declared to be for his benefit, though the action was brought by the senior mortgagee, and the land is insufficient to satisfy his debt. Nesbit v. Wood, 22 Ky. Law Rep. 127, 56 S. W. 714.

A receiver appointed in an action to foreclose a junior mortgage can not apply the rents and profits collected by him to the payment of taxes or interest on a senior mortgage since they belong to the owner of the equity of redemption. Stevens v. Hadfield, 196 Ill. 253, 63 N. E. 633.

Where neither the bill nor cross-bill in an action of foreclosure by a senior mortgagee ask for a receiver, none will be appointed even though a junior mortgage provides for the appointment of a receiver. Gillespie v. Greene County Savings & Loan Assn., 95 Ill. App. 543.

Buchanan v. Berkshire L. Ins. Co., 96 Ind. 510.

Receivers pendente lite in a suit in equity by the holders of a second deed of trust are properly ap-

§ 254. Rights of a Junior Mortgagee to a Receiver as Against a Senior Mortgagee.

As far as a senior mortgagee is concerned, the right of a junior mortgagee to a receiver is circumscribed by the principle that a court of equity, in appointing a receiver, can not interfere with prior vested interests, and therefore a receiver on behalf of a junior mortgagee can be appointed only subject to the rights of prior mortgagees.[1]

pointed where default had been made in the payment of interest on both the first and second deeds of trusts, the maker being insolvent, the property, if sold at a threatened sale under the first trust deed, would bring insufficient to pay the debts secured by both deeds, and the persons in possession and claiming to be the equitable owners of the property are seeking to force a sale under the first trust deed so as to destroy the value of the second deed of trust, though the holders of the latter had offered, if the rents in their hands were insufficient to pay the accrued interest on the first deed of trust, to advance the remainder and stop the sale, but such offer had been refused. Wood v. Grayson, 16 App. D. C. 174.

In an action to foreclose a second mortgage, a receiver may be appointed where it appears that it is doubtful whether the property will bring more than enough to pay the first mortgage and the taxes. Browning v. Stacey, 52 App. Div. 626, 65 N. Y. Supp. 203.

Where a second mortgage contains a provision for the appointment of a receiver pending foreclosure to collect the rents and profits of the mortgaged premises, and the party in possession refuses to pay the interest and taxes and is receiving the rents, and there is doubt whether the security is adequate, a receiver should be appointed. Thomas v. Davis, 90 App. Div. 1, 85 N. Y. Supp. 661.

Where a second mortgage stipulated that a receiver of rents and profits might be appointed without regard to the value of the property and a strong showing of equitable waste was made the appointment should be made even though the testimony on the question of inadequacy was not convincing. Browning v. Sire, 56 App. Div. 399, 67 N. Y. Supp. 798, 9 N. Y. Ann. Cas. 127.

An assignment of the rents made prior to the commencement of the action or to the application for a receiver gives the assignee a right to the rents superior to that of the receiver. Harris v. Taylor, 22 App. Div. 109, 47 N. Y. Supp. 913; Harris v. Lesster, 35 App. Div. 462, 54 N. Y. Supp. 864. See, also, Bradley & Currier Co. v. Hofmann, 70 App. Div. 77, 74 N. Y. Supp. 1076.

Browning v. Sire, 33 Misc. Rep. 503, 68 N. Y. Supp. 875, 9 N. Y. Ann. Cas. 240.

[1] Cortleyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478.

It might happen that a prior mortgage would cover property in addition to that covered by the junior mortgage and that the additional property would be sufficient security for the prior debt. In such a case the prior mortgagee may be compelled to resort to the additional property and the junior mortgagee may have a receiver appointed over the property covered by his mortgage.[2]

But the main conflict that has arisen concerning the respective rights of mortgagees of varying rank has been in regard to priorities with reference to the rents and profits of the mortgaged property. In this regard the first general rule is that if a mortgagee is so situated that he can acquire a lien upon the rents and profits only through the aid of a receiver, then his right to them commences only after he has taken steps to secure the equitable lien upon them which the appointment of a receiver gives him.[3] It might happen, as we have above indicated, that the prior mortgagee is so situated that he

2 Henshaw v. Wells, 9 Humph. (28 Tenn.) 568.

3 Douglass v. Cline, 12 Bush (Ky.) 608; Harris v. Lesster, 35 App. Div. 462, 54 N. Y. Supp. 864; Ranney v. Peyser, 83 N. Y. 1, 9.

Where the lien created by a trust deed, giving the grantee a specific lien on the rents of the premises, can only be enforced, as against a junior mortgagee lawfully in possession, through a receiver, the grantee improperly secures the appointment of a receiver, he can not lien against the mortgagee through the receivership. Ruprecht v. Muhlke, 225 Ill. 188, 80 N. E. 106.

In a well considered case arising in Porto Rico there is a dictum to the effect that where there are two mortgages upon a sugar plantation, including the crop, and the value of the crop to be harvested within several months will be sufficient to take care of the first mortgage, under the doctrine of marshalling a fund, the first mortgagee, especially in circumstances of a financial stringency occasioned by the sudden breaking out of war, would be enjoined from foreclosing his mortgage at the instance of the second mortgagee and a receiver appointed to conserve the property for the benefit of all creditors. This situation was thought by the court to be particularly applicable to sugar plantations where it is customary to deal with the crop in a manner as if it is a species of property separate and distinct from the land upon which it is grown. Hesse v. Ledesma, 7 Porto Rico Fed. 521.

can not successfully apply for a receiver at the time when the junior mortgagee is entitled to have one appointed. In such a case there could be no conflict and the junior mortgagee would be entitled to the rents collected by a receiver.[4]

Where, however, the situation is such that several mortgagees of varying rank could all become entitled to the appointment of a receiver of rents and profits on taking proper steps to procure one a second rule becomes applicable. This rule is to the effect that although the first rule, just above mentioned, is sometimes construed to mean that the right of a receiver to the rents and profits will date from the commencement of the action, nevertheless, as between conflicting mortgagee claimants, priority, as a reward of diligence, will be given to the one who first secures an equitable lien upon them through the appointment of a receiver.[5]

A junior mortgagee may have a receiver appointed in an action to foreclose commenced by himself and thus acquire a specific lien upon the rents and a priority over the senior mortgagee.[6] He may obtain a receiver upon the filing of a cross-bill and proper motion in an action begun by his senior and may have this right even though his debt is not due.[7] While the junior has this priority,

[4] Goddard v. Clarke, 81 Neb. 373, 116 N. W. 41.

See, also: Kramp v. Kramp, 185 Ill. App. 464; Roach v. Glos, 181 Ill. 440, 54 N. E. 1022, Farmers' Nat. Bank v. Backus, 67 Minn. 43, 69 N. W. 638; New Jersey Title Guarantee & Trust Co. v. Cone & Co., 64 N. J. Eq. 45, 53 Atl. 97; Conroy v. Polstein, 150 App. Div. 832, 135 N. Y. Supp. 419.

[5] Post v. Dorr, 4 Edw. Ch. (N. Y.) 412.

[6] Williams v. Williams' Assignee, 7 Ky. Law Rep. (abstract) 448; Longdock Mills & Elevator v. Alpen, 82 N. J. Eq. 190, 88 Atl. 623; Madison Trust Co. v. Axt, 146 App. Div. 121, 130 N. Y. Supp. 371; Kroehle v. Ravitch, (Olcott) 148 App. Div. 54, 132 N. Y. Supp. 1056; (1911) Abrahams v. Berkowitz, 146 App. Div. 563, 131 N. Y. Supp. 257, affirming order, (1910) 70 Misc. Rep. 319, 127 N. Y. Supp. 224.

[7] Buchanan v. Berkshire L. Ins. Co., 96 Ind. 510; New Jersey Title, etc., Co. v. Cone & Co., 64 N. J. Eq. 45, 53 Atl. 97.

money collected by his receiver can not be used for purposes that will inure primarily to the benefit of the senior.[8] To give the junior such priority the purposes of the order must be properly set forth in the order of appointment and an order simply stating the duties of the receiver in a general way may not have this effect.[9] Even though the order appointing the junior mortgagee's receiver is erroneous, as, for instance, because it was made before the action was commenced, it may become binding upon the senior mortgagee by his participation, without objection, in subsequent proceedings under it.[10]

The priority thus acquired by the junior continues until by proper proceeding the senior secures the appointment of a receiver on his own behalf. A displacement of the junior's priority may be accomplished by an order extending the receivership to cover the rights of the senior,[11] or by the appointment of a different receiver,[12]

8 Madison Trust Co. v. Axt, 146 App. Div. 121, 130 N. Y. Supp. 371.

9 New Jersey Title Guarantee & Trust Co. v. Cone & Co., 64 N. J. Eq. 45, 53 Atl. 97; Last v. Winkel et al., 86 N. J. Eq. 356, 97 Atl. 961.

Where a receiver of a third mortgagee fails to pay taxes and water rates as directed in the order appointing him, and on sale by the first mortgagee there is a deficiency on the second mortgage, the last mentioned is, by subrogation, entitled to have the amount paid from the sale money for taxes and water rates refunded to him from money collected by the receiver. Frankenstein v. Hamburger, 73 App. Div. 352, 76 N. Y. Supp. 818.

10 Anderson v. Riddle, 10 Wyo. 277, 68 Pac. 829.

Where a receiver has been appointed in foreclosure proceedings by the third mortgagee, and it is doubtful whether the value of the lands exceeds the amount of the first mortgage, a second mortgagee, on commencing foreclosure, may have the receivership extended to also cover his mortgage.

11 (1899) Putnam v. McAllister, 57 N. Y. Supp. 404; modified (1900) 49 App. Div. 361, 63 N. Y. Supp. 250.

A senior mortgagee may have the receivership procured by the second mortgagee extended to protect his mortgage also. Anderson v. Matthews, 8 Wyo. 513, 58 Pac. 898.

12 Schneider v. Miller, 155 Wis. 239, 144 N. W. 286.

even without an order revoking or modifying the order appointing the former receiver.[13]

An action commenced by a first mortgagee merely to foreclose his mortgage after a second mortgagee had commenced suit and obtained the appointment of a receiver is not necessarily subject to dismissal as being independent of the latter and therefore tending to interfere with the jurisdiction of the court over the property through the receivership.[14] The fact that a junior mortgagee has filed his claim before a general receiver of the mortgagor may not estop him from intervening in a foreclosure suit brought by a first mortgagee and thereby seeking to foreclose.[15]

d. Receivership Affecting Mortgaged Property, But Not in Aid of Foreclosure by Mortgagee.

§ 255. Receiverships in Foreclosure Actions for the Benefit of Others than the Mortgagee.

The preceding divisions of the chapter have set forth the rules and principles established by courts of equity in appointing and dealing with receivers in aid of foreclosure suits. There are, however, many other instances in which receiverships are created over property covered in whole or in part by mortgages and these receiverships affect in various ways the rights of those interested in the mortgaged property.

While it is common to speak loosely of a receiver appointed in a foreclosure suit at the instance of the mortgagee as a receiver for his benefit, it must be remembered that a receiver is not the agent of the party at whose instance he is appointed nor of any other party

13 Hennessey v. Sweeney, 57 N. Y. Supp. 901, 28 Civ. Proc. Rep. 332.
14 American Surety Co. v. Worcester Cycle Mfg. Co., 90 Fed. 773.
15 Continental Trust Co. v. Patterson, 26 Colo. App. 186, 142 Pac. 422.

to the action. He is an officer of the court appointing him; he does not take possession of the property involved as against any party but to protect and preserve it for the benefit of all who have an interest in it.[1] It may happen, however, that the mortgagee is not in a position to ask for a receiver or does not desire one. In such cases a receiver may be appointed at the instance of some other party to the action. A defendant mortgagor may have a receiver appointed on a showing that the mortgagee is wrongfully or fraudulently injuring his interests.[2] A defendant who is liable for a deficiency judgment may have a receiver appointed.[3] A defendant wife, who had joined in the mortgage and had a separate interest in the property may have a receiver appointed.[4] Creditors may intervene and have a receiver appointed, without, however, displacing the priority of the mortgagee's claim over the expenses of the receivership.[5] A mortgagee, who has had a receiver appointed, may lose some of his rights, or

1 Central Trust Co. v. Worcester Cycle Mfg. Co., 90 Fed. 584.

A foreclosure receiver appointed on an allegation that the property is insufficient to satisfy the debt, is neither an "assignee" nor "receiver," within section 7051 of Burns's Ann. St., 1901, providing that where a property owner's business shall be put in the hands of any assignee, receiver, or trustee, the debts owing to laborers or employees by the property owner shall be treated as preferred debts; nor is he an "assignee" or "receiver" within section 7058, providing that all debts due any person for manual or mechanical labor shall be preferred claims in all cases where property shall pass into the hands of an "assignee" or "receiver," and shall be first paid in full. McDaniel v. Osborn (Ind. App.), 72 N. E. 601, 603.

2 Sibson v. Hamilton & Rourke Co., 21 Wash. 362, 58 Pac. 219.

Where the mortgagee is amply responsible, and only matter to be attended to is collection of rent under a lease, application for a receiver by an equitable owner will be denied, under Code Civ. Proc., § 713, subd. 1, relating to receivers. Manhattan Life Ins. Co. v. Hammerstein Opera Co., 180 App. Div. 69, 167 N. Y. Supp. 245.

3 Philadelphia Mortgage & Trust Co. v. Oyler, 61 Neb. 702, 85 N. W. 899; President, etc., of Insurance Co. of North America v. Oyler, 61 Neb. 702, 85 N. W. 899.

4 Main v. Ginthert, 92 Ind. 180.

5 Craver v. Greer, 107 Tex. 356, 179 S. W. 862.

priorities, by agreements or stipulations made with other creditors.[6] A defendant who asks for a receiver must of course show that he has equitable grounds to warrant the appointment.[7]

An instance of a receivership somewhat analogous to those just above mentioned is that created at the instance of a bondholder who commences an action to foreclose a deed of trust given to secure his bond. The bondholder is not a trustee nor a mortgagee but he may have the right to sue in foreclosure and have a receiver appointed.[8]

§ 256. Receivership as Against Mortgagee in Possession.

Under various circumstances, as for instance in aid of proceedings in aid of execution, courts have the power to

6 Where attached property claimed by a receiver appointed in a suit to foreclose a mortgage was sold under a stipulation that one-half the gross proceeds should be held subject to the rights of the attaching creditors, and its being adjudged to them, the term "gross proceeds" may properly be construed to mean the proceeds after deducting the necessary expenses of sale; but such creditors should not be charged with expenses which would not have been incurred but for the claim of the receiver. American Surety Co. v. Worcester Cycle Mfg. Co., 114 Fed. 658.

An assignment by a mortgagee in pursuance of settlement between mortgagor and its creditors of his deficiency judgment with reservation only of his rights as purchaser of the mortgaged premises to the rents, issues, and profits in the hands of the receiver, deprived him of his right thereto by virtue of his deficiency judgment. Elliott v. Hudson, 18 Cal. App. 642, 124 Pac. 103, rehearing denied (Sup.) 124 Pac. 108.

7 Mylvirn Corp. v. N. Passman & Son, Inc., et al., 157 N. Y. Supp. 372.

8 Georgia Coast & P. R. Co. v. Lowenthal, 238 Fed. 795, 151 C. C. A. 645; Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895; Title Ins., etc., Co. v. California Development Co., 171 Cal. 227, 152 Pac. 564; Etna Steel & Iron Co. v. Hamilton, (Ga.) 73 S. E. 8.

A holder of mortgage bonds, who through a petition of intervention asks to be made a party plaintiff, and to adopt the allegations of the complaint, in a foreclosure action brought by another bondholder, is not estopped from questioning the validity of a previous appointment of a receiver and the issuance of receiver's certificates, where the court did not grant the petition, but afterwards permitted him to appear as defendant, and to file a cross complaint attacking the order appointing the receiver and author-

appoint receivers over the property of debtors at the instance of their creditors. Under the general rule relating to receiverships, such appointments are made without prejudice to vested existing rights. Such appointments can not deprive a mortgagee creditor of any of his rights; and a receiver appointed in this way must surrender possession to a mortgagee who subsequently makes a rightful demand therefor.[1] If the mortgagee is rightfully in possession and has not been paid, a receiver on behalf of a creditor can not be appointed unless a showing is made that the mortgagee is irresponsible and there is danger of loss of the rents and profits or that the mortgagee is committing waste, or is guilty of fraud.[2]

§ 257. General Receiverships Over the Affairs of Insolvent Creditors.

In most of the states there are statutes, of the same general purport but varying in detail, by which courts are permitted to appoint receivers to take charge of the

izing the issuance of the certificates. Belknap Sav. Bank v. Lamar Land & Canal Co., 28 Colo. 326, 64 Pac. 212.

Where the facts shown do not justify the appointment of a receiver on behalf of mortgage bondholders the court may nevertheless retain the case and require the mortgagor to render accounts from time to time of its receipts and disbursements as a protection to the bondholders. Stewart v. Chesapeake, etc., Canal Co., 5 Fed. 149, 4 Hughes 47.

1 First Nat. Bank v. Cook, 12 Wyo. 492, 2 L. R. A. (N. S.) 1012, 76 Pac. 674, 78 Pac. 1083.

A foreclosure receiver of rents and profits is entitled to rents accruing after the commencement of the action but before his appointment as against a receiver appointed on behalf of a creditor in supplemental proceedings. Donlon & M. Mfg. Co. v. Cannella, 89 Hun 21, 34 N. Y. Supp. 1065.

2 Harding v. Garber, 20 Okla. 11, 93 Pac. 539; Furlong v. Edwards, 3 Md. 99; Schultz v. Jerrard, (N. J. Eq.) 3 Atl. 265, 2 Cent. Rep. 211; Quinn v. Brittain, 3 Edw. Ch. (N. Y.) 314; Brayton, etc., v. Monarch Lumber Co., 87 Ore. 365, 169 Pac. 528, 170 Pac. 717; United States v. Masich, 44 Fed. 10.

A receiver will not be appointed on behalf of the wife of the mortgagor in a suit for alimony as against a mortgagee in possession in the absence of a showing of waste, or fraud, or other inequitable conduct. Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442.

property and affairs of debtors who have made assignments for the benefit of their creditors, or, at the instance of creditors, of debtors who are heavily embarrassed or insolvent.[1] We are not here concerned with the conditions, or grounds, on which such receivership may be created; our interest is simply in the rules that govern the operations of such receiverships in so far as they affect mortgaged property.[2]

The first rule applicable is a rule applicable to all receiverships, namely, that the appointment of a receiver does not in any way destroy or weaken vested existing interests.[3] In a case from Maryland this rule is stated

1 Liquidation commissioners, selected by the stockholders of a corporation, who, in accordance with the conditions of their appointment, elect to proceed under the orders of a court rather than independently and who are formally appointed by the court as receivers, are in law receivers. In re J. D. Connell Iron Wks. Co., 138 La. 702, 70 So. 617.

2 See Floore v. Morgan, (Tex. Civ.) 175 S. W. 737 and Colburn v. Yantis, 176 Mo. 670, 75 S. W. 653.

3 Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12.

Hewitt v. Walters, 21 Idaho 1, Ann. Cas. 1913C, 35, 119 Pac. 705; Martin v. Adams Brick Co., 180 Ind. 181, 102 N. E. 831.

The liens of mortgagees can not without the consent of the mortgagees be supplanted by receiver's certificates issued upon mining property for obligations other than those arising by way of expenditures for realization and for preserving the property while the business is in the course of administration under a general receivership. International Trust Co. v. Decker Brothers, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152.

Where property subject to two mortgages was sold in a receivership proceeding to which neither of the mortgagees was a party, but the first mortgagee accepted a dividend, the purchaser took the rights both of the mortgagor and the first mortgagee and was entitled to the lien of the first mortgage, notwithstanding the purchase price was less than the amount of such mortgage, upon a foreclosure sale by the second mortgagee. Martin v. Adams Brick Co., 180 Ind. 181, 102 N. E. 831.

A receiver of the whole property appointed in an action to foreclose a mortgage given by two tenants in common should not be required to give up or account for one-half of the income to a receiver appointed in supplementary proceedings of the property of one of the mortgagors. Grover v. McNeely, 72 App. Div. 575, 76 N. Y. Supp. 559.

One having an interest in the

as follows:[4] "The bill upon which the receivers were appointed asked no relief against the appellant's mortgage; the order appointing receivers did not affect the appellant's rights under the mortgage; their appointment did not disturb nor divest the lien of the mortgage; the receivers held the property subject to the mortgage; and without the written consent of the mortgagee could sell only the equity of redemption." Under this rule mortgagees are not liable for the receivership expenses.[5]

Another rule applicable to the matter in hand is one which we have noticed in preceding sections of this chapter. A mortgagee who is entitled to obtain an equitable lien upon the rents and profits of the mortgaged property through the appointment of a receiver obtains his lien only from the time of the appointment, or, at best, from the time of the commencement of his action. This

real estate, and who had paid the interest on a mortgage to prevent foreclosure, was entitled to be subrogated to the rights of the mortgagee, and receive payment from a receiver appointed to collect rents and apply them toward mortgages. Sampers v. Conolly, 115 App. Div. 364, 100 N. Y. Supp. 806.

Unless bonds by their terms mature, the fact of a receivership does not make them mature. A receivership does not change or increase liabilities but keeps them in statu quo and the court administers the property to the best interest of all concerned. Welch & Co. v. Central San Cristobal, 6 Porto Rico Fed. 564.

A mortgagee of a part only of a corporation's property should not on sale of its property by a receiver be given a preference in the proceeds of all its property. General Electric Co. v. Canyon City Ice & Light Co., (Tex. Civ.) 136 S. W. 78.

[4] Pyles v. Manufacturers', etc., Co., 126 Md. 560, 95 Atl. 169, 170.

See, also, In re J. D. Connell Iron Works Co., 138 La. 702, 70 So. 617. The reason for the rule, as founded on the constitutional inhibition against the impairment of contracts and the proposition that when contracting parties stipulate as to the remedy, the remedy is itself part of the contract and within the purview of the constitutional provision, is well stated in Galey v. Guffey, 248 Pa. St. 523, 94 Atl. 238.

[5] Ætna Life Ins. Co. v. Leonard, 186 Fed. 148, 108 C. C. A. 260; Hooven-Owens-Rentschler Co. v. T. Schriver & Co., (Tex. Civ.) 184 S. W. 359.

rule is applicable as between a foreclosure receiver and a general receiver.[6]

When mortgaged property is in the hands of a general receiver the mortgagee may not proceed against the property and interfere with the possession of the receiver without the consent of the court in which the proceedings are pending. The receivership court will prevent the maintenance of actions begun while the proceeding is pending.[7] If the mortgagee desires to proceed he must

[6] Freedman's Sav. & T. Co. v. Shepherd, 127 U. S. 494, 32 L. Ed. 163, 8 Sup. Ct. 1250; Mayfield v. Wright, 107 Ky. 530, 54 S. W. 864; Gilbert v. Buttler's Adm'r, 7 Ky. Law Rep. (abstract) 837; Lowell v. Doe, 44 Minn. 144, 46 N. W. 297; New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132; Holly Realty Co. v. Wortmann, 121 N. Y. Supp. 572.

Where the accounts of a statutory receiver, also subsequently appointed in a suit to foreclose a second mortgage, have not been settled, the rights of judgment creditors and second mortgagee can not be determined on a motion for an order directing the receiver to account for the rents collected by him and to pay the same over to the first mortgagee. Abrahams v. Berkowitz, 70 Misc. Rep. 319, 127 N. Y. Supp. 224.

[7] Forest Lake Cemetery v. Baker, 113 Md. 529, 77 Atl. 853, 858; Slade v. Massachusetts Coal & Power Co., 188 Fed. 369.

Where mortgage foreclosure sales of property in the possession of receivers, made without first obtaining leave to sell, are subsequently ratified, they are just as binding as if prior leave had been granted. Forest Lake Cemetery v. Baker, 113 Md. 529, 77 Atl. 853, 858.

It is error for the court to give the mortgagee permission to foreclose where the receiver is in possession and claiming that the mortgage is fraudulent without giving notice to the receiver. In re Braue, 72 Misc. Rep. 58, 129 N. Y. Supp. 111.

Since property in the hands of a receiver is in the hands of the court, bondholders who have a right to demand certain collateral security in lieu of selling the property can not make their demand upon the mortgagor. Welch & Co. v. Central San Cristobal, 6 Porto Rico Fed. 564.

A sale by a trustee under a deed of trust of land in possession of a receiver is void in Texas. Scott v. Crawford, 16 Tex. Civ. 477, 41 S. W. 697; Ellis v. Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858. See In re Hasie, 206 Fed. 789 (bankruptcy case).

Where default is made in the payment of interest and the accumulation of a sinking fund on a mortgage given by a corporation which is in the hands of a receiver, the trustee named in the mortgage may declare the mortgage debt

seek permission of the receivership court. Leave to institute a separate foreclosure action will rarely be given and the usual method is to require the mortgagee to seek his relief in the receivership proceedings themselves, the receivership being extended so as to protect the rights of the mortgagee.[8] In one case[9] the reason for the rule is stated as follows: "We have not been able to find a single case holding that a trial court abused its discretion in denying a petition to sue a receiver. The courts are vested with much latitude and only in rare cases is such permission granted. The reason being that a court of equity having complete jurisdiction affords ample remedy, can better dispose of the many interests, protect parties, save costs, and prevent harassing the receiver and unnecessary destruction of what might become an insolvent estate." Calling attention to the facts of the instant case and to the probably small margin between the value of the property and the amount of the secured claims, the court further says: "If the court had permitted one claimant, and, if one, then all, to institute a separate suit it certainly would have been disastrous to the estate and would have entailed loss to all, except some who might be amply protected, thereby defeating the very object for which the receiver was appointed." Permission to institute foreclosure proceedings is, however, occasionally granted.[10] Sometimes a separate receiver is appointed for such of the property of the estate as is covered by mortgages.[11]

Conflicts between general and foreclosure receivers, usually between receivers of federal and state courts,

due and bring a foreclosure suit. See Guaranty Trust Co. v. International Steam Pump Co., 231 Fed. 594, 145 C. C. A. 480.

[8] American Loan, etc., Co. v. Central, etc., R. Co., 86 Fed. 390; Deposit Bank, etc., v. Kirby, 175 Ky. 700, 194 S. W. 929.

[9] Holmes, etc., Mtg. Co. v. Ardmore Nat. Bank, 48 Okla. 319, 150 Pac. 105.

[10] Pyles v. Manufacturers', etc., Co., 126 Md. 560, 95 Atl. 169; Galey v. Guffey, 248 Pa. St. 523, 94 Atl. 238.

[11] Ball v. Improved Property, etc., Co. et al., 220 Fed. 637, 136 C. C. A. 245.

often present a conflict of jurisdiction between two courts of concurrent jurisdiction and we must in such circumstances meet the rules that govern such a situation. We are concerned, of course, only with actions of such a character that in order that the court may grant the full relief sought in the action it may become necessary for the court to take possession of the property either to manage or sell it for the benefit of the parties. If the suits are of such a character as to create a real conflict of jurisdiction over the subject matter of the litigation then the court that first acquires jurisdiction of the subject matter will retain jurisdiction for all purposes; if, however, there is no conflict of jurisdiction as to the subject matter then the court which first acquires actual possession of the res will retain jurisdiction. In Empire Trust Co. v. Brooks,[12] it is said: "Conflict of jurisdiction as to the subject matter of the litigation does not mean merely that the two suits relate to the same physical property. . . . It means that the issues involved, relief prayed for, and parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first." In deciding that, in the matter before it, there was no conflict of jurisdiction of the subject matter as between the state and federal courts involved, the court said: "The subject matter of the suit in the federal court exclusively related to the foreclosure of the appellant's mortgage. In the suit . . . in the state court the foreclosure of appellant's mortgage was not sought. The appellant as trustee, and the bondholders, as such, were not made parties to it. . . . The state court could not

12 Empire Trust Co. v. Brooks, 232 Fed. 661, 146 C. C. A. 567; Knudsen v. First Trust, etc., Bank, 245 Fed. 81, 83, 157 C. C. A. 377; Milwaukee & St. P. R. Co. v. Milwaukee & M. R. Co., 20 Wis. 165, 88 Am. Dec. 735. If receivers appointed by one court voluntarily appear in a foreclosure action brought before another court and proceed without making objection to the jurisdiction of the latter, it may foreclose. Continental Trust Co. v. Patterson, 26 Colo. App. 186, 142 Pac. 422.

have sold the mortgaged property free of liens nor could it have foreclosed the lien of appellant's mortgage." The purpose of the action in the state court was the appointment of a receiver of a corporation as insolvent under a statute of Texas and, by an amendment, the marshaling of its assets and its liquidation under the Texas laws.[13]

The various interested parties in general receivership proceedings may by their conduct in the proceeding, or by stipulation, lose or waive, by way of estoppel, rights that they would otherwise have. A mortgagee who participates in the request for the appointment of a receiver loses the benefit of the rule that postpones the claims of a mortgagee to the expenses of the receivership.[14] A mortgagee who permits the disbursal under court order

13 Craver v. Greer, 107 Tex. 356, 179 S. W. 862.

14 A mechanic's lien, subsequent to a mortgage, does not obtain priority over receiver's certificates, when the fund is insufficient to pay the mortgage, because the mortgagee waived priority to the certificates. Pusey & Jones v. Pennsylvania Paper Mills, 173 Fed. 634.

A certain agreement among interested parties held to amount to an agreement that the rents should be applied toward the mortgage. Ball v. Improved Property Holding Co., 220 Fed. 637, 136 C. C. A. 245.

If a mortgagee impliedly agrees that laborers and material men may first be paid out of a trust fund created from the current income, before he has any claim thereto, and if one performs labor or supplies material in reliance upon this understanding, he has a right which a court of equity may assist him to enforce, as well as to defend, and he may, if he so desires, initiate a proceeding for that purpose. Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171.

In an action for foreclosure brought by a mortgagee after the dismissal of a creditor's action instituted by the mortgagee and in which a receiver was appointed, the mortgagee is not entitled to the rents collected by such receiver. Scott v. Ware, 65 Ala. 174.

Priority over receivership expenses is not lost by mortgagees simply because they participated in a creditors' meeting at which the action was decided on. Craver v. Greer, 107 Tex. 356, 179 S. W. 862.

Priority over receivership expenses is not lost by mortgagee's accepting money with other creditors from mortgagor's grantee under an arrangement with mortgagor. Hooven-Owens-Rentschler Co. v. T. Schriver & Co., (Tex. Civ.) 184 S. W. 359.

of the only fund to which his lien attaches can not have the lien attached to other funds covered by other liens.[15]

While a general receiver of a debtor does not have title to the property placed in his care he is practically substituted for the owner in the management of it. The owner's control over the property is suspended during the receivership.[16] The receiver has no greater rights in the mortgaged property than the owner had; and, on the other hand, he has the same defenses against a mortgage that the owner might have.[17] The receiver is circumscribed by the rule that he must act impartially for the best interest of all creditors and he can not take a course, as, for instance, suing to have a mortgage cancelled, that will inure to the benefit of some and to the detriment of others.[18] A receiver may, on payment, execute satisfaction and discharge of mortgages held by his debtor, even though the amount secured is not yet due;[19] he may sue to foreclose mortgages held by his debtor;[20] he may be authorized to intervene in a foreclosure action affecting the property of his debtor and control the validity of the mortgage.[21] In fact the receiver, in so far as mortgaged property under his control is concerned, is in

15 Walker v. Linden Lumber Co., 170 N. C. 460, 87 S. E. 331.

16 Jaggers v. Sparks et al., 127 Ark. 567, 193 S. W. 67. In this case it is decided that a judgment rendered in an action brought by the receiver on the note and mortgage is binding upon the holder and therefore a protection to the maker against any subsequent action by the holder.

17 Hatch v. Johnson Loan, etc., Co., 79 Fed. 828; American Waterworks & Electric Co. v. Towle, 245 Fed. 706, 158 C. C. A. 108; Williams v. Old Colony Trust Co., 222 Mass. 378, 110 N. E. 1029; Thomson Estate v. Washington Inv. Co., 84 Wash. 326, 146 Pac. 617.

18 American Trust, etc., Bank v. McGettigan, 152 Ind. 582, 71 Am. St Rep. 345, 52 N. E. 793; Wimpfheimer v. Perrine, 67 N. J. Eq. 597, 50 Atl. 356.

19 Heermans v. Clarkson, 64 N. Y. 171.

20 Jaggers v. Sparks, 127 Ark. 567, 193 S. W. 67.

21 Equitable Trust Co. of New York v. Great Shoshone & Twin Falls Water Power Co., 245 Fed. 697, 158 C. C. A. 99.

the same position as the owner would be except for the protection and restrictions above indicated.[22]

Analogous to the matters just above considered is the question of the effect upon the rights of mortgagees of the institution of bankruptcy proceedings against the mortgagor. It is sufficient here to say that practically the same rules apply to a receiver or a trustee in bankruptcy, as far as mortgaged property of the estate is concerned, as apply to a general receiver of the mortgage debtor.[23]

In various other relations, where the mortgaged property comes, in a sense, into custodia legis, questions similar to those that arise in general receivership and bank-

22 The receiver may be authorized to borrow money to buy a mortgage. Beaton v. Seaboard Portland Cement Co., 211 Fed. 84, 127 C. C. A. 508.

A provision in a mortgage to a building association that it is non-negotiable and uncollectible by any other person than the association does not militate against an assignment made by a receiver of the association under an order of court. Spinney v. Miller, 114 Iowa 210, 89 Am. St. Rep. 351, 86 N. W. 317.

Where partners transferred property to another so as to enable him to mortgage it for the benefit of the firm, a receiver of the partnership can not in equity be permitted to cancel the transfer without relieving the mortgagor of all liability. Security Trust Co. v. Dinsmore, 186 Mich. 273, 152 N. W. 964.

A mortgagee may sue a receiver to compel a reformation of the mortgage so as to have the description include property intended by the parties to be included. Ryder v. Ryder, 19 R. I. 188, 32 Atl. 919.

23 In re Elmore Cotton Mills, 217 Fed. 808, 810; In re Jersey Island Packing Co., 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560; Sample v. Beasley, 158 Fed. 607, 85 C. C. A. 429; Matter of Mayer, 156 Fed. 432; Central Trust Co. v. Worcester Cycle Mfg. Co., 86 Fed. 35; Mirabal v. Albuquerque, etc., Mills, (N. M.) 170 Pac. 50; Rhinelander v. Richards, 184 App. Div. 67, 171 N. Y. Supp. 436; In re Busch Brewing Co., 41 App. Div. 204, 58 N. Y. Supp. 812. In matter of Dooner & Smith, Bankrupt, 40 Am. Bankruptcy Rep. 116, it was held that where mortgaged property sold by a trustee brought only sufficient to pay a first and a second mortgagee, a third mortgagee was entitled to rents collected by the trustee even though he had taken no steps to have the rents sequestered in his behalf. As against the trustee he was held to be the virtual owner after bankruptcy.

ruptcy proceedings arise and the same rules are generally held to apply.[24]

§ 258. Receiverships Created at Instance of Others Than Mortgagees.

In foreclosure proceedings it may happen that the mortgagee does not desire or is not in a position to ask for a receiver. It might happen that a mortgagee, having the senior lien on the property, could not show that the property was inadequate security for his debt. A subsequent lienor would be in a different position in this regard since his security is only the equity remaining in the property after all prior liens are satisfied. Parties other than the complaining mortgagee may have receivers appointed on making a showing to the effect that such a course is necessary for the adequate protection of their interests.[1]

There are various sorts of litigation, not instituted by mortgagees and not in foreclosure, in which, at the instance of parties other than mortgagees, receiverships may be created under such circumstances as to affect or involve mortgaged property. For instance, a judgment creditor of the mortgagor may have the right to levy upon and sell the property under execution, and if the mortgagee attempts to interfere with the proceeding the creditor may enjoin him from so doing and have a receiver appointed. The levy must be upon the property with the intention of selling it subject to the mortgage; and it must be shown that the debtor has no other property out of which the creditor's claim can be satisfied and that the mortgaged property is more than sufficient to

[24] Property of decedents: Tetzloff v. May, 172 Iowa 617, 154 N. W. 905; Mayfield v. Wright, 107 Ky. 530, 54 S. W. 864; St. Louis Nat. Bank v. Field, 156 Mo. 306, 56 S. W. 1095; Cohn et al. v. Bartlett et al., 182 App. Div. 245, 169 N. Y. Supp. 604.

Property of an incompetent: Hodges v. McDuff, 69 Mich. 76, 36 N. W. 704.

Property of a minor: Wilson v. Wilson, 2 Keen. 249, 48 Eng. Reprint. 624.

[1] Craver et al. v. Greer et al., 107 Tex. 356, 179 S. W. 862; First

pay the mortgage debt. The case for a receiver is strengthened if it is made to appear that the mortgagee is claiming a lien upon more property than is rightfully covered by his mortgage.[2]

In such proceedings as various sorts of creditors' suits against failing or insolvent debtors, proceedings in aid of execution, bankruptcy proceedings, and the like, receivers may be appointed and in such cases mortgaged property of the debtor will be involved in the receivership. It is not our purpose here to discuss the conditions or grounds under which these receiverships will be created but to point out the various respects in which they may affect the rights and interests of the parties to the mortgage.

It is to be observed in the first place that a receiver will not be appointed as against a mortgagee in possession unless he is wrongfully or fraudulently interfering with the rights of other creditors.[3] It is not necessary that a creditor's receivership be made to cover the mortgaged property if the creditor's interest in the equity be otherwise properly protected.[4]

The general rule that a receivership does not create nor destroy vested interests in property and that a receiver takes the property subject to all valid existing liens upon it applies to these receiverships. One important application of this rule, in so far as mortgaged property is concerned, is to the effect that where the receivership has not been created, at his instance, the priority of the mortgagee's interest in the property can not, unless he has in some way created an estoppel against himself, be dis-

State Bank, etc., et al. v. Hubbard, etc., Gin Co. et al. (Tex. Civ.), 178 S. W. 1015; Rice v. Ahlman, 70 Wash. 6, 126 Pac. 64.

2 Rose v. Bevan, 10 Md. 466, 69 Am. Dec. 170; Vochell v. Hynson, 26 Md. 83.

3 Schultz v. Jerrard (N. J.), 3 Atl. 265; Brayton, etc. v. Monarch, etc., Co. et al., 87 Ore. 365, 169 Pac. 528, 170 Pac. 717.

4 Burgwyn Bros. Tobacco Co. v. Bentley, 90 Ga. 508, 16 S. E. 216; Leadbetter v. Leadbetter, 125 N. Y. 290, 21 Am. St. Rep. 738, 26 N. E. 265.

placed by the expenses of the receivership.[5] The doctrine of "confusion of property" will not apply against the priority of a mortgagee because the mortgaged property was sold in bulk with other property where the confusion was due to the conduct of a receiver for which the mortgagee was not more responsible than were the other interested parties.[6] A mortgagee may, however, lose his claim by permitting the only fund on which he has a lien to be distributed by the receiver without objection.[7] If the mortgagee has rightfully obtained possession of mortgage chattels before the commencement of the receivership proceedings, an action in replevin will not lie against him at the instance of the receiver.[8]

In connection with the question of the displacement of prior vested liens by the creation of a receivership there frequently arise questions concerning the interpretation and application of statutes, now very commonly found throughout the United States, giving to laborers, mechanics, and others, employed by corporations, a prior lien upon the property upon which they have worked, for their wages in case of insolvency or the appointment of a

5 First State Bank, etc. v. Hubbard, etc., Co. et al. (Tex. Civ.), 178 S. W. 1015; Craver et al. v. Greer et al., 107 Tex. 356, 179 S. W. 862.

6 Walker et al. v. Linden Lumber Co., 170 N. C. 460, 87 S. E. 331.

A receiver appointed over the property of a lumber company was authorized to continue the business. Having on hand money obtained from the sale of certain lumber, he was ordered to pay the wages of some of his employees out of this money. A certain creditor held a mortgage on part of the lumber. Since the wages would have had to be paid if necessary from the proceeds of the corpus of the company's property and since the mortgagee had not created any element of estoppel against himself, it was held that he was entitled to be paid out of other funds and if necessary out of the proceeds of the corpus. Security Trust Co. v. Bank of Bernice, 239 Fed. 665, 152 C. C. A. 499.

7 Hollenbeck v. Louden, 35 S. D. 320, 152 N. W. 116.

8 Security Trust Co. v. Bank of Bernice, 239 Fed. 665, 152 C. C. A. 499; Schmidtman v. Atlantic Phosphate, etc., Co., 230 Fed. 769, 145 C. C. A. 79; Central Sav. Bank v. Newton, 59 Colo. 150, 147 Pac. 690.

receiver over the affairs of the corporation. Such statutes are usually held to apply to the wages of laborers and mechanics employed by a receiver appointed to continue the business of the corporation and many of them expressly apply to the general expenses of the receivership. It is universally held that these statutes fasten the liens they create only upon the property of the corporation. If a corporation acquires property subject to a mortgage, or if, at the time of acquiring property, the company gives a mortgage upon it to secure part of the purchase price, then the property of the corporation is only its equity of redemption in the property; these liens attach only to this equity and can not displace the lien of the mortgages. It will not be assumed that the legislature intended that a vested contract lien should be subject to be displaced by subsequent occurrences unless it unmistakably expressed its intention to that effect; such statutes will be construed as giving to the objects of its protection only a preference over other unsecured creditors unless the intention of the legislature to give them a lien is so expressly declared as to have no room for doubt. Such statutes can not affect mortgage liens that are vested at the time the statutes go into effect but the existence of such a statute gives notice to a mortgagee that his security is subject to the impairment that the functioning of the statute causes.[9]

While receiverships created at the instance of creditors of a mortgagor do not divest the lien of a mortgage they nevertheless in certain ways affect the rights of the mortgagee in the enforcement of his lien. The receiver is an officer of the court and his possession is the possession of the court. The property is in *custodia legis* and the mortgagee can not disturb nor interfere with this possession without first obtaining the permission of the

9 Humphrey Bros. et al. v. Buell, etc., Co., 174 N. C. 514, 93 S. E. 971; Walker et al. v. Linden Lumber Co., 170 N. C. 460, 87 S. E. 331.

court. Usually the mortgagee is required to present his claim in the receivership proceeding itself,[10] but the court may permit an independent suit in foreclosure to be instituted and, if necessary, may extend the receivership to cover the foreclosure action.[11]

On the other hand the remedies of general creditors against a mortgagee are affected by the appointment of a creditor's receiver. It is, of course, a general rule that a mortgage that may be void as being fraudulent against creditors or as not complying with statutory provisions as to form and recordation is nevertheless good as between the mortgagor and mortgagee and can not be attacked by a creditor of the debtor unless he first secures some lien upon the mortgaged property.[12] This rule does

10 Security Trust Co. v. Bank of Bernice, 239 Fed. 665, 152 C. C. A. 499.

11 Guaranty Trust Co. v. International, etc., Co., 231 Fed. 594, 145 C. C. A. 480; In re Webster Loose Leaf Filing Co., 240 Fed. 779; Equitable Trust Co. of N. Y. v. Great Shoshone, etc., Co. et al., 245 Fed. 697, 158 C. C. A. 99; Arkansas Cypress, etc., Co. v. Meto Valley R. Co., 97 Ark. 534, 134 S. W. 1195; Farmers' Loan, etc., Co. v. Hotel Brunswick Co., 12 App. Div. 626, 42 N. Y. Supp. 350.

A chattel mortgagee who is entitled to possession of the mortgaged property may bring an action in conversion against a creditors' receiver who has taken it into his custody. Albien v. Smith, 24 S. D. 203, 123 N. W. 675; Hundley Dry Goods Co. v. Albien, 32 S. D. 60, 142 N. W. 49.

When a creditor's receiver sells mortgaged chattels under an order of court, the proper course is for the mortgagee to present his claim in the receivership court and ask for a lien upon the proceeds; if he unnecessarily sues the receiver in foreclosure the receiver will be allowed the expenses of advertising and selling and the mortgagee will not be allowed attorney's fees stipulated for in the mortgage in case of suit. Pickering v. Richardson, 57 Wash. 117, 106 Pac. 614.

It is within the discretion of the court whether or not to enjoin a suit commenced against the receiver without its consent. Schwabacher Bros. & Co. v. Schade & P. Co., 99 Wash. 271, 169 Pac. 783.

A chattel mortgagee may sue a receiver to have the mortgage reformed to cover all the property intended to be included. Ryder v. Ryder, 19 R. I. 188; 32 Atl. 919.

12 Stephens v. Meriden Britannia Co., 160 N. Y. 178, 73 Am. St. Rep. 678, 54 N. E. 781; Albien v. Smith, 26 S. D. 551, 128 N. W. 714, affirming judgment on rehearing 24 S. D. 203, 123 N. W. 675.

not apply to a creditor's receiver nor to creditors who have had their claims allowed in the receivership proceeding. The reason for the exception is given in a Washington case[13] as follows: "This court has uniformly held that the property of an insolvent corporation in the hands of a receiver is a trust fund for the payment of all of its creditors. . . . While we have held in the cases first above cited that the word 'creditors' in the chattel mortgage statute refers to creditors having some form of lien against the property, those were cases where the rights of creditors of an insolvent corporation after a receiver was appointed were not considered. It seems too plain for discussion that after a receiver has been appointed and the property of an insolvent corporation taken into his possession, neither the debtor nor a creditor after that time by any act of his may create a new lien upon the property. While the receiver takes only the title of the debtor at the time of appointment and holds no greater interest than the debtor had yet he takes the property into his custody as an officer of the court and neither the debtor nor his creditors after that time can create or perfect liens which have not been perfected prior to the time of the receiver's appointment and possession of the debtor's property."

Either the receiver or creditors with approved claims may in the receivership proceedings, if the mortgage claim is presented there, or by intervention or as defendant in a foreclosure suit, or by independent action brought in equity for the purpose, contest the validity of the mortgage.[14]

[13] Mutual Inv. Co. v. Walton Mach. Co. et al., 91 Wash. 298, 157 Pac. 682.

[14] Equitable Trust Co. of N. Y. v. Great Shoshone etc. Co., 245 Fed. 697, 158 C. C. A. 99; In re Webster Loose Leaf Filing Co., 240 Fed. 779; Guaranty Trust Co. of N. Y. v. International etc. Co., 231 Fed. 594, 145 C. C. A. 480; Berliner v. Kuttner, 85 Misc. Rep. 461, 147 N. Y. Supp. 308; Mutual Inv. Co. v. Walton Mach. Co., et al., 91 Wash. 298, 157 Pac. 682.

Where, as the result of the intervention of certain creditors in

2. *Receiverships Affecting Mortgaged Chattels.*

a. Common Law and Equitable View of Chattel Mortgage and Right of a Mortgagee to a Receiver on Foreclosure.

§ 259. Common Law View.

The common law view of a mortgage that it is, in law, what it is, literally, in form, a conveyance of the title to the property by the mortgagor to the mortgagee, is applicable, not only to mortgages of real property,[1] but to chattel mortgages as well.[2] During the pendency of the mortgage the mortgagee is as against the mortgagor, the owner of the property. This ownership is, however, qualified. It is, of course, subject to be defeated by the performance of the conditions, performance of which the mortgage stipulates shall entitle the mortgagor to restoration of the ownership. But there are other qualifications to the mortgagee's title. If he is in possession he does not own the rents and profits, such as the increase

a foreclosure suit, the portion of plaintiff's mortgage that covered certain chattels is declared void and a sum of money thus obtained for the benefit of creditors it is not an abuse of discretion for the court to deny an application for permission to intervene, made after the suit was determined, on the part of another creditor who had failed to apply earlier. The court says: "Instead of availing itself of that right and opportunity (to intervene) it allowed the contest to be carried on by and at the expense of those of the general creditors of the insolvent that have been named, resulting in the decree that has been referred to. Not until after the suit in which it could have intervened had been ended by the final decree therein and the sale of the property thereunder did the company manifest any intention of intervening and not until those creditors had made application to the court for the payment of their claims out of that fund did the appellant company appear with its verified complaint in intervention claiming such an amount as would practically take the whole of the fund in question. We think that the most favorable view that can be taken of the application is that it was addressed to the sound discretion of the court below and are of the opinion that such discretion was not abused by the denial of the application." Equitable Trust Co. of N. Y. v. Great Shoshone etc. Co., 245 Fed. 697, 158 C. C. A. 99.

1 See, supra, § 239.

2 Wilson v. Brannan, 27 Cal. 258.

of cattle or the wool on sheep, and if he takes these he must apply them toward the payment of the debt and account for them to the mortgagor. If he is out of possession he is not entitled to an accounting from the mortgagor or any third party in possession, of the rents and profits; and, even though he subsequently takes possession as after default and after his title has become absolute, he can not sue in his own right for rents or profits, such as charges for freight on a mortgaged ship, accruing after the mortgage but before possession.[3] The common law mortgagee's ownership becomes absolute, however, upon default and if then out of possession he can recover the property in an action at law in replevin. Because he has this legal remedy he is generally held not to be entitled to a receiver if, without gaining possession, he commences an action to perfect his title by shutting off, or foreclosing, the mortgagor's equity of redemption.

§ 260. Equitable View.

Both through actions brought by mortgagees to perfect their title upon default and actions brought by mortgagors to redeem mortgaged property, courts of equity acquired jurisdiction over litigation concerning mortgaged property. In the practice of these courts in dealing with such litigation there has developed a change from the common law view of a mortgage to what might be called the equitable view—namely the view that a mortgage simply grants to the mortgagee a lien upon the property affected, as security for a debt, but does not transfer title to him. This equitable view is now established in many jurisdictions by statute. While this development has applied to chattel mortgages as well as to real property mortgages,[1] in the case of the former the development has not been so extensive, either territorially

[3] Whitmore v. Parks et al., 22 Tenn. (3 Humph.) 95; Chimney v. Blackman, 3 Douglas (British) 391.

[1] See § 239, supra.

or as to its effect upon the legal rights of the parties, as in the case of the latter. The common law view of the effect of a chattel mortgage on the title still largely prevails, though in some jurisdictions the effect is declared by statute to be only the equitable one above mentioned.[2] Even in such jurisdictions the mortgagee is given the right on default, especially when the mortgage stipulates that he may do so, to sell the property by some summary method, or proceed in foreclosure.[3] The foreclosure here mentioned is an equitable foreclosure, that is, an action through which the mortgagee seeks the payment of his debt by a sale of the property, with the right on the part of the mortgagor to receive any surplus upon the sale or, on the part of the mortgagee, to have a personal judgment against the mortgagor for any deficiency. In such foreclosure actions it is now generally recognized, either because the right has come to be granted by courts of equity through their inherent powers or has been established by statute, that the mortgagee may, on a proper showing, have a receiver appointed; and, when he forecloses, the mortgagee has this right, even though he has the right to take possession through an action at law in replevin.[4]

b. General Principles Governing Receiverships in Actions to Foreclose Chattel Mortgages.

§ 261. Discretion of Court.

The general principles governing the appointment of receivers and the operation of receiverships, as set forth in the early chapters of this work, are applicable in actions to foreclose chattel mortgages. The purpose of the re-

2 See California Civil Code.

3 See California Civil Code, Wilson v. Brannan, 27 Cal. 258.

4 H. B. Claflin Co. v. Furtick, 119 Fed. 429; State Journal Co. v. Commonwealth Co., 43 Kan. 93, 22 Pac. 982; Haggard v. Sanglin, 31 Wash. 165, 71 Pac. 711; Libert v. Unfried, 47 Wash. 182, 91 Pac. 774.

ceivership is to preserve and care for the property involved in the action so that it may be available for proper disposal under the final decree of the court.[1] The remedy is merely ancillary to a suit in equity; it is not a matter of right; and whether it will be granted or withheld is largely within the discretion of the court. In a Maryland case affecting mortgaged chattels,[2] the court, after remarking that the question of the propriety of appointing a receiver had been discussed in former decisions probably more fully and more frequently than any other question, called attention to the fact that in a somewhat earlier case,[3] the results of the court's previous deliberations on the matter had been reduced to five propositions: "(1) The power to appoint is a delicate one and to be exercised with great circumspection; 2. It must appear that the claimant has a title to the property and the court must be satisfied by affidavit that a receiver is necessary to preserve the property; 3. There is no case where the court appoints a receiver merely because the measure can do no harm; 4. The fraud or imminent danger of the intermediate possession should not be taken by the court but must be clearly proved; 5. Unless the necessity be of the most stringent character the court will not appoint until the defendant is first heard in response to the allegation."

§ 262. Necessity for Pending Suit.

Since a receivership is merely an ancillary remedy there can not be an action merely for the appointment of a receiver; there must be pending before the court some action seeking a general relief. In the matter we are now discussing an action seeking the payment of a debt by the

1 H. B. Claflin Co. v. Furtick, 119 Fed. 429; Libert v. Unfried, 47 Wash. 182, 91 Pac. 774.

2 Voshell v. Hynson, 26 Md. 83.

3 Blondheim v. Moore, 11 Md. 365.

sale of property in aid of which relief the power of the court to appoint a receiver may be called into operation.[1]

In a foreclosure action, as in any other action, the jurisdiction of the court is limited to the issues raised by the proceeding; it can not permit nor compel parties not directly interested in those issues to be brought before it nor permit nor compel its receivers to take possession of property which is not the subject matter of the litigation.[2]

1 State v. Union National Bank, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585.

2 Ex parte Equitable Trust Co., 231 Fed. 571, 145 C. C. A. 457. This matter was an appeal to the United States Circuit Court of Appeals, Ninth Circuit, from the District Court of the U. S. for the Second Division of the Northern District of California from certain orders made by the District Court and an original application for writs of prohibition and mandamus. The Equitable Trust Co., as trustee under a deed of trust securing bonds of the Western Pacific Railway Company, brought suit in the District Court to foreclose the deed of trust and receivers were appointed to take possession of all of the property of the railway company. In due time all of the parties to the action were before the court with stipulations asking for and consenting to an immediate decree of foreclosure and an order of sale of all the properties of the defendant company. At the time the mortgage, or trust deed, which was sought to be foreclosed, was executed, there was also made a certain contract. The defendant railway company and the Denver & Rio Grande Railroad Company were among the parties to this contract. By the contract, for all practical purposes it may be said here, the Denver Company was obligated to pay certain amounts to the Western Company, if that company failed to meet payments of interest and sinking fund on the mortgage and these amounts were to be turned over to the trustee under the mortgage. The Denver Company, it was claimed, had failed to make the payments called for under this contract and at or about the time of commencing the foreclosure suit, the trustee, Equitable Trust Co. of New York, commenced an action in the District Court of New York against the Denver Company to enforce the rights claimed under this contract. At one of the hearings in the foreclosure suit the existence of this contract and the pendency of the New York action were brought to the attention of the court and an order was made enjoining the trustee from proceeding with the New York suit without the consent of the California court and ordering that the Denver Company be made a party to the foreclosure suit and directed to interplead therein. The appeal was from this

In the summary of general principles quoted from a Maryland decision in the preceding section it is stated that "it must appear that the claimant has a title to the property." It is not necessary, however, in a foreclosure suit that the plaintiff should base his claim upon a strictly formal mortgage. The intent of the parties to a contract largely governs its effect and an instrument regardless of its form may, pursuant to the intent of its signers, be construed to have the force of a mortgage. The matter is not one of form but of substance and equity. In an Arkansas case,[3] it is said: "Equity requires no particular words to be used in creating a lien. It looks through the form to the substance of an agreement and if from

order and the prohibition proceedings sought an order forbidding the District Court from enforcing its order with reference to the interpleading of the Denver Company. In the foreclosure suit it had been shown that there was need for an early sale because a favorable opportunity to re-organize and re-finance the defendant debtor company had been arranged for, an opportunity which a very large majority of the bondholders were anxious to take advantage of, and this opportunity would be lost if an early sale was not had. The Court of Appeals reversed the order enjoining the trustee from proceeding in New York and issued the writ of prohibition. In the course of its opinion the Court of Appeals says: "The District Court in California was not asked to give relief against the Denver Company, nor was it asked to appoint receivers, except to protect and preserve, pending the litigation, the property subject to the mortgage lien, which did not include the right of the trustee to enforce rights, herein involved, against the Denver Company, for it may be reiterated that it was not to be sold under foreclosure, but was to survive to the trustee for the benefit of the bondholders. It comes then to this: The receivers had a right to the custody of only the property the subject matter of litigation described in the amended complaint." And again: "We would not in any sense lessen the power of a court of equity to protect itself against being made an instrument of injustice. It may appropriately, and should, scrutinize matters brought before it and which are fairly within and directly related to the issues presented. But its jurisdiction is always limited to the subject matter in the case before it.

3 Martin v. Schichtt, 60 Ark. 595, 31 S. W. 458.

See, also, Arkansas Cypress Shingle Co. v. Meto. etc. Co., 97 Ark. 534, 134 S. W. 1195.

the instrument evidencing the agreement the intent appears to give or to charge or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified the lien follows." Instruments that are in effect, though not in form, mortgages are sometimes spoken of as equitable mortgages and the liens they create as equitable liens. It is to be noticed, however, that the term "equitable mortgage" is here used in a sense different from that in which we have used it above to designate a mortgage viewed simply as giving a lien by way of security, in contrast with a common law mortgage viewed as granting title. While the court may not, on the hearing of a motion for the appointment of a receiver, finally determine the intent of the instrument relied upon by plaintiff claiming it to be a mortgage, it may, however, determine that there is sufficient probability of the correctness of plaintiff's contention to warrant the appointment as far as that point is concerned.[4]

Though a mortgagee may have taken possession of the mortgaged property or purchased it at a summary sale, he may be under the necessity of commencing an action to foreclose or in the nature of an action to foreclose and may, on a proper showing, in such an action have a receiver appointed.[5]

[4] Keane v. Kibble et al., 28 Idaho 274, 154 Pac. 972. In this case the contention of defendant was that the instrument sued upon was a conditional sale and not a mortgage; and that, title being in plaintiff, he could not have a receiver appointed over his own property. In his affidavit, used on the motion, plaintiff contended that he could under the law and would show, on the trial, by parol evidence that the instrument was intended as a mortgage. The receivership was allowed. See, however, a strong dissenting opinion.

In Semmes v. Rudolph Stecher Brewing Co. (Ruediger), 195 Mo. App. 621, 187 S. W. 604, it was held that an instrument, "in the nature of a chattel mortgage," was a transfer of the title sufficient to bring it within the purview of a statute concerning bulk sales.

[5] In Alexander v. Houston (Miss.), 31 So. 211, complainants,

§ 263. Property Affected by Receivership.

Since the purpose of the receivership is to preserve the property involved in the action and hold it ready for distribution in accordance with the final decree of the court, in a foreclosure action, the receiver can be placed in possession only of the property covered by the mortgage and it is error for the court to direct the receiver to take possession of property not so covered.[1]

When it is claimed that certain property, such as a leasehold, had been taken in the name of a third party instead of in the name of the mortgagor, for the purpose of defrauding the mortgagee of his security, and a showing is made sufficient to warrant the belief that the claim is well founded, the court may order the receiver to take

under a provision of the mortgage to the effect that they could claim a foreclosure at any time before the maturity of the debt if they became dissatisfied with the security, exercised this option and purchased at a summary sale for less than the amount of the debt. Defendants refused to deliver possession and complainants sued to perfect their title, or, in case it was found defective, to foreclose. On the equitable showing made by the complaint a receiver was appointed, and in J. I. Case Threshing Machine Co. v. Barney, 54 Okla. 686, 154 Pac. 674, the plaintiff sued to foreclose a mortgage on a threshing machine securing a debt of about $2400. A receiver was appointed and on order of court, sold the property before trial to plaintiffs for $1400. Defendants cross-complained on the ground that plaintiffs had before commencing suit wrongfully taken possession of the property and by neglecting it had permitted it to deteriorate in value. On the trial the court, of its own motion, discharged the receiver and set aside all of his acts and refused to permit plaintiffs to prove that they had purchased at the receiver's sale. The appellate court ruled that this order of the trial court was erroneous, although it expressly refrained from deciding whether or not the trial court had "authority" to appoint a receiver and order the property sold and "assumed" that it had that "power." It ruled however that the taking of the property by plaintiff before action was justified under a stipulation of the mortgage giving it the power on default to take and sell the property.

1 Ex parte Equitable Trust Co. of New York, 231 Fed. 571, 145 C. C. A. 457; State v. Union Nat. Bank, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; Thomas v. Armstrong, 51 Okla. 203, 151 Pac. 689.

possession of the property and hold pending the result of a full hearing of the matter.[2]

When the mortgaged property is being used in a business and it is necessary for the purpose of preserving the value of the property as security for the debt the court may order the receiver to continue the business, especially when the mortgage expressly covers the good will.[3]

If the mortgaged property, while in the possession of the receiver, is destroyed by fire and the property was insured for the benefit of the mortgagee, the receiver will be authorized to collect the insurance, and the lien of the mortgage will be transferred to the fund.[4]

§ 264. The Court's General Control Over the Receivership.

As the question of propriety of creating a receivership is within the very wide discretion of the court and to be

2 Leader Pub. Co. v. Grant Trust & S. Co., 182 Ind. 651, 108 N. E. 121.

Where goods which have been fraudulently purchased are mortgaged by the purchaser and the seller is claiming the property as against the mortgagee, a receiver may be appointed to preserve the property pending the determination of the title to it regardless of the solvency or insolvency of the mortgagee. Exchange Bank v. H. B. Claflin Co., 100 Ga. 640; Wolfe v. Claflin, 81 Ga. 65.

Unsecured creditors may identify and separate what goods they can from the debtor's common stock and a receiver may be appointed to take charge of the goods so identified and separated but not for the whole property where a mortgagee of it is solvent. Atlantic, etc., Ice Co. v. Bluthenthal, 101 Ga. 541.

3 Cake v. Mohun, 164 U. S. 311, 41 L. Ed. 447, 17 Sup. Ct 100; Leader Pub. Co. v. Grant T. & S. Co., supra.

The fact that a mortgage covered certain stock, machinery and the crops for a certain year did not give the court the right to direct the receiver to farm the property for the next year. Burton v. Pepper, 116 Miss. 139, 76 So. 762.

Where the mortgage covers property in process of manufacture and the property will depreciate unless the manufacturing is continued, the court may authorize the receiver to continue the work. Valley Nat. Bank v. H. B. Claflin Co., 108 Iowa 504, 79 N. W. 279.

4 First State Bank v. Hubbard, etc., Co. (Tex. Civ.), 178 S. W. 1015.

determined, in the last analysis, by its judgment as to what course will probably be for the best interest of all the parties concerned, so all of its details are within the same discretion and, except where prescribed by statute, are to be determined, in the light of all the facts laid before the court and from the point of view of this object of the proceeding.

Unless otherwise prescribed by statute the court may in the first instance make the appointment on an ex parte hearing and without notice. Usually such an appointment is only temporary; and, at any rate, such an appointment is always open to review through a motion on the part of the defendant to vacate the order and dismiss the receiver.[1] The receivership may be vacated at any time, though not without due regard to the acts of the receiver and other rights that may have accrued thereunder.[2]

The receiver is an officer of the court and is under its direction and control. Orders establishing his duties and powers should be definite and explicit and, if ambiguous, may be declared erroneous on that ground.[3] It is the duty of the receiver to seek the advice and direction of the court in regard to difficulties that arise in the course of his administration.[4] The receiver is under the pro-

1 Meyer v. Thomas, 131 Ala. 111, 30 So. 89; Wilson v. Aultman & T. Co., 91 Ky. 299, 15 S. W. 783; Rice v. Ahlman, 70 Wash 6, 126 Pac. 64; Libert v. Unfried et ux., 47 Wash. 182, 91 Pac. 774; O'Donnell v. First Nat. Bank, 9 Wyo. 408, 64 Pac. 337.

2 Mains v. Des Moines Nat. Bank, 113 Iowa 395, 85 N. W. 758; J. I. Case Threshing Machine Co. v. Barney, 54 Okla. 686, 154 Pac. 674; Libert v. Unfried et ux., 47 Wash. 182, 91 Pac. 774.

Where a receiver on foreclosure had been appointed ex parte and subsequently a motion to vacate was granted on the ground that insolvency of the mortgagor was not shown, the order vacating was not conclusive as against creditors or trustee in bankruptcy in a suit to recover a preference. Golden Hill Distilling Co. v. Logue, 243 Fed. 342, 156 C. C. A. 122.

3 Watson v. Cudney, 144 Ill. App. 624.

4 Guaranty Trust Co. of New York v. International Steam Pump Co., 231 Fed. 594, 145 C. C. A. 480.

tection of the court and other parties may not proceed against him or the property under his control without the sanction of the court; but orders made in this regard should not be revoked without an opportunity being given to all interested parties to be heard.[5]

All such questions as the proper person to be appointed, the character of expenditures to be made by the receiver and charged against the estate, and the amount of the fee to be paid the receiver are within this equitable discretion of the court.[6] Because of its general control over the receiver, the court may, on foreclosure sale being decreed, if the statute does not otherwise provide, authorize the receiver to make the sale.[7]

§ 265. Grounds for Appointing a Receiver.

While it is true that the question of the propriety of appointing a receiver is always within the discretion of the court, it is true, nevertheless, that, either through the development of the practice of courts of equity or through statutory enactments governing the matter, the principle has been established that a certain sort of equitable showing must be made by the party applying for a receiver before the court will feel justified in making the appointment. The general rule is practically that the showing must be to the effect that the property involved is in danger of being lost, removed from the jurisdiction, or materially injured. Since the only interest that the

5 Equitable Trust Co., etc. v. Great Shoshone, etc., Co. et al., 245 Fed. 697, 158 C. C. A. 99; Atlantic Realty Co. v. Wlodar, 119 App. Div. 850, 104 N. Y. Supp. 843; In re Tobenkin, 119 App. Div. 850, 104 N. Y. Supp. 843; Tobenkin v. O'Brien, 119 App. Div. 850, 104 N. Y. Supp. 843.

6 Rose v. Nicholson, 128 Ark. 296, 194 S. W. 501; State Journal Co. v. Commonwealth Co., 43 Kan. 93, 22 Pac. 982; Hughes v. Edisto Cypress S. Co., 51 S. C. 1, 28 S. E. 2; Euphrat v. Morrison, 39 Wash. 311, 81 Pac. 695; Farmers' Loan & Trust Co. v. Hotel Brunswick Co., 12 App. Div. 626, 42 N. Y. Supp. 350.

7 Leader Pub. Co. et al. v. Grant Trust & Savings Co., 182 Ind. 651; 108 N. E. 121.

mortgagee has in the property is to have it held as security for his debt; this general rule, as far as foreclosure actions are concerned, has come to be expressed in special rules relative to that purpose. Sometimes statutes simply set forth the grounds on which receivers may generally be appointed; these statutes are held to be merely declaratory of the equity rules and when applied to foreclosure actions are interpreted with reference to the equity rules relating thereto. In some jurisdictions there are statutes relating especially to foreclosure actions. These statutes require a showing similar to that required under the rules of equity courts but usually eliminate some detail, such as the insolvency of the mortgagor. Either under the equity rules or statutory provisions there is room for the operation of the discretion of the court; it is never compulsory on the court to make the appointment simply because a technically sufficient showing has been made; the court can always ask whether or not the mortgagee can in all conscientiousness ask for the remedy.

It is both an equity and universal statutory requirement that the mortgagee asking for a receivership as an aid to his foreclosure suit must show that the mortgaged property is inadequate security for the debt.[1] The inadequacy shown, in order to meet the requirements of the rule, either equitable or statutory, must be a condition that did not exist at the time the mortgage was made, and must be due to some delinquency of the debtor or to causes over which he had no control and of such a character as to justify the mortgagee's request for the relief.[2]

It is a requirement of the equity rule, that the mortgagee must show that the mortgagor or the person liable

1 Wright v. Wright, 180 Ala. 343, 60 So. 931; Keane v. Kibble et al., 28 Idaho 274, 154 Pac. 972; Leader Pub. Co. v. Grant T. & S. Co., 182 Ind. 651, 108 N. E. 121; Tuttle v. Blow, 176 Mo. 158, 98 Am. St. Rep. 488, 75 S. W. 617.

2 Whitehead v. Hale, 118 N. C. 601, 24 S. E. 360.

for a deficiency judgment is insolvent.[3] This requirement is sometimes dispensed with in statutes dealing with the question.[4] If the property has passed into the hands of a third person his possession will not be interfered with unless it is shown that he is insolvent and unable to respond to a judgment for any damage that might be done to the property pending foreclosure.[5]

It is the requirement of the equity rule that, in addition to showing the inadequacy of the security and the insolvency of the mortgagor, the mortgagee must also show that the property has suffered some sort of equitable waste or injury at the hands of the mortgagor or is in danger of suffering such waste pending the action. Even though statutes may not expressly require such a showing courts usually interpret statutes as being declaratory of the equity rule and require the showing to be made. To meet the requirements of the rule the waste shown must be of such a character as to affect the value or availability of the property as security for the debt, and must be something different from the depreciation naturally due to ordinary use of the property.[6] The mere fact that there is delay in the progress of the suit will not justify the appointment of a receiver, even though the delay may be due to the tactics of the mortgagor.[7] The fact that the property is perishable will,

3 Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co. (C. C.), 80 Fed. 68; Mannos v. Bishop, etc., Co., 181 Ind. 343, 104 N. E. 579.

4 See: Keane v. Kibble et al., 28 Idaho 274, 154 Pac. 972; Leader Pub. Co. v. Grant T. & S. Co., 182 Ind. 651, 108 N. E. 121.

5 Meyer v. Thomas, 131 Ala. 111, 30 So. 89; Commerce Trust Co. v. White, 169 Mo. App. 5, 154 S. W. 864.

6 H. B. Claflin Co. v. Furtick, 119 Fed. 429; Ridgely v. Abbott Quicksilver Mining Co., 16 Cal. App. 773, 117 Pac. 1036; Reynolds v. Quick, 128 Ind. 316, 27 N. E. 621; Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 104 N. E. 579; Tuttle v. Blow, 176 Mo. 158, 98 Am. St. Rep. 488, 75 S. W. 617; Euphrat v. Morrison, 39 Wash. 311, 81 Pac. 695; O'Donnell v. First Nat. Bank, 9 Wyo. 408, 64 Pac. 337.

7 Mannos v. Bishop-Babcock-

however, be taken into account in determining what is a reasonable time to allow the mortgagor to sell the property after default under a claim that there had been a stipulation to the effect that he should have the privilege of doing so.[8] The fact that the property has been attached and sold will not defeat the mortgagee's right to a receiver,[9] and the fact that, pending the foreclosure action, the property is levied upon may be reason for appointing a receiver and enjoining a sale under the levy.[10] That a receivership will prevent a multiplicity of suits may justify the appointment.[11] When a court has enjoined the summary sale of mortgaged property, the mortgagee is entitled to a receiver pending the trial of the action.[12]

The requisite showing to justify the appointment of a receiver must be made by competent and satisfactory evidence.[13] Where, however, the court has jurisdiction to appoint a receiver and an order appointing is possibly erroneous simply because of some incompetency or informality of the evidence received as a basis for the order, prohibition against further proceedings under the receivership is not an available remedy.[14] A subsequent lienor can not object to the appointment of a receiver when it is made to appear that the debt of the mortgagee foreclosing is much greater than the value of the property.[15] A receiver need not be appointed when the defendant offers to furnish a bond that will afford the com-

Becker Co., 181 Ind. 343, 104 N. E. 579.

8 Hill v. Cohen, 21 Ky. Law Rep. 1356, 55 S. W. 1.

9 Cooper v. Berney Nat. Bank, 99 Ala. 119, 11 So. 760.

10 Guerra v. Nistal, 66 Fla. 579, 64 So. 236.

11 Wiedemann v. Sann (N. J. Eq.), 31 Atl. 211.

12 Citizens' State Bank v. First Nat. Bank, 56 Tex. Civ. 515, 120 S. W. 1141.

13 Arnold et al. v. Meyer (Tex. Civ.), 198 S. W. 602.

14 Skeen et al. v. District Court, 29 Idaho 331, 158 Pac. 1072.

15 Whaley v. Bright, 189 Ala 134, 66 So. 644.

plainant as ample protection as a receivership would give him.[16]

3. Receiverships Affecting Pledges.

§ 266. General Rules Applicable.

Since the distinguishing characteristic of a lien obtained by pledge is the giving to the pledgee possession of the property involved, and since, also, a pledgee usually has the right to collect his debt by summary sale of the property, we do not find questions arising as to the right of a pledgee to have the aid of a receivership in enforcing his lien.[1] On the other hand, receivers of pledgees or of pledgors may be appointed and thus the pledged property become involved in receivership proceedings. In such cases the general rule applicable to all receiverships applies. The receiver, so to speak, takes the property as he finds it; no new titles are created; vested liens are not divested; the receiver has no greater rights, as a rule, in the property than its owner had. The questions that arise in such cases involve simply the application of this principle to the peculiar facts that attend the pledging of property as security for a debt or an obligation. Any person who would have a right to demand possession from the pledgee, has the same right as against the receiver of the pledgee.[2] The pos-

16 Williams v. Noland, 2 Tenn. Ch. 151.

1 Under a special statute a municipality had the power to borrow money to pay for local street improvements and to secure the debt by "pledging" assessments levied upon property owners benefited by the improvements. The "pledge" was represented by bonds issued by the municipality. The law provided also various methods for collecting unpaid assessments. These provisions furnished ample remedy at law for any holder of bonds that remained unpaid after maturity and he was not entitled to a receivership created in a suit in equity brought to collect the assessments. Street Grading Dist., etc. v. Hagadorn, 186 Fed. 451, 108 C. C. A. 729.

2 A guarantors administrator is entitled to receive pledged property from the pledgee's receiver when such administrator has paid

session of a pledgee can not be disturbed by a receiver of the pledgor, unless the debt is paid;[3] nor does the appointment of a receiver deprive the pledgee of his

the debt guaranteed by him. Hinckley v. Calvin, 233 Ill. 139, 84 N. E. 174.

This is simply the rule that a surety upon paying the debt of his principal is subrogated to the benefit of any collateral security which the creditor holds for the payment of the debt; and to the benefit of all rights and remedies which the creditor had against the principal debtor.

3 Booth v. Atlanta, etc., Assn., 132 Ga. 100, 63 S. E. 907.

National Exchange Bank v. Benbrook, etc., Furnishing Co. (Tex. Civ.), 27 S. W. 297. This case gives the reason for the rule and shows some of the contentions that have been raised against its application. In the opinion the court said: "It is not questioned that the contract by which the school warrants were delivered as security to appellant is in all respects legal, and of binding force upon all parties. The money loaned to appellee represented by the notes, went into the treasury, and became a part of the assets of the corporation, and the school warrants were turned over to appellant to secure the repayment of this money, and, by the terms of the written contract, appellant had the right, upon default in the payment of any of the notes executed by appellee, to sell such warrants, either at public or private sale, and apply the proceeds to the satisfaction of the debt for which said warrants had been delivered as security. The fact that appellee (corporation) subsequently became unable to meet its obligations and insolvent, and the fact that appellant was about to sell the warrants under the power granted to it in the said contracts, furnish no sufficient ground for a court of equity to summarily wrest such securities from the possession of appellant, and place them in the hands of a receiver, at the instance of creditors who have acquired no specific interest in such school warrants. The court had no right or authority to interfere with appellant's possession of the warrants, without first requiring the payment of the debt which they were pledged to secure. Carter v. Hightower, 79 Tex. 135, 15 S. W. 223; In re Home Provident Safety Fund Assn., 129 N. Y. 288, 29 N. E. 323; Hudson v. Wilkinson, 61 Tex. 606; Goldfrank v. Young, 64 Tex. 432, 437; Risk v. Kansas Trust & Banking Co., 58 Fed. 45; Schultz v. Jerrard (N. J. Ch.) 3 Atl. 265; Beach Rec. §§ 80-82 Jones Pledges §§ 720, 724, 730; King v. Texas Banking & Insurance Co., 58 Tex. 669. This is not a case of an insolvent corporation preferring creditors; and the proposition urged by appellant, that an insolvent corporation can not prefer creditors, as its property constitutes a trust fund for the benefit of all creditors, is not applicable. At the time appellant made the loans of money to appellee, and received the school warrants as security for such loans, it is not shown that the appellee (corporation) was insolvent; and

right to sell under the pledge.[4] The receiver of a pledgor has the right to redeem the property.[5] The receiver of the pledgor and the pledgee can not effect a sale of the property to the pledgee on terms contrary to the conditions of the pledge agreement and disadvantageous to the creditors.[6] The receiver of the pledgor may contest the validity of the pledge[7] or of a foreclosure sale.[8] While the above stated general rule prevails, nevertheless the appointment of a receiver may affect the remedies of a pledgee, as it may those of any other lienor.[9]

if it had been insolvent at the time the money loaned by appellant became part of the assets of the corporation; and it is admitted in this case that the transaction was bona fide, and not intended for the purpose of absorbing the assets of the corporation. It is also urged by appellee, in support of the action of the court below, that under the law, upon the death of the pledgor, the pledgee can not proceed to sell the subject of the pledge, but must proceed through the probate court in the regular course of administration. This is a sound proposition of law, but, in our judgment, it has no application to the question involved in this case."

The rule applies even though possession by the pledgee was not obtained until after the death of the pledgor. Brady v. Furlow, 22 Ga. 613. See, also, Coleman v. Salisbury, 52 Ga. 470.

4 National Exch. Bank v. Benbrook, etc., Furnishing Co. (Tex. Civ.), 27 S. W. 297.

5 Powell v. Waldron, 89 N. Y. 328, 42 Am. Rep. 301.

6 Ozan Lumber Co. v. Goldonna Lumber Co., 124 La. 1025, 50 So. 839.

7 Ballard v. Audubon Nat. Bank, 222 Fed. 57, 137 C. C. A. 595.

8 Where the pledgee of city warrants has sold them to himself on foreclosure of the pledge and sues the city thereon the receiver of the insolvent pledgor may intervene and set up his claim that such foreclosure was void. Muhlenberg v. Tacoma, 25 Wash. 36, 64 Pac. 925.

9 If a foreclosure action is necessary the receiver of the pledgor is a necessary party. Denny v. Cole, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940.

A pledgee can not claim priority as having an equitable lien when receivers had been appointed before he perfected his legal lien by reducing the property to possession. American Can Co. v. Erie Preserving Co., 183 Fed. 96, 105 C. C. A. 388, affirming orders (C. C. 1909) 171 Fed. 540, 548.

Since a receiver has the right to elect whether or not he will be bound by an executory contract of the person over whose estate he was appointed, the contract being for personal services calling for large expenditures in their per-

4. Receiverships Affecting Mechanics' Liens.

§ 267. Receiverships in Foreclosure of Mechanics' Liens.

A mechanic's lien is purely a creation of statute. It was not known to the Common Law. Though it exists by statute in perhaps every state of the United States, there is not that great volume of precedent in the records of English and American equity courts to point to the proper solution of questions concerning receiverships in suits foreclosing such liens as there is in the case of other liens, such as mortgages. In deciding these matters courts have been left practically to their own initiative. An examination of some of the decided cases will serve to show how courts have reasoned in considering the matter.

In an early New York case a "receiver of rents and profits" was denied.[1] The application was based upon the grounds of inadequacy of security, insolvency of the debtor, and waste, by way of failure to pay interest on prior encumbrances and prolonging the litigation for the purpose of collecting the rents. The court considered the question to be whether or not the lienor was entitled to the rents. It considered the matter from the point of view of an analogy between a mechanic's lien and a mortgage. "It has been held in this court," says the opinion, "that the proceedings to foreclose a mechanic's lien are similar, or analogous, to proceedings to foreclose a mortgage on real property. But this only applies to the proceedings in court; it is not intimated that the lien resembles a mortgage on real estate. * * * In equity the word lien is used to denote a charge, or incumbrance merely, where there is no right to the thing itself. Our real estate liens are not necessarily connected with pos-

formance, the pledgee of the money to be earned under such a contract is not entitled to receive them as against the receiver. United Electric, etc., Co. v. Louisiana, etc., Light Co., 71 Fed. 615.

[1] Meyer v. Seebald, 11 Abb. Prac. U. S. (N. Y.) 326, note.

session any more than they are dependant upon it (mortgages not overdue, etc.). * * * I regard the object of the law to be to give the mechanic a preference over subsequent assignees and lienors and no more; to give him an advantage in time but not to give him a security of as high character as a mortgage by which the mortgagor acknowledges the debt, conveys the whole property to the mortgagee to satisfy it upon condition of non-payment, vesting the latter with the legal right and leaving in himself but an equitable one.* * * Such an estate and such a right it could not have been intended to vest in a mechanic who simply files a notice of the amount he claims (without any acknowledgment by the owner of its being due) and has yet to prove it affirmatively to be "due in a legal proceeding to foreclose." It might be observed here that the courts of New York had regularly held that, on default, a mortgagee of real property was entitled to the rents and profits, even in the absence of a stipulation to that effect in the mortgage, and could obtain an equitable lien upon them by having a receiver appointed in a foreclosure action. It had been frequently held, also, by the courts of that state, that courts of equity had power to appoint receivers in mortgage foreclosure actions not only because of their inherent powers but because of a statute giving them power to make such appointments in all cases in which it had been the practice of equity courts to do so.[2]

[2] In Webb v. Van Zandt, 16 Abb. Practice (N. Y.) 314, note, a receivership was allowed. A receiver of rents and profits was asked for on the ground of inadequacy of security, though the reporter's notes state that an argument on the ground of threatened waste was made and that analogy between the lien and a mortgage was drawn. In the opinion there is no reference to any statute nor is any reason for the decision given.

In Gallagher v. Karns, 27 Hun (N. Y.) 375, a receiver was allowed in an action to foreclose a lien for the cost of certain work in boring wells on oil-producing property. Nothing is said in the opinion about the grounds on which the appointment was based. The appointment was based upon a special statute and it is pointed

In a Minnesota case,[3] a receiver was appointed by the trial court. The order was reversed but expressly on the ground that the showing made in the lower court was not sufficient. The appellate court, considering the solution of

out that the statute provided that "courts shall have full power to enforce rights and equities between all parties by any of the remedies usual in said courts"; and it is said: "Liens and equities arising thereout are enforced in this court by the remedy reached through the instrumentality of a receiver, wherever and whenever such liens and equities are in danger and liable to fail without such instrumentality." The case cites Webb v. Van Zandt, supra, as authority.

In Poerschke v. Kedenburg, 6 Abb. Prac. U. S. (N. Y.) 172, there is dictum based on Webb v. Van Zandt, that a receiver may be appointed in a mechanics' lien case.

In Mylvirn Corp. v. Passman & Son, 157 N. Y. Supp. 372, it was decided that a receiver had been improperly allowed. The action was in foreclosure by a second mortgagee in possession, collecting the rents on the authority of a stipulation in the mortgage and an assignment of the rents. The application was by a mechanics' lienor defendant. It was ruled that in the absence of a statute expressly permitting the appointment and in the absence of any showing of waste a receiver could not be allowed.

In Meyer v. Seebold, referred to in the text, there is cited, by way of analogous authority, a Texas case, Pratt v. Tudor, 14 Tex. 37. This was an action in forcible entry and detainer by a mechanics' lienor against the debtor, the plaintiff claiming the right of possession until he was paid. It was held that the action did not lie. The statute gave the mechanic a lien "in the nature of a mortgage," but, as pointed out in the opinion, did not specify which party was to remain in possession. "In this state," it is said, "a mortgage does not give possession nor any right of possession, even after forfeiture, especially with reference to real property." In the absence of a special stipulation, the mortgagor usually remains in possession. "The law does not contemplate that satisfaction shall be had out of rents and profits. Unless expressly set forth we are not to presume an intention that owners should be debarred the use of their property until the termination of a suit of which the main issue might be whether there was anything owing on the contract or not and which might by accident be prolonged for years." It is pointed out that there is no analogy between this lien and the liens given to mechanics on personal property under the common law for the reason that in regard to the former the recording laws provide the protection that is furnished by the possession upon which the latter depend.

3 Northland Pine Co. v. Melin Bros., 136 Minn. 236, 161 N. W. 407, 408.

the question necessary to a proper decision of the case, ruled that the lower court had authority to grant the relief if a sufficient showing was made.[1] The allegations of the complaint were to the effect that complainant, a materialman, was one of several lienors holding an aggregate of some $50,000 worth of liens; that there were prior mortgages; that the mortgages and liens equaled the value of the property; that the building was unfinished and if allowed to remain as it was would rapidly deteriorate; that unused material on the ground would deteriorate if not taken care of; that the owners were insolvent and unable to proceed and that work on the building had ceased. As expressed in the application and directed in the order of appointment the receiver was to take possession of and manage the property, including the improvements and material on the ground furnished for the erection of the building "in such manner as will best conserve the interests of all persons having valid liens against the property" until such time as the court might otherwise order. The appellate court, speaking through Mr. Justice Bunn, says: "In this state, while the lien is purely a creature of statute, an action to enforce it is an ordinary civil action, proceeding according to the usual course of the law, and governed by the same rules of practice and procedure as any other similar action, except as expressly modified by the statute itself. Equitable principles are applicable in enforcing the lien. It has been held in a few cases in other states that a receiver of the rents and profits can not be appointed in a mechanic's lien action in the absence of a statute authorizing such appointment. [Stone v. Tyler, 173 Ill. 147; Meyer v. Seibold, 11 Abb. Prac. U. S. 326; (Contra Webb v. Van Zandt, 16 Abb. Prac. 314); Pratt v. Tudor, 14 Tex. 37]. These cases are manifestly not in point, as the receiver in the case at bar was not to take the rents or profits, but merely to conserve the property and the material on hand,

[1] See also Dezurick v. Iblings (Minn.), 167 N. W. 116.

pending the action. We hold that the court had the power to appoint a receiver for these purposes if the facts showed that it was necessary for the protection or preservation of the property.'"[4]

[4] In the above case the counter showing was a complete refutation, both by denial and affirmative statement, of all the allegations of the complaint. In reversing the order of appointment the court says: (quoting an earlier decision) "The showing must be clear, strong, and convincing. Such an application will not be granted in a doubtful case"; and, "When we consider how little a receiver could do to help out the lien claimants, and how much he could do to embarrass the owners of the property, and what expense might be incurred, it is difficult to escape the conclusion that the order was inadvertently made."

In Chicago Title etc. Co. v. Chapman, 132 Ill. App. 55, an order appointing a receiver was affirmed. Among other things it was shown that the building was not completed and that a mortgagee who had loaned a sum of money to pay for the construction had diverted part of the fund to other purposes and still held some of it. An action to foreclose a deed of trust was commenced about the same time and a motion for a receiver made in that suit also. The two motions were heard at the same time. The suits were consolidated and an order made appointing a receiver to complete the building, make it tenantable and rent it. Just before the order was made the foreclosing trustee withdrew its motion for a receiver but the appellate court intimates that this withdrawal was ineffective and that the trustee was a party defendant in the mechanics' lien case so that the court was warranted in appointing a receiver because of the foreclosure of the trust deed. However it is pointed out that there was no attempt made in the order to determine what might be a proper disposition of the rents and that the statute authorizing the court, on a foreclosure of a mechanic's lien, to complete the building where the same should be deemed for the best interests of all the parties.

In Stone v. Tyler, 173 Ill. 147, 50 N. E. 688 it was ruled that in the absence of a statute specially authorizing a receiver the court was not empowered to appoint a receiver of rents and profits in a mechanic's lien foreclosure. It was also ruled that when such a suit was pending at the time a statute authorizing the appointment in such suits "in the same manner, for the same causes, and for the same purposes as in cases of foreclosure of mortgages" went into effect was not applicable to the case, both on general principles and because of special provisions in the act.

In Rudd v. Littell, 20 Ky. Law Rep. 158, 162, 45 S. W. 451, 46 S. W. 3 it was held that although, where a building was constructed under a contract with a remainderman, who, under a special stat-

§ 268. Receiverships Affecting Property Covered by Mechanics' Liens.

Property covered by mechanics' liens may be affected by receivership proceedings although they do not arise in actions to foreclose the liens, and the same rules apply here as in foreclosure of mortgages. The appointment of a receiver does not divest the lien, although it may affect the lienor's methods of enforcing it.[1] The appointment of a receiver does not obviate the necessity of taking all the necessary statutory steps to protect and preserve the lien.[2] If the property is sold by the receiver, the lien follows the fund.[3] If a receiver is appointed for the property of an insolvent contractor, the receiver may be authorized to continue the work; he may himself have a mechanic's lien upon the property and those serving him will be protected either by proper court order or by the right to liens.[4] A receiver of property is limited by the terms of any order authorizing him to make improve-

ute, had been appointed by the court as agent for the other remainder interests and had been authorized to make a loan for the purpose of paying for the building, the contractor's lien against the property was limited to the amount of the loan, the contractor was entitled in equity to be paid from rents collected through a receiver.

1 Fenton et al. v. Fenton Bldg. Co., 90 Conn. 7, 96 Atl. 145; Totten & H. I. & S. Foundry Co. v. Muncie Nail Co., 148 Ind. 372, 47 N. E. 703; Randall v. Wagner Glass Co., 47 Ind. App. 439, 94 N. E. 739; Hickey v. Collom, 47 Minn. 565, 50 N. W. 918; Burns v. Sewell, 48 Minn. 425, 51 N. W. 224.

An action to foreclose a mechanic's lien might be maintained without permission of the receivership court; but the judgment would be binding only upon the parties to the action and the receiver's possession could not be disturbed except by permission of the court. Richardson v. Hickman, etc., et al., 32 Ark. 406. See, also, Andrews, etc., Iron Co. v. I. D. Smead, etc., Co., 5 Ohio C. Dec. 460, 11 Ohio Cir. Ct. R. 286.

2 Withrow Lumber Co. v. Glasgow Inv. Co., 101 Fed. 863, 42 C. C. A. 61; Smith v. Pierce, 45 App. Div. 628, 60 N. Y. Supp. 1011.

3 Randall v. Wagner Glass Co., 47 Ind. App. 439, 94 N. E. 739.

4 Fenton et al. v. Fenton Bldg. Co., 90 Conn. 7, 96 Atl. 145; Guimarin & Co. v. Southern L. & T. Co., 100 S. C. 12, 84 S. E. 298. See, also, §§ 34 et seq., supra.

ments and one serving him in such matter is bound also by the order.[5] If a mechanic's lien or the right to one is included in the receivership property, the receiver may proceed to enforce it.[6] The possession of property by a court in mechanic's lien foreclosure proceedings may be sufficient to support the superior jurisdiction of one court as against another court of concurrent jurisdiction under the rule that where the causes of action in the two courts are not the same, comity between courts leaves the jurisdiction for all purposes to the court that first acquires actual possession.[7]

5 Tenth Nat. Bank of Philadelphia v. Smith Const. Co., 218 Pa. St. 584, 67 Atl. 874.

6 Curtis v. Broadwell, 66 Iowa 662, 24 N. W. 265; German Bank v. Schloth, 59 Iowa 316, 13 N. W. 314; Fullerton Lumber Co. v. Gates, 89 Mo. App. 201.

7 In Rogers, etc., Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 53 Am. St. Rep. 494, 31 L. R. A. 335, 34 S. W. 57, it was held that, where a mechanics' lien suit in the state court had proceeded to the point where a judgment as to the amount of the claim and granting a lien had been rendered and a transcript of the judgment had been filed so as to entitle the claimant to a special execution before a receiver in a mortgage foreclosure suit in a federal court had been appointed, the state court retained exclusive jurisdiction, although the special execution had not issued; citing Heidritter v. Elizabeth, etc., Co., 112 U. S. 294, 305, 28 L. Ed. 729, 5 Sup. Ct. 135.

Where a state court had appointed a receiver in a lien suit after a personal judgment had been rendered in a federal court in an action in which the property had been attached but before execution had issued; a suit had been commenced in the federal court by the judgment creditor in which he alleged that the lien was invalid or inferior to his judgment, the state court was without jurisdiction to appoint a receiver, the foreclosure action had been instituted to delay and hinder the enforcement of the judgment, and that the judgment claim was prior to a trust deed securing bonds for $80,000, and in which he prayed for a decree determining priorities and asked for a receiver; and before the motion for a receiver was heard a suit to foreclose the trust deed was commenced in the state court and the former receivership extended to that suit; it was held that the state court had the exclusive jurisdiction. Questions as to the sufficiency of the complaints or of the evidence in the state court could not be determined by a federal court having no jurisdiction to review the proceedings in that court; although the jurisdiction of

5. *Receiverships Respecting Statutory Labor Liens.*

§ 269. Rules Governing the Subject.

In many states of the Union statutes have been enacted designed "to protect employes and laborers in their claims for wages"[1] and providing, generally, that when the business of an employer is suspended by the appointment of a receiver the wages of specified classes of employes, accruing within a designated period before the creation of the receivership, shall be preferred to other claims against the employer. These statutes have generally been recognized as valid legislation, but they are strictly construed in regard to all points, such, for instance, as the classes of employes that come within their protection.[2] Two important points in regard to their application are necessary to be noticed here.

In the first place, unless the statute expressly gives the preferred employe a lien upon the property, or some portion thereof, of the employer, it will be held that the employe's claim for wages does not displace any existing specific lien and that the employe is simply to be placed in the list of general creditors with a preference over all

the state court to appoint a receiver in the lien suit might be doubtful, there was no doubt as to its jurisdiction to do so in the foreclosure suit, even though the appointment might have been improvident; and the merger of the two receiverships in the state court had occurred under such circumstances as to leave no point of time at which the jurisdiction of the federal court could attach. The attachment in the suit in the federal court created but a security to pay the judgment; "it did not draw the realty into the custody of the federal court and was no barrier to other liens and actual seizure by another court." Pacific Coast Pipe Co. v. Conrad City Water Co., et al., 237 Fed. 673.

1 Colorado Revised Statutes, 1908, §§ 6998-7000.

2 Security Trust Co. v. Bank of Bernice, 239 Fed. 665, 152 C. C. A. 499. See reference to point in Schmidtman v. Atlantic, etc., Co., 230 Fed. 769, 145 C. C. A. 79.

As to the strict construction on the point of the identification of the property or fund to which such a preference may attach, see Gulf Pipe Line Co. v. Lasater (Tex. Civ. App.), 193 S. W. 773.

others in that class. The point is fully treated and this conclusion reached in an original consideration of the matter by the United States Circuit Court of Appeals of the Second Circuit, in construing a New York statute of this sort.[3] In its opinion the court, speaking through Judge Lacombe, says: "Manifestly the statute involved[4] is in derogation of the Common Law and of common rights. It is a well established principle that a receiver of an insolvent corporation takes the property subject to existing liens. The fact of insolvency and the fact of the appointment of a receiver does not impair a valid contract lien. * * * Impairment of existing contract liens must be found in a statute or they will not be found at all. Statutes which disturb vested rights are to be closely scrutinized and are not to be given such construction, unless their language clearly indicates an intention on the part of the legislature to change the existing law. * * * The security afforded by a lien well recognized in law and equity has always been held entitled to consideration. The person who has a specific lien on property is entitled to pay himself out of that property; and, if it be insufficient, then to prove his claim for deficiency and to share with unsecured creditors in the proceeds of property not covered by his lien. No other creditor is entitled to any part of the proceeds of property covered by lien until the lienor is first paid. These principles have been so well settled for so long that it might fairly be supposed that a legislature seeking to exclude their application in certain cases would declare its intention in unmistakable language. Certainly the language of this statute is not unmistakable; it may be construed to subordinate all specific liens to claims for wages of employes; it may also be construed to give the latter preference only in unencumbered assets."[5]

3 Schmidtman v. Atlantic, etc., Co., 230 Fed. 769, 145 C. C. A. 79.

4 Section 9, New York Labor Law (chapter 415, § 8, Laws of 1897).

5 To same effect see Central Sav.

The other point concerning these statutes to which we here call attention is the proposition that, even though the statute expressly protects the preferred employe by giving him a lien upon the property of the employer for his wage claim, the lien does not displace specific liens to which the property was subject at the time the employer acquired it. The lien created by the statute attaches only to the property of the employer. If the property is acquired subject to a vendor's lien for the purchase price or to a prior mortgage or other encumbrance, the "property" of the employer is simply the equity remaining over and above these encumbrances; and this equity is all that the statutory lien can affect.[6]

6. Receiverships Affecting Equitable Liens.

§ 270. General View of the Subject.

It has been said that the only lien upon real estate which equity creates is that of a vendor's lien for the purchase price.[1] The circumstances under which equitable liens may be created against personal property are,

Bank v. Newton, et al., 59 Colo. 150, 147 Pac. 690. In the opinion in this case it is pointed out that the Supreme Court of Illinois, in Seymour v. Berg, 227 Ill. 411, 10 Ann. Cas. 340, 81 N. E. 339, adopted this view, thereby overruling one of its earlier decisions, Heckman v. Tammen, 184 Ill. 144, 56 N. E. 361. One who takes a mortgage upon property subject to an employee's lien for wages takes as security only the equity remaining in the property over and above the mortgage. Security Trust Co. v. Bank of Bernice, 239 Fed. 665, 152 C. C. A. 499.

6 Authorities here will be given when certain manuscript now being revised is returned—F. D.

Where the statute extends its protection to wages accruing "within" a certain period prior to the appointment of the receiver, the term "within" will be construed to mean "subsequent to," and the benefits will inure not only to persons employed before the receivership but to the employees of a receiver who continues the business.

1 As we have stated supra, § 339, however, the term "equitable lien" is frequently applied to a contract lien where, because of the intention of the parties, the lien is created by a contract but the contract is not in the usual form; such equitable liens may of course attach to real property.

however, almost innumerable. It is not practical here to seek to enumerate or classify them or to set forth the application of the principles governing receiverships to them with any particularity. Certain general principles may, however, be stated.

As a rule, the assistance of a receivership may be had in a suit to enforce an equitable lien under the same circumstances and conditions under which that remedy is available in foreclosing a contract lien.[2]

It is, of course, always a question as to whether or not a claimant has a lien which he can enforce by foreclosure, with the aid of a receivership, or which he can enforce against property in the hands of a receiver.[3] Equitable liens, like other liens, are not divested by the appointment of a receiver; the receiver takes the property of the debtor subject to all valid pre-existing liens.[4] Liens can

2 Meridian Oil Co. v. Randolph, 26 Okla. 634, 110 Pac. 722.

Where a sales agent makes advances to the manufacturers upon goods which are to be stored in separate warehouses and insured in his name, he has such an equitable lien as will be protected by a record. Garrison v. Vermont Mills, 154 N. C. 1, 31 L. R. A. (N. S.) 450, 69 S. E. 743.

3 Where goods are sold on a conditional sale contract in which they were not to be removed and proceeds from their sale were to be paid to the vendors, an application for a receiver by the vendor was refused even though the purchaser was insolvent and appropriating the proceeds. Steele v. Aspy, 128 Ind. 367, 27 N. E. 739.

4 Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12; Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699; Travis v. McBride, 166 Mich. 126, 131 N. W. 520; Albien v. Smith, 24 S. D. 203, 123 N. W. 675; First Nat. Bank v. J. I. Campbell Co., 52 Tex. Civ. 445, 114 S. W. 887.

A factor's lien will be enforced. Cameron v. Cronse, 11 App. Div. 391, 42 N. Y. Supp. 58.

An equitable right of set-off may be enforced as against a receiver. In re Farmers' & Merchants' Bank of Lawrence, 194 Mich. 200, 160 N. W. 601.

A lumber company entered into an agreement with its creditors whereby they extended the time of payment of their debts and agreed not to give any creditor collateral security without the consent of the other creditors and also agreed to prorate its profits amongst its creditors. It afterwards, with the consent of its creditors, agreed to give a creditor who furnished goods to be used as funds for operating expenses a first lien

not be perfected after the appointment of a general receiver or a receiver in insolvency proceedings.[5] After the appointment of a receiver any enforcement of a lien that involves an interference with his possession can not be effected without the consent of the court in which the receivership proceedings are had.[6] A sale of the involved property will not destroy the lien; the lien will attach to the proceeds, unless some estoppel has been created against the claimant.[7] While a lien against a special fund may be lost if the fund can not be traced, any improper mingling of the fund with other moneys by the receiver

upon lumber produced at its mill. Upon the company going into a receivership, it was held that the lien would be recognized. Atlanta Nat. Bank v. Four States Grocer Co. (Tex. Civ.), 135 S. W. 1135.

5 Brown v. Massachusetts Hide Corporation, 218 Fed. 769, 134 C. C. A. 447, citing Thomas v. Taggart, 209 U. S. 385, 52 L. Ed. 845, 28 Sup. Ct. 519; Zartman v. First Nat. Bank, 216 U. S. 134, 54 L. Ed. 418, 30 Sup. Ct. 368.

As to the right of an owner, pending receivership proceedings, to create liens against any interest that may remain to him after prior claims are paid, see Lauraine v. Masterson (Tex. Civ.), 193 S. W. 708.

It is only under special circumstances or specific provisions of the statute, or decree of court that a lien may be acquired over property in the hands of a court of equity. Clinchfield Fuel Co. v. Titus, 226 Fed. 574, 141 C. C. A. 330.

6 Randall v. Wagner Glass Co., 47 Ind. App. 439, 94 N. E. 739; In re New Glenwood Canning Co., 150 Iowa 696, 130 N. W. 800.

The receivership court may without an abuse of discretion, refuse permission to a lien claimant to foreclose his lien by means of an independent suit. Holmes & Hibbard Mortg. Co. v. Ardmore Nat. Bank, 48 Okla. 319, 150 Pac. 105.

An equitable lien upon property in the hands of a receiver must be established and enforced in the receivership proceedings. James Freeman Brown Co. v. Harris, 88 S. C. 558, 70 S. E. 802.

The receivership court may order a fund to be obtained for the purpose of satisfying a lien by a separate sale of the property covered thereby. State v. District Court in and for Third Judicial Dist., 37 Utah 418, 108 Pac. 1121.

See, also, Galey v. Guffey, 248 Pa. St. 523, 94 Atl. 238.

7 Liens upon property held by a receiver are not diverted by a sale by him. Central Trust Co. v. Wabash, etc., Ry. Co., 30 Fed. 344; Myers v. Estell, 48 Miss. 372; Miller v. Bowles, 58 N. Y. 253; Fidelity Title, etc., Co. v. Schenley, etc., R. Co., 189 Pa. St. 363, 69 Am. St. Rep. 815, 42 Atl. 140.

or any diversion of the fund will not destroy the lien, except in case of an estoppel against the claimant and, if possible, the lien will be satisfied from other sources.[8] A lien claimant who intends to appeal from an adverse order in the receivership proceeding must lay the necessary foundation by proper exception and objection to the order.[9]

8 Where the income of a railroad has been diverted from a mortgagee entitled to it, his claim may be met from the corpus. Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171.

The fact that the receiver mixed the fund collected with other moneys will not prevent an enforcement of a lien against the fund if it can be traced into his hands. Scully v. Colean Mfg. Co., 160 Ill. App. 286.

9 Narfleet v. Tarbaro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

CHAPTER XII.

PROCEEDINGS IN AID OF GENERAL CREDITORS.

1. In General.

§ 271. Scope of Treatment of Subject.

The remedy by receivership is one employed, or granted, by courts of equity. The appointment of a receiver can be invoked only in a pending suit brought to obtain some relief which the court has jurisdiction to grant. The receivership is merely ancillary to, or in aid of, the main cause of action. There are in general four classes of equitable actions in which this remedy may be available. One of these classes consists of cases where, after the rendition of a judgment or decree, the ordinary processes of the court or its legally constituted officers can not efficiently act or properly perform the duties required to carry the judgment or decree into effect.[1] We come now to consider certain of this class of cases.

It frequently happens that creditors who have reduced their claims to the form of money judgments are, for one reason or another, unable to realize upon the judgments and secure payment of their claims by means of execution, garnishment, attachment, or any of the other processes by which courts assist judgment creditors in this behalf. Courts of equity have come to the assistance of judgment creditors in this situation in two well established lines of cases, in both of which, under proper conditions, receivers may be appointed to hold the property involved until the final determination of the cause. These cases, so far as they involve the remedy of a receivership, form the subject matter of this chapter. There are also to be considered, as analogous to these equity actions, two statutory proceedings, now very

1 See § 6, supra.

widely existing, which are designed to attain the same results and involve the appointment of so-called receivers.

§ 272. Right of Contract Creditors to Have Receiver Appointed.

In limine, it is necessary to observe that a mere contract creditor who, neither by his contract nor by a judgment, has obtained a lien upon any property of his debtor, is not in a position, unless aided by a special statute,[1] to institute an action in equity in which he can ask for the appointment of a receiver and thus deprive the debtor of the possession and management of his property. This proposition would naturally follow from the general rule applicable to the appointment of a receiver in any case to the effect that one seeking such an appointment must show either that he has a clear right to the property itself or that he has some lien upon it or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim.[2] The application of this general rule to a typical case of such a contract creditor is well set forth by the United States Circuit Court of Appeals in passing on an order appointing a receiver made by a District Court of West Virginia.[3] The action was brought by a creditor holding unsecured notes to the amount of ten thousand dollars. The allegations of the complaint were to the effect that the defendant though solvent was heavily embarrassed and unable to meet his current obligations, including plaintiff's notes

1 Civ. Code 1895, § 2716, of Georgia, authorizes a receiver for an insolvent trader at the instance of creditors representing one-third of the unsecured debts of the trader. A debt secured by collateral security of pledge, though such security may be less than the debt, is not an unsecured debt under this provision. Farmers' Union Warehouse Co. v. Coweta Fertilizer Co., 133 Ga. 132, 65 S. E. 291.

In many states, at the instance of creditors, general or otherwise, receivers may be appointed to take possession of the property of insolvent corporations and wind up their affairs. See Blum v. Rowe, 98 Wash. 683, L. R. A. 1918C, 630.

2 See, § 6, supra.

3 Davis et al. v. Hayden, 238 Fed. 734, 151 C. C. A. 584.

with interest; that his property was largely encumbered and only equities remained for unsecured creditors; that many of his creditors were pressing him and either had commenced or threatened to commence suits; that if the property was sold at forced sale the unsecured creditors would get nothing, but that the property could be conserved so as to pay all creditors in full. The appellate court said: "We rest our decision on the ground that the facts alleged in plaintiff's bills present no case for the cognizance of the federal court of equity. It is to be noted that plaintiff is a mere contract creditor, without lien or security of any kind, and without the claim of right to charge any specific property with the payment of his debt; that Thompson, though temporarily embarrassed by lack of ready money, is asserted to be abundantly solvent; that the suit was evidently brought in pursuance of a prearranged plan between the plaintiff and Thompson; and that it was the obvious purpose of the suit, not to enforce the plaintiff's own demand, but to enable Thompson, by means of a receivership and injunction, to prevent his creditors from taking any steps to collect their claims. And the case for relief amounts only to this: That certain creditors of Thompson have obtained judgments against him on which executions may issue; that other creditors have levied attachments upon his property; that still others threaten to sell the collaterals held in pledge, as they have the right to do; and that in consequence the assets of Thompson are liable to become so depleted that unsecured creditors will not be paid.

"We are clearly of the opinion that these facts are insufficient to warrant the action of the court below. In its most favorable aspect the plaintiff's case comes under no recognized head of equity jurisdiction. Indeed, we take it to be an established principle of jurisprudence that a court of equity is without power, in the absence of statu-

tory authority, to appoint a receiver of the assets of an individual debtor, or to enjoin the prosecution of claims against him, at the suit of a mere contract creditor who has no lien or other security, and who asserts no right to subject any specific property to the payment of his debt. Equity may aid in a proper case when legal remedies have been exhausted, but can not be resorted to in the first instance. The authorities to this effect are numerous and of uniform import. Among the leading cases which illustrate and apply the doctrine are Thompson v. Railroad Companies, 73 U. S. (6 Wall.) 134, 18 L. Ed. 765; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; Cates v. Allen, 149 U. S. 452, 13 Sup. Ct. 977, 37 L. Ed. 804, and Hollins v. Brierfield, C. & I. Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. In the last-named case the Supreme Court said:

" 'The plaintiffs were simple contract creditors of the company, their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors can not come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state.'

"We are convinced that the appointment of a receiver and the restraining of creditors in this case, upon the facts alleged by both parties to the original bill, are not only without support in principle or precedent, but manifest the attempted exercise of powers which as repeated decisions declare, are not possessed by a federal court."[4]

[4] In this case, answering the argument that jurisdiction had been obtained by the consent of the debtor, the court quoted from Maxwell v. McDaniels, 184 Fed. 311, 106 C. C. A. 453, as follows: "An individual is not a corporation. The administration of the affairs of an insolvent individual is not a recognized head of equity

jurisdiction, as is the administration of the assets of an insolvent corporation. The subject-matter in the former case is not one over which the court has jurisdiction. Mere waiver by the defendant of objections otherwise fatal to the capacity of the plaintiff to invoke the jurisdiction in the case of a corporation removes the only obstacle to the granting of the relief desired. In the case of an individual defendant it leaves untouched the most serious difficulty of all, namely, that the subject-matter is not one within the province of the court."

Answering the argument that the appointment was based upon a West Virginia statute providing that "a court of equity may, in any proper case pending therein, in which the property of a corporation, firm or person is involved, and there is danger of the loss or misappropriation of the same or a material part thereof, appoint a special receiver of such property or of the rents, issues and profits thereof, or both," the court quoted from Thompson v. Adams (60 W. Va. 463, 55 S. E. 668), as follows: "Under our statute a receiver will be appointed where there is danger of loss or misappropriation of the property, or a material part thereof of a debtor; but this is only done in a proper pending case. It certainly must be at the instance of some one who has a right to charge the property and the statute does not mean to extend this remedy to every one who claims to be a common creditor. Equity must have jurisdiction, independent of the appointment of a receiver."

The appointment of a receiver at the instance of a general creditor is not justified by a statute providing that a receiver may be appointed "when in the discretion of the court, it may be necessary to secure ample justice to the parties." Grays Harbor Commercial Co. v. Fifer, 97 Wash. 380, 166 Pac. 770; Blum v. Rowe, 98 Wash. 683, L. R. A. 1918C, 630, 168 Pac. 781.

Other cases establishing the same doctrine as to the rights of mere contract creditors are the following: Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; International Trust Co. v. United Coal Co., 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; Hogsett v. Thompson, 258 Pa. St. 85, 101 Atl. 941; Cahn v. Johnson, 12 Tex. Civ. App. 304, 33 S. W. 1000.

In certain North Carolina cases a different position has been taken and contract creditors have been permitted to maintain equitable actions in which they sought both to establish their claims and to set aside transfers alleged to be in fraud of creditors. This position is based upon the proposition that, while the equity rule that required a litigant to show that he had exhausted his legal remedies before he could ask for the assistance of an equity court was logical when the two courts were separate institutions, each having its own set of rules of practice, the equity court operating simply in aid of the law court, because it was necessary to preserve the harmony of their actions in the exercise of their separate functions, the reasons for the rule and therefore the rule itself "cease when the powers of both and the functions of each are committed to a single

2. Creditors' Equity Suits to Set Aside Fraudulent Conveyances.

§ 273. General Nature of the Action.

It is a function for which courts of equity are peculiarly fitted to detect fraud and to restore to their rights persons who have been wronged thereby and a means of making this function effective is the appointment of receivers.[1] It is in pursuance of this power that such courts have entertained jurisdiction of one class of cases by which they have come to the aid of judgment creditors who have not been able to realize upon their judgments and secure payment of their claims through the ordinary legal processes provided for that purpose. There are two distinctive features of this class of suits: (1) The action is brought to reach some specific piece or pieces of property, real or personal; (2) the property involved is of such a character that it could ordinarily be effectively reached by means of such a law process as a writ of execution. The reason why the creditor must go into

tribunal substituted in place of both." Dawson Bank v. Harris, 84 N. C. 206; Hancock v. Wooten, et al., 107 N. C. 9, 11 L. R. A. 466, 12 S. E. 199. In the latter case after a decree declaring the transfer void and setting it aside a receiver was appointed to hold the property until the relative rights of the interested creditors could be determined.

1 Heard v. Murray, 93 Ala. 127, 9 So. 514; Webb v. First Baptist Church Trustees, 90 Ky. 117, 13 S. W. 362; In re Lewis Pet'tion, 52 Kan. 660, 35 Pac. 287; West v. Chasten, 12 Fla. 315; St. Louis, etc., Coal & Min. Co. v. Edwards, 103 Ill. 472; Baker v. Backus' Admr., 32 Ill. 79; Powell v. Quinn, 49 Ga. 523; Thompsen v. Diffenderfer, 1 Md. Ch. 489; Haight v. Burr, 19 Md. 130; Voshell v. Hynson, 26 Md. 83; Meridian News, etc., Co. v. Diem, etc., Paper Co., 70 Miss. 695, 12 So. 702; Buckley v. Baldwin, 69 Miss. 804, 13 So. 851; Nichols v. Perry Patent Arm Co., 11 N. J. Eq. 126; State v. Delafield, 8 Paige (N. Y.) 527; Ellett v. Newman, 92 N. C. 519; Mitchell v. Barnes, 22 Hun. (N. Y.) 194; Simmons Hardware Co. v. Waibel, 1 S. D. 488, 36 Am. St. Rep. 755, 11 L. R. A. 267, 47 N. W. 814; Gunn v. Blair, 9 Wis. 352; Northern Pac. R. Co. v. St. Paul, M. & M. R. Co., 47 Fed. 536; affirmed in 4 U. S. App. 149; Towle v. American Bldg. Loan & Invest. Soc., 60 Fed. 131.

equity is because some embarrassment, impediment, or obstruction stands in the way of a safe and practical exhaustion of the law process due to the fact that the debtor has transferred the legal title or placed some encumbrance upon it for the purpose of hindering, delaying, or defrauding his creditors.[2] The purpose of the suit is to have the impediment declared fraudulent and void as to the plaintiff and thus open up the way to the effective sale of the property under the law process.[3]

§ 274. Conditions for Appointment of Receiver.

The equitable remedy of a receivership is not open to a litigant who has an available and adequate remedy at law.[1] In some jurisdictions a judgment creditor, because the fraudulent conveyance is, as to him, a nullity, whatever its effect as between the parties may be, could sell the property on execution and the purchaser could maintain an action in ejectment against the vendee, trying the issue of fraud in such action.[2] This method, however, would hardly be safe. Usually the judgment creditor would have to be the purchaser, setting off his judgment against the purchase price. He would then lose his judgment if he failed effectively to prove the fraud. Under these circumstances the legal remedy is held not to be exclusive and the equitable principle above referred to is held to be satisfied if the creditor shows that he has some sort of a lien upon the property. His judgment

2 Shainwald v. Lewis, 6 Fed. 766, 7 Sawy. (U. S.) 148; Fusze v. Stern, 17 Ill. App. 429; De Long v. Mechanics, etc., Bank, 168 App. Div. 525, 153 N. Y. Supp. 1010, 1012.

3 Under some circumstances the property may be ordered sold pendente lite and the proceeds held to await the outcome of the litigation. Kubl v. Martin, 26 N. J. Eq. 60, or by a receiver, appointed for the purpose, after judgment. Rankin v. Schultz, 141 Iowa 681, 118 N. W. 383; Shand v. Hanley, 71 N. Y. 319.

1 See, § 8, supra.

2 Maders v. Whallon, 74 Hun 372, 26 N. Y. Supp. 614; Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082; Burch v. Brantley, 20 S. C. 503.

may give him a lien; or he may have a lien by having attached the property at the commencement of the action; or he may secure a lien by a levy of execution.[3] In this way the creditor also removes the objection which, as we have just above shown, stands in the way, under another general rule concerning the creation of receiverships, of a mere contract creditor's going into equity and asking for that remedy.

§ 275. General Principles and Grounds for the Appointment of a Receiver.

The appointment of receivers in actions against fraudulent conveyances has naturally developed under the practice of equity courts. Hence the general rules governing receiverships apply in this class of cases. The appointment, like the appointment in general, rests in the sound judicial discretion of the court, under the statutory provisions, and the practice of the court, upon notice given to the debtor and those interested in the property, or their appearance. The order should receive special care and be drawn with reference to the object or purpose of the receivership, having reference to the nature and character of the property involved. The general duties imposed upon the receiver, and the general rules regarding the regularity of the appointment, and the methods of attacking the same, are equally applicable to this class of receiverships; and so with reference to the bond and sureties of the receiver, as well as the general principles governing the selection of a receiver, his powers, duties, functions, and liabilities.

3 Hirsch v. Israel, 106 Ia. 498, 76 N. W. 811; Beck v. Burdett, 1 Paige (N. Y.) 305, 19 Am. Dec. 436; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494, 511.

A creditor may lose his right to a receiver through laches in taking steps to procure a lien upon the property. Pearce v. Jennings, 94 Ala. 524, 10 So. 511.

If the judgment lien has expired the action will not lie. Newman v. Willetts, 52 Ill. 98. See note 4, § 372, supra.

Granting that the plaintiff has placed himself in a position that entitles him to ask for a receiver, the question as to whether or not he shows sufficient equitable necessity to warrant the employment in the case of this drastic remedy is decided under the general rules governing that matter, with such adaptations as are necessitated by the circumstances of the case.[1]

Where possession of the property involved in the action has been obtained by fraud or the property has been dealt with in some fraudulent manner, a showing of the fraud is usually sufficient to warrant a receivership.[2] The showing in this behalf must be sufficient to warrant the belief that the plaintiff will probably prevail in the action.[3] Since all that the creditor is entitled to is the satisfaction of his judgment, a showing that the judgment debtor has sufficient other property for that purpose will defeat the application for a receiver, even though the creditor may have the right to pursue the particular property involved in the action.[4] A receiver of the property, or of the rents and profits thereof, will not be appointed if the vendee or transferee is in possession, is not insolvent, and can be made to respond to any judgment against him for the property, or the rents and profits, or any damage to the property.[5] It might be that a receiver would be appointed to prevent a multiplicity of suits involving it.[6] The circumstances that may

1 See, chapter 2, supra.

2 See, § 6, supra.

3 See, § 12, supra.

4 Second Ward Bank v. Upmann, 12 Wis. 499. We are not in this text concerned with the question as to what allegations are necessary to establish a cause of action so that the creditor may maintain his suit, whether or not he shows that he is entitled to a receiver. Our province is simply to show under what circumstances a receiver will be appointed, assuming that the plaintiff gets into court. Of course a receiver can not be appointed if the complaint does not state a cause of action.

5 Turnipseed v. Kentucky Wagon Co., 97 Ga. 258, 23 S. E. 84; Clark v. Raymond, 85 Ia. 737, 52 N. W. 489; Gassaway v. Heidenheimer (Tex. Civ. App.), 37 S. W. 343.

6 Thus where goods were seized under a writ of attachment and were then replevied by the debtor,

sufficiently show fraud and the necessity for a receiver are, of course, innumerable.[7]

§ 276. Effect of Assignment for Benefit of Creditors.

While any transaction with reference to the debtor's title to property, such as a sale, a mortgage, or a judgment, may be attacked as a fradulent conveyance, an assignment for the benefit of creditors needs to receive special attention. This method of handling the assets of a debtor is entirely statutory and the proceedings under such an assignment are such only as are provided for in the statute permitting it. It is, of course, impracticable to consider in detail the various statutes bearing on such questions. If there is in the hands of an assignee a surplus over and above what is necessary to satisfy the claims of the creditors to be benefited by the assignment, the surplus may be reached by garnishment.[1] If the assignment is sufficiently defective to make it invalid it

and a subsequent attachment creditor in the same court charged fraud and collusion between the debtor and the first attaching creditor, it was held that a receiver should be appointed in order to prevent a multiplicity of suits. Sackhoff v. Vandegrift, 98 Ala. 192, 13 So. 495.

And where, after one creditor of a manufacturing firm attached his property, other creditors began replevin proceedings, charging fraud, in an equitable action by the attaching creditor against the other claimants, seeking to protect the attachment lien, and to secure an adjudication in one suit upon the conflicting claims, the appointment of a receiver was held proper. National Park Bank v. Goddard, 62 Hun 31, 16 N. Y. Supp. 343.

7 Werborn's Admr. v. Kahn, 93 Ala. 201, 9 So. 729; Stern v. Austern, 120 N. C. 107, 27 S. E. 31; Wagener v. Pape, 46 S. C. 245, 24 S. E. 340.

Where, after the levy of execution, a portion of the land involved was sold in condemnation proceedings and the condemnation price paid into court, a receiver could be appointed to take the fund and hold it pending the outcome of the action. Ahlbanser v. Doud, 74 Wis. 400, 43 N. W. 169; see, also, Rose v. Bevan, 10 Md. 466, 69 Am. Dec. 170; Beam v. Bennett, 51 Mich. 148, 16 N. W. 316.

1 Leeds v. Sayward, 6 N. H. 83; Viall v. Bliss, 9 Pick. (Mass.) 13; Ward v. Lamson, 6 Pick. (Mass.) 358; Brewer v. Pitkins, 11 Pick. (Mass.) 298; Copeland v. Weld,

does not operate to assign the property; under such circumstances the property is not then in the custody of the law and remains open to seizure on legal process.[2] If permissible under the statute, general creditors may intervene in the proceedings, ask that the proceeds of property sold under an invalid assignment and one giving an improper preference be distributed among all the assignor's creditors, and that a receiver be appointed to administer the trust.[3]

But the proposition that we are chiefly interested in here is that such an assignment may itself be attacked as a fraudulent conveyance in a suit of the kind that forms the subject of this subdivision. In an Alabama case the appointment, without notice, of a receiver as against an assignee for the benefit of creditors was sustained on appeal.[4] The case well illustrates the sort of facts that will justify the appointment of a receiver in such a case. The complaint alleged that the defendants were insolvent; that they had, on the pretense of payment of a simulated debt, transferred a large part of their stock of merchandise to their mother and that she was disposing of them through an agent; that the rest of their goods had been assigned, for the benefit of certain creditors, to an insolvent assignee, who was not under

8 Me. 44; Jewett v. Barnard, 6 Me. 381; Todd v. Bucknam, 11 Me. 41.

2 Bradley v. Bailey, 95 Iowa, 745, 64 N. W. 758.

3 Hockaday v. Drye, 7 Okla. 288, 54 Pac. 475.

4 Maxwell v. Peters Shoe Co., 109 Ala. 371, 19 So. 412. A receiver will be appointed when the assignee, or trustee, is not responsible and will probably dispose of the property before the termination of the suit. Ellett v. Newman, 92 N. C. 519.

A receiver will not be appointed as against an assignee, or trustee, who is responsible and denies the charge of fraud. Levenson v. Elson, 88 N. C. 182.

An assignment to the debtor's father, an insolvent, without actual change of possession is presumptively fraudulent and justifies a receivership. Connah v. Sedgwick, 1 Barb. (N. Y.) 210; see, also, Hancock v. Wooten, 107 N. C. 9, 11 L. R. A. 466, 12 S. E. 199; and State v. Foot, 27 S. C. 340, 3 S. E. 546.

bond; that the assignee was making fraudulent preferences; that both the mother and the assignee were aware of defendant's insolvency; that the entire transaction was a scheme to hinder, delay, and defraud creditors.

Mere delay on the part of the assignee, or trustee, will not justify the appointment of a receiver at the request of impatient creditors, who can point to no substantial fraud.[5] It is improper to appoint a receiver to collect the assets and deliver them to the assignee;[6] but the court, in lieu of appointing a receiver, may permit the assignee to collect the assets and restrain him from distributing them until the suit has been finally determined.[7] An instruction to the receiver to sell the property and distribute the proceeds, so far as necessary, in settling the claims of the creditors plaintiffs, and the balance among other creditors is erroneous.[8]

3. Creditors' Equity Suits to Reach Assets Not Accessible Under Law Process.

§ 277. Nature of the Action.

"The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of this court are perfectly adequate to carry that principle into full effect."[1] This quotation expresses the principle upon which the jurisdiction of equity courts to entertain the second class of cases in which they come to the aid of judgment creditors is based. The fundamental allegation that states the cause of action in a proper complaint, or bill, is one to the effect that the judgment debtor owns

5 Pyles v. Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909; Dozier v. Logan, 101 Ga. 173, 28 S. E. 612.

6 Mussbaum v. Price, 80 Ga. 205, 5 S. E. 291.

7 Spring v. Strauss, 3 Bosw. (N. Y.) 607.

8 Middleton v. Taber, 46 S. C. 337, 24 S. E. 282.

1 Edmeston v. Lyde, 1 Paige Ch. (N. Y.) 637, 641, 19 Am. Dec. 454.

property, equitable interests, choses in action, or whatnot, that, under the laws of the jurisdiction in which the judgment was obtained can not be seized and sold under process of execution or the like. It has sometimes been held that such an action is available only to one whose judgment is based on a cause of action that was itself cognizable only in a court of equity;[2] but the prevailing opinion is that it is open to one who has obtained a judgment at law as well as to one who has obtained his judgment in equity.[3] The purpose of the action is to subject these "equitable," or non-executionable, assets of the debtor to the payment of the creditor's claim.

§ 278. Conditions for Appointing a Receiver.

To meet the proposition that a litigant who has an available remedy at law is not entitled to a receiver, a creditor in this class of action is required to show that he has had execution issued and that the execution has been returned *nulla bona*.[1] The positive affidavit that no

2 Donovan v. Finn, 1 Hopk. Ch. (N. Y.) 59, 14 Am. Dec. 531; Pettit v. Candler, 3 Wend. (N. Y.) 618, 624.

3 Board of Public Works v. Columbia College, 17 Wall. (U. S.) 521, 530, 21 L. Ed. 687; Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512, 4 Sup. Ct. 522; Spader v. Davis, 5 Johns. Ch. (N. Y.) 280.

1 Biedler v. Douglas, 35 Ill. App. 124; Skeele v. Stanwood, 33 Me. 307, 309; Gorton v. Massey, 12 Minn. 145, 147, 90 Am. Dec. 287; Adee v. Bigler, 81 N. Y. 349; Bayand v. Fellows, 28 Barb. (N. Y.) 451; Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 144; Hendricks v. Robinson, 2 Johns. Ch. 283, 296; Carter v. Hightower, 79 Tex. 135, 15 S. W. 223; Hulse, etc., v. Wright, Wright (Ohio) 61; Rhodes v. Cousins, 6 Rand. (Va.) 188, 18 Am. Dec. 715; Zell Guano Co. v. Heatherly, 45 W. Va. 311, 31 S. E. 932.

The legal remedy of mandamus may be available to a creditor, as in the case of a judgment against a political corporation, like a county, or a city; if so, the fact that it fails to produce the money —"a very usual result in the use of all remedies"—will not entitle a creditor to maintain an equitable action and have a receiver appointed to collect a tax: Thompson v. Allen County, 115 U. S. 550, 29 L. Ed. 472, 6 Sup. Ct. 140; Rees v. Watertown, 86 U. S. 107, 22 L. Ed. 72. In the latter case the court says: "The remedy (mandamus) is in law and theory adequate and perfect. The difficulty

execution has been returned is a sufficient answer to the motion for a receiver.[2]

The rule that a litigant asking for a receiver must show that he has some interest in or lien upon the property sought to be involved in the receivership is met by the proposition that the filing of a bill in this class of cases gives the plaintiff a lien which dates from the commencement of the action.[3]

§ 279. Grounds for the Appointment of a Receiver.

When a creditor has qualified himself to commence his action and to ask for a receiver under the rules set forth in the preceding section, the judgment debtor has but little opportunity to resist the application. He can not ordinarily question the judgment;[1] the fact that he refuses voluntarily to offer his property in satisfaction

is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. . . . A court of equity can not, by avowing there is a right but no remedy known to the law, create a remedy in violation of law, or even without authority of law. It acts upon established principles not only, but through established channels." A remedy at law is inadequate, in the equity sense, only when "in its nature or character it is not fitted or adapted to the end in view." Thompson v. Allen County, supra.

A receiver will not be appointed merely because the equitable remedy may be more convenient than the law process. Harris v. Beauchamp, 1 Q. B. 801; Manchester, etc., Co. v. Parkinson, 22 Q. B. 173.

The facts that property subject to levy is not saleable and that the sheriff is disqualified from serving the writ, do not justify the appointment of a receiver. Buckeye Engine Co. v. Donan Brewing Co., 47 Fed. 6.

Acceptance of a note for the judgment does not, unless accepted as satisfaction thereof, bar the creditor from this legal remedy. Balde v. Smith, 5 Ch. Sent. 11.

2 Wright v. Strong, 3 How. Pr. (N. Y.) 112; Ahlhauser v. Doud, 74 Wis. 400, 43 N. W. 169.

3 Heard v. Murray, 93 Ala. 127, 9 So. 514; Spader v. Davis, 5 Johns. Ch. (N. Y.) 280; Weed v. Pierce, 9 Cow. (N. Y.) 722, 728; Ames v. Blunt, 5 Paige Ch. (N. Y.) 13.

1 Mattingly v. Nye, 75 U. S. 370, 19 L. Ed. 380.

of the judgment is considered as fraud and the appointment of the receiver follows almost as a matter of course.[2]

Vice-Chancellor Sanford, in an early New York case,[3] has given a very clear epitome of plaintiff's rights in the action. First he called attention to the distinction between this class of action and the one considered in the preceding division of the chapter, as follows: "The power of the Court of Chancery to aid the creditor in removing fraudulent impediments in the way of levying on the personal property liable to execution, or selling the real estate of his debtor, is an old established ground of jurisdiction, which is not in question here. The bill in those cases was auxiliary to the carrying into effect the process of the law courts, and differed from our creditor's suit now under consideration, in this, that in the suit to set aside a fraudulent conveyance of land, so as to give effect to a judgment, the bill need not allege anything more than the recovery of the judgment, and where it was to remove an obstruction affecting movable property, it was only requisite to allege an execution issued to the county where the property was situated;[4] while in the creditor's bill against equitable interests and things in action, the creditor must show the issuing of an execution and its regular return unsatisfied." Then, in regard to the latter sort of suit, the Vice-Chancellor said: "I may therefore assume, that by the law [not statute] of this state as settled more than twenty years

2 Gage v. Smith, 79 Ill. 219; Corning, etc., v. White, 2 Paige (N. Y.) 567, 22 Am. Dec. 659; Congden v. Lee, 3 Edw. Ch. (N. Y.) 304; Bank of Monroe v. Schermerhorn, Clarke Ch. (N. Y. 214; Austin v. Figueira, 7 Paige (N. Y.) 56.

In Bloodgood v. Clark, 4 Paige (N. Y.) 574, the rule is stated as follows: "In these cases of creditors' bills where the return of execution unsatisfied presupposes that the property of the debtor, if any he has, will be misapplied, and entitles the complainant to an injunction in the first instance, it seems to be almost a matter of course to appoint a receiver to collect and preserve the property pending the litigation."

3 Storm v. Waddell, 2 Sandf. Ch. (N. Y.) [1845] 494, at 511.

4 See, § 274, supra.

before this case arose, an unsatisfied execution creditor had a right to file a bill in this court to compel payment of his debt out of the equitable interests and things in action of the judgment debtor.

"I will now endeavor to show what is the effect of such a bill when filed and duly prosecuted.

"Before filing it, the creditor must have obtained a judgment or a decree for the payment of money, issued his execution against both the real and personal property of his debtor, and had it actually returned and filed. And he must state in his bill under oath that the sum claimed upon his judgment or decree is due to him over and above all claims of the debtor by way of off-set or otherwise. This makes a case which leaves little room for contingency or uncertainty in the result of the suit, so far as complainant's debt is concerned. His cause of action must be upon the records of some court of law which of themselves are evidence of the existence of the debt.

"Upon filing the bill, an injunction is taken out and served with the subpoena to answer, restraining the debtor from parting with any of his property or effects till the further order of the court. And for the better protection of the property and its conversion into money, a receiver is speedily appointed, who, under the order of the court, is vested with all such property (or with sufficient specific portions of it to pay the complainant's debt and costs, and all prior claims upon the same), and the debtor is compelled to assign and deliver such property to the receiver under the direction of a master of the court.

"Unless the defendant can make a defense on some one of the very narrow grounds open to him, the decree presently ensues, which directs the receiver to pay to the

complainant out of the fund in his hands, the judgment with interest, and the costs of the suit.'"[5]

§ 280. Necessity for Showing Existence of Property of Debtor.

The general rules respecting the necessity for the existence of property have heretofore been discussed.[1]

In our present discussion we have thus far spoken of this action as being designed to enable the creditor to subject to his judgment property, such as equitable interests[2] and choses in action, that, under the law of the jurisdiction, can not be subjected to seizure under execution or other similar writs. In this phase of the action, the property sought to be involved is known to the creditor and is specifically mentioned in the bill. Such is also the situation with reference to the property involved in the creditor's action, just above discussed, to set aside fraudulent transfers.[3] It may be, however, that the debtor has concealed his property in some way or other so that, while the creditor practically knows that the debtor has property, he does not know where or in what form it is. In this situation the creditor is entitled to the

5 The judgment, which, as above stated, is essential as a foundation for the creditor's right of action in this character of suit, is not necessarily one obtained in a law court. The creditor's claim may be of such a character as to be cognizable only in an equity court and the creditor may have to resort to such a court for his judgment. Since executions on equity judgments have been allowed a creditor may maintain such a suit as we are discussing upon an equity judgment and return unsatisfied of execution based thereon. In considering the necessity for an execution returned unsatisfied as a foundation for an equity suit, it is essential to keep in mind the distinction between a suit brought to enforce satisfaction of a judgment already obtained—the kind of suit we are now considering—and a suit brought to obtain a judgment in the first instance. See Shainwald v. Lewis, 6 Fed. 766, 7 Sawy. 148.

1 See, § 13, supra.

2 Equitable interests, choses in action, etc., may, by statute, be subject to legal process and therefore be reachable by a creditor without the necessity for an equitable action. See Shainwald v. Lewis, 6 Fed. 766, 7 Sawy. 148.

3 See, § 273, supra.

aid of equity, the foundation of the jurisdiction being the identical principle above stated, namely, the power of equity to subject all the property of a debtor to the payment of his debts. The action brought by a creditor seeking unknown property is identical in principle with that brought by a creditor seeking specific property not subject to execution, and proceeds, in all material points, along the same lines and to the same end. The peculiar features of the action, not relating at all to the principle on which the jurisdiction is founded, are that the property is not specifically mentioned in the complaint and that the property, when discovered, may be of such a character that it could have been reached, at the outset, by execution, if its existence or whereabouts had been known. If it should happen to be of that character the court nevertheless retains jurisdiction and treats the property under the receivership in the same manner as it would any other property. The "discovery" is made either through replies, given in the answer, to inquiries set forth in the bill,[4] or through a receiver to whom is given the duty and the power to ferret out the property and reduce it to possession. That equity courts have jurisdiction to entertain an action of this character was the main question at issue on a motion to vacate an order appointing a receiver and ordering the defendant to make an assignment to him in a suit arising in the Federal District Court of the District of California.[5] The allegations of the bill illustrate the nature of the jurisdiction which the court was asked to exercise. The complainant, asignee of a certain bankrupt firm, had obtained a decree against defendant, in an equity action, based on the charge that he had obtained possession of funds of the firm "by fraud and collusion and by means of fraudulent and collusive judgments founded on fictitious

4 Pettit v. Chandler, 3 Wend. (N. Y.) 618, 624; Vicksburg, etc., R. R. Co. v. Phillips, 64 Miss. 108, 1 So. 7.

5 Shainwald v. Lewis, 6 Fed. 766, 7 Sawy. 148.

debts." In the complaint in the action referred to here, after alleging the jurisdictional facts of obtaining this judgment[6] and of the return of an execution unsatisfied, averred: "that respondent had procured a homestead to be declared upon his land—had sold valuable real estate, and threatens, intends, and is about to leave and depart from the United States, and take and carry with him all his money and other property, with the intent, object, purpose, and design of preventing the same from being levied upon or applied in satisfaction of said decree, and with intent to hinder, delay, and defraud this complainant of the moneys and property to which he is entitled under said decree. That since the enrolling of said decree the respondent has secretly transferred a large part of his property to divers persons, and has secreted the remainder of his property with the intent and design aforesaid, and to prevent said property from being seized on execution or secured or applied to satisfy said decree." Concerning the bill, the court said: "If these allegations are true, or even partially true, a stronger case for the appointment of a receiver could not well be imagined. Unless this court can interpose in the most summary manner the complainant will be remediless, and its decree abortive."

It will thus be seen that this class of actions may be maintained and a receiver obtained without an actual showing that the debtor has any specific property that the receiver may take. All that is necessary is a circumstantial showing that he has or ought to have some property.[7]

6 A question at issue on the hearing of the motion was as to whether or not a creditor could maintain his action based on an unsatisfied equity judgment instead of a judgment at law.

7 In Strong v. Goldman, 8 Biss. 552, Fed. Cas. No. 13542, it was alleged that defendant Goldman, who had been a wholesale boot and shoe dealer, had in a very short time disposed of a very large stock of goods, contracted large personal and commercial debts,

§ 281. Property Affected by the Receivership.

Every species of property, owned by the debtor at the time of the commencement of the suit, may be brought under the administration of the receiver; and all of his property may be so brought, although the court may, in its discretion, instruct the receiver to impound only sufficient property to satisfy the demands of plaintiff, with interest and costs, after the property has been freed of any valid prior encumbrances.[1] Property acquired by the debtor subsequent to the filing of the bill will not be affected, but may be brought in, if necessary, by a supplemental bill.[2]

§ 282. Effect of an Assignment for Benefit of Creditors.

The fact that the debtor has made an assignment for the benefit of creditors does not prevent a non-assenting creditor from maintaining an action in equity to secure the satisfaction of his judgment. Because of the limited powers that an assignee for creditors has under the statute it is held that the proceedings under the assignment should not be considered exclusive and a bar to general equity action and that there will not be created any conflict of jurisdiction between the equity court and the court having jurisdiction of the assignment proceedings.[1]

and then assigned a small remnant for the benefit of his creditors.

In Bloodgood v. Clark, 4 Paige (N. Y.) 577, it is said: "It is no sufficient answer to such an application to say there may not be any property to protect, as the complainant proceeds at the peril of costs if there be no property and if there is nothing for the receiver to take the defendant can not be injured by the appointment."

1 Board of Public Works v. Columbia College, 17 Wall. (U. S.) 521, 530, 21 L. Ed. 687; Shainwald v. Lewis, 6 Fed. 766, 7 Sawy. 148; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Pettit v. Chandler, 3 Wend. (N. Y.) 618, 624; Spader v. Davis, 5 Johns. Ch. (N. Y.) 280.

2 Holmes v. Millage L. R., 1 Q. B. Div. (1893) 551; Graff v. Bonnett, 25 How. Pr. (N. Y.) 470, 2 Rob. 54; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Eager v. Price, 2 Paige (N. Y.) 333.

1 Strong v. Goldman, 8 Biss. 552, Fed. Cas. No. 13542. This case was

§ 283. Lien and Priority Acquired by the Complainant.

By filing his bill the creditor acquires a lien upon all of the property of the debtor that is brought into the receivership, and the lien dates from the filing. While there may be found expressions placing the lien at the time of some later step in the cause, such as the serving of the subpoena, or even the appointment of the receiver, they were probably made because they were sufficient for the purposes of the case under consideration.[1]

The lien establishes two priorities in favor of the creditor. His lien is superior to any right subsequently acquired in the property.[2] The lien gives the action a

instituted in a federal court at a time when the debtor had made an assignment for creditors under an Illinois statute and proceedings thereunder were pending in the proper Illinois court. Such proceedings are purely statutory and such statutes exist in most of the states. While these statutes vary in detail they are sufficiently similar in general provisions and in their purpose to warrant the opinion that the conclusion reached in the cited case would apply to such proceedings under any of the statutes. The equity jurisdiction was invoked because of the evident fraudulent concealment of assets by the debtor and the conclusion of the court was: "On this showing it seems to me there is a case made for the appointment of a receiver to be clothed with powers competent for the court to confer, for the purpose of bringing suits, or prosecuting this suit, and unearthing if possible the disposition this man has made of this property. A receiver will therefore be appointed with such powers as the court may now or hereafter confer upon him in the premises."

In this connection see also the general subject of Conflict of Jurisdiction.

1 Shainwald v. Lewis, 6 Fed. 766, 7 Sawy. 148; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Fetter v. Cirode, 4 B. Monroe (Ky.) 482; Newdigate v. Jacobs, 9 Dana (Ky.) 17.

2 Weed v. Smull, 3 Sandf. Ch. (N. Y.) 273.

The point at issue in Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494, frequently referred to in these notes, was as to the respective priorities of a creditor suing in equity and an assignee in bankruptcy, when the equity suit had been commenced before the bankruptcy proceedings. The case was decided in favor of the equity complainant. The lengthy discussion in the opinion of the nature and force of the equity action was for the purpose of showing that the creditor had a lien within the meaning of that term as used in a certain section of the bankruptcy statute then in force.

certain aspect of an action *in rem*, and the action may continue as against the property even after the judgment debtor has been discharged from the debt in bankruptcy proceedings.[3] If, however, the property discovered and brought into the receivership is such that it was subject to levy of execution the lien of an equitable complainant will not be superior to that of one who levies execution upon it prior to the appointment of the receiver.[4] The lien thus acquired can not displace any prior valid lien; if, however, a prior encumbrancer of land is not entitled to rents and profits until he secures a lien upon them by the appointment of a receiver, a judgment creditor will be entitled to all rents collected by his receiver until the encumbrancer by intervention or independent action secures his right to them by having the receivership extended to cover his claim.[5]

An assignment under the insolvent acts after the commencement of the suit only gives to the assignee a right to the surplus after the payment of the complainant's debt. Corning, etc., v. White, 2 Paige (N. Y.) 567, 22 Am. Dec. 659.

3 Fetter v. Cirode, 4 B. Monroe (Ky.) 482.

4 Lansing, etc., v. Easton, 7 Paige (N. Y.) 364; Storm v. Badger, 8 Paige (N. Y.) 130.

In commenting on these two decisions in Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494, the vice-chancellor says: "Whatever may be the true grounds of the rule, it does not affect the force of the lien of a creditor's suit, upon equitable interests and things in action. In the absence of an authoritative exposition of the reasons, I submit that the decisions may be upheld on the following. The object of these suits is to remedy the defect of legal process in the collection of debts. There is no difficulty in obtaining satisfaction out of the chattels of the debtor, in ordinary cases, by sale on execution. And the creditor who first levies his execution on such chattels is entitled to priority by his greater vigilance. The effecting of such a levy indicates that the remedy at law was not imperfect, and, as that is the principal remedy, and the one in equity is ancillary, the former should take precedence, so long as the possession and title remain in the debtor. But when the proceeding in equity, by an order for a receiver or otherwise, has made what is equivalent to an actual levy in behalf of the suitor in this court, he is then the vigilant creditor and obtains the prior lien."

5 Morrogh v. Hoare, 5 Ir. Eq. Rep. (1842-43) 195. See, also, Holland v. Cork & K. R. Co., Ir. Eq.

In the second place, when more than one action has been commenced against the same debtor in an effort to reach the same property, the various creditors are preferred in the order in which their complaints are filed.[6]

§ 284. Duties and Powers of Receiver.[1]

Upon the appointment of a receiver the title to the debtor's property is vested in him, subject to certain qualifications and conditions. Usually, however, the debtor is compelled to make an assignment to the receiver. His title is, of course, defeasible and the title to such property as remains after the claims of the creditors who are parties to the action reverts to the debtor. The receiver acts under the orders of the court. He has power to take whatever steps are necessary to reduce the property of the debtor to possession. If he finds property that has been fradulently conveyed he has the power to sue to have the conveyance set aside[2] and reduce it to his possession.

§ 285. Effect of Statutory Provisions.

The jurisdiction of courts of equity to entertain suits of this character has been maintained without the aid of statutory enactment and is an inherent power. However, in many jurisdictions statutes have been passed definitely

Rep. (1868) 417. See, also, § 247, supra.

6 Corning, etc., v. White, 2 Paige (N. Y.) 567, 22 Am. Dec. 659; Burrell v. Leslie, 6 Paige (N. Y.) 445. See, however, Boynton v. Rawson, 1 Clarke's Ch. (N. Y.) 584. See, also, Hancock v. Wooten, 107 N. C. 9, 11 L. R. A. 466, 12 S. E. 199.

1 "A receiver is a convenient and important, but not indispensable part of the proceeding. The effects locked up, as it were, in the hands of the debtor by the injunction, may be decreed to be delivered to the complainant or sold by a master and applied in satisfaction of the debts and costs." Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494, 544.

2 Olney v. Tanner, 10 Fed. 101; Brown v. Folsom, 62 N. H. 527; Miller v. MacKenzie, 29 N. J. Eq. 291; Bostwick v. Menck, 40 N. Y. 383; South Bend Toy Mfg. Co. v. Pierre, etc., Ins. Co., 4 S. D. 173, 56 N. W. 98.

assigning the jurisdiction and regulating the procedure. In some instances the statutes were prompted by divergencies of opinion among the courts as to the extent of the jurisdiction or respecting some details of the procedure.[1] The statutes are frequently construed as being merely declaratory of the equity rule, or principle. Where the statute specifically makes provision concerning any particular detail of the procedure, such as the time when the lien of the creditor attaches to the property, it is conclusive.[2] If the statute does not expressly provide for a receiver, one will be appointed in a proper case, under a general statute allowing a receiver in case of fraud or when there is danger of loss.[3]

4. Proceedings Supplementary to Execution.[1]

§ 286. General Character of Such Proceedings with Reference to Receiverships.

In many of the code states statutes have been enacted to permit a proceeding, commonly called "proceedings supplementary to execution," designed to assist a judg-

1 "The provisions [of the N. Y. statute] referred to were introduced into the statutes of New York chiefly to set at rest the questia vexata which had been raised by the cases of Hadden v. Spader and Donovan v. Fin, already noticed." . . . The doctrine of Hadden v. Spader was thus explicitly recognized by legislation." Shainwald v. Lewis, 6 Fed. 766, 7 Sawy. 148. The statute referred to is 2 Revised Statutes 173, 174, which went into effect on January 1, 1830; and in connection with the above quotation the court refers to Revisers' Notes, 3 R. S. 669, 2d ed.

2 Under the Iowa statute the lien of the plaintiff attaches as of the time of the service of a copy of the petition and notice of the injunction.

3 Hirsch v. Israel, 106 Ia. 498, 76 N. W. 811.

1 In some states, under the statute dealing with garnishments, a receiver may be appointed in aid of the proceedings. Myres v. Frankenthal, 55 Ill. App. 390. Where the garnishee was a pledgee of corporate stock, and his debt was past due, and he raised no objection, it was proper for the court to appoint a receiver to sell the stock, pay the pledgee, and hold any surplus to await the outcome of the garnishment suit. Kimbrough v. J. K. Orr Shoe Co., 98 Ga. 537, 25 S. E. 576.

ment creditor in much the same way as a suit in equity of the sort just above considered assists him. Indeed these proceedings have been said to be a substitute for such suits.[2] There are two features usually provided for in these statutes which, as far as we are concerned, create the similarity between these statutory proceedings and the equity suit, to wit: (1) The statutes provide for the discovery of hidden property of the debtor by examination of the debtor himself and of third parties; (2) they provide for the appointment of a receiver with powers similar to those of the equity receivers. These proceedings are, however, purely statutory. They are not declaratory of nor a development of any equity proceeding, except in so far as they have been perhaps suggested by the course of proceeding in creditors' equity suits and except that, in some instances where the statutes have been silent on some detail of procedure, courts have followed the analogy of the equity proceeding. These proceedings are usually ancillary to and a continuation of the main suit, by which the creditor's claim is established. The receiver appointed in such proceedings has no power except such as is conferred upon him by statute.[3] General statutes with reference to the powers of receivers are not

Under Judgment Act, 13 and 14 Vict., C 29, a judgment creditor, by registering a certain affidavit, attained the status of a mortgagee of the debtor's property, and entitled to the rents and profits; if there are prior encumbrances he may institute a proceeding in equity or an accounting and have a receiver appointed; such a judgment mortgagee would not have a claim to the rents and profits prior to the holders of mortgage and debenture bonds which had been issued under a statute making the rents and profits security for the interest. Holland v. Cork & Kinsale Ry. Co., 2 Ir. Eq. Rep. (1868) 417.

2 McCullough v. Clark, 41 Cal. 298; Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120.

3 Bates v. International Co., 84 Fed. 518; Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120; McCullough v. Clark, 41 Cal. 298; Mason v. Weston, 29 Ind. 561; Ludes v. Hood, 29 Kan. 49; Flint v. Webb, 25 Minn. 263; Miller v. Perkins, 154 Mo. 629, 55 S. W. 874; Becker v. Farrance, 31 N. Y. 631; Pope v. Cole, 64 Barb. (N. Y.) 406; Levey v. Bull, 47 Hun (N. Y.) 350; Coates v. Wilkes, 92 N. C. 376;

usually held applicable to receivers designated in these supplementary proceedings statutes unless expressly made so.[4]

§ 287. Conditions for Appointment of Receiver.

The supplementary proceedings, we are discussing, are usually designed to assist judgment creditors to obtain satisfaction of their claims out of property that can not be reached by execution either because (1) it is not by law subject to execution, (2) or is hidden and has not been discovered by the creditor, or (3) it has been fraudulently transferred or subjected to encumbrance by the debtor. Accordingly it is usual to ask the judgment creditor demanding a receiver to show that he has exhausted his legal remedy through execution. If the statute requires such a showing it must, of course, be made.[1] The appointment usually follows the examination made for the discovery of property and depends upon the outcome of the examination; and, unless otherwise provided in the statute, is undoubtedly subject to the discretion of the court or judge by whom, under the statute, the appointment is to be made.[2] In New York, when the

Hennesaw Mills Co. v. Walker, 19 S. C. 104; Graham v. La Crosse & M. R. Co., 10 Wis. 459; Smith v. Weeks, 60 Wis. 94, 18 N. W. 778.

4 Stephens v. Meriden Britania Co., 160 N. Y. 178, 73 Am. St. Rep. 678, 54 N. E. 781.

1 Peck v. Dicken, 41 Misc. Rep. 473, 84 N. Y. Supp. 1094; DeVivier v. Smyth, 6 N. Y. Civ. Proc. Rep. 394, 1 How. Pr. (N. S.) 48.

When the right to a receiver has once attached it can not be destroyed by any act other than the payment of the judgment, or by its becoming barred through lapse of time under the statute, or by the arising of some circumstance or condition such as to make it certain that a receiver can not be of any assistance to the creditor. Tomlinson, etc., Mfg. Co. v. Shatto, 34 Fed. 380; Hall v. Senior, 54 Misc. Rep. 463, 106 N. Y. Supp. 29.

A receiver will not be appointed for the purpose of collecting costs in supplementary proceedings which have not been awarded or allowed, where the judgment creditor has without the knowledge of his attorney settled the matter in full. Peterson Bros. v. Goorley, 14 Misc. Rep. 56, 35 N. Y. Supp. 297.

2 Bean v. Heron, 65 Minn. 64, 67 N. W. 805; Flint v. Zimmerman, 70 Minn. 346, 73 N. W. 175.

return of an execution *nulla bona* was not expressly required by the statute, most of the judges required such a showing.[3] Probably the established rule is, in the absence of statutory provision covering this point, to follow the analogy of the equity suit. If the property sought to be impounded is such that it is not subject to levy and sale on execution or other process the creditor will be required to show that he has exhausted his legal remedy. If the property is subject to levy the creditor will ordinarily be required to proceed by execution, thus preserving to the debtor any right that he might have to redeem from the sale.[4] If the property has been fraudulently transferred the creditor will not be compelled to run the risk of such levy, but may have a receiver appointed to test the fraud in a proper action.[5]

§ 288. Necessity for Showing Existence of Property Subject to Receivership.

The question as to what property of the debtor may be brought under the receivership is, like every other point involved in the proceedings, dependent upon the provisions of the statute under which the proceedings are brought. Decisions in the different states and, for that matter, in any state at different dates, must be read in the light of the statutes existing at the times the decisions were made. The statutes, however, are all alike as

3 Hanson v. Tripler, 3 Sandf. (N. Y.) 733, 1 Code R. (N. S.) 154; Holbrook v. Orgler, 40 N. Y. Sup. Ct. 33, 49 How. Pr. 289; Andrews v. Glenville Woolen Co., 11 Abb. Pr. N. S. (N. Y.) 78; Darrow v. Lee, 16 Abb. Pr. (N. Y.) 215; Contra Union Bank v. Sargeant, 53 Barb. (N. Y.) 422, 35 How. Pr. 87.

4 Moyer v. Moyer, 7 App. Div. 523, 40 N. Y. Supp. 258; Bunn v. Daly, 24 Hun (N. Y.) 526; Ashley v. Turner, 22 Hun (N. Y.) 226; Tinkey v. Langdon, 60 How. Pr. (N. Y.) 180.

5 Todd v. Crooke, 4 Sandf. (N. Y.) 694; Heroy v. Gibson, 10 Bosw. (N. Y.) 591. If the appointment is not absolutely void because of some violation of the statute and is simply improvident it can not be collaterally attacked in an action brought by the receiver. Stiefel v. Berlin, 28 App. Div. 103, 51 N. Y. Supp. 147.

to their purpose and very similar in the general character of the provisions made for accomplishing this purpose. Certain statements may be made as of practically universal application.

The appointment of a receiver is largely within the discretion of the court. The court will not perform an idle act and will not appoint a receiver unless it appears that the appointment is likely to be of some advantage to the creditor.[1] The court is given ample power to discover property through the examination of the debtor himself and any other parties whom the creditor may call as witnesses.[2] The denial of the debtor that he owns property or the assertion of ownership by third parties in whose possession property that possibly belongs to the debtor or in which he possibly has some interest is found will not, however, avail to bar the appointment.[3] All that is necessary is a showing to the effect that the debtor probably owns property[4] which should be subjected to the statute.

If the statute does not permit a certain kind of property, as is the case, for instance, in some states, with reference to real property, the creditor can not reach it and must resort to an action in equity.[5] It may be stated, as of practically universal application, that:

1 Flint v. Webb, 25 Minn. 263; Knight v. Nash, 22 Minn. 152; Adler v. Turnbull, 57 N. J. L. 62, 30 Atl. 319; Colton v. Bigelow, 41 N. J. L. 266.

2 Bradley v. Burk, 81 Minn. 368, 84 N. W. 123; People v. Hanbury, 162 App. Div. 337, 147 N. Y. Supp. 851; Price v. Creme de Mohr Co., 78 Misc. Rep. 42, 137 N. Y. Supp. 732; Feinberg v. Kutcosky, 147 App. Div. 393, 132 N. Y. Supp. 9; Becher v. Gerlich, 72 Misc. Rep. 157, 129 N. Y. Supp. 614.

3 Collins v. Angell, 72 Cal. 513, 14 Pac. 135; Kimbrough v. J. K. Orr Shoe Co., 98 Ga. 537, 25 S. E. 576; Dickinson v. Onderdonk, 18 Hun (N. Y.) 479; Rodman v. Henry, 17 N. Y. 482.

4 Flint v. Webb, 25 Minn. 263.

5 Skinner v. Terhune (Terhune v. Skinner), 45 N. J. Eq. 565, 19 Atl. 377; In re Stoddard, 128 App. Div. 759, 113 N. Y. Supp. 157; Hall v. Senior, 54 Misc. Rep. 463, 106 N. Y. Supp. 29; Maples v. O'Brien, 116 N. Y. Supp. 175; Damers v. Sternberger, 52 Misc. Rep. 532, 102 N. Y.

(1) Property exempt from execution can not be brought under the receivership;[6]

(2) Property subsequently acquired by the debtor can not be reached unless the proceeding is extended to cover it;[7]

(3) The proceeding is for the benefit only of the creditor who institutes it and the property seized may be limited in amount to what is sufficient to satisfy his demands;[8]

(4) So far as permitted by the statute every species of property which the debtor owns or in which he has an interest may be administered in some appropriate way;[9]

Supp. 740; Bartkowaik v. Sampson, 73 Misc. Rep. 446, 133 N. Y. Supp. 401.

6 Finnin v. Malloy, 33 N. Y. Super. Ct. 382; Cooney v. Cooney, 65 Barb. (N. Y.) 524; Andrews v. Rowan, 28 How. Pr. (N. Y.) 126; Tillotson v. Wolcott, 48 N. Y. 188.

7 Guild v. Meyer, 56 N. J. Eq. 183, 38 Atl. 959; Howell v. McDowell, 47 N. J. L. 359, 1 Atl. 474; Willson v. Salmon, 45 N. J. Eq. 257, 17 Atl. 815; Graff v. Bonnett, 25 How. Pr. (N. Y.) 470; Campbell v. Foster, 16 How. Pr. (N. Y.) 275; Du Bois v. Cassidy, 75 N. Y. 298; Murphy v. Cram, 157 App. Div. 609, 142 N. Y. Supp. 972; People ex rel. Duvall v. Cocks, 162 App. Div. 453, 147 N. Y. Supp. 829; Gibney v. Reilly, 26 Misc. Rep. 275, 56 N. Y. Supp. 1055.

On this theory it has been held that if exempt property is destroyed by fire after the appointment of the receiver, he will not be entitled to insurance collected thereon. Sands v. Roberts, 8 Abb. Pr. (N. Y.) 343.

8 John Mulstein Co. v. City of New York, 213 N. Y. 308, 107 N. E. 651, affirming judgment John Mulstein Co. v. Banzhaf, 160 App. Div. 890, 144 N. Y. Supp. 1122; Boucker Contracting Co. v. W. H. Callahan Contracting Co., 218 N. Y. 321, 113 N. E. 257; Hubbard v. J. P. Lewis Co., 128 App. Div. 416, 112 N. Y. Supp. 1050.

9 Moak v. Coats, 33 Barb. (N. Y.) 498; Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Barnes v. Morgan, 3 Hun (N. Y.) 703, 705.

Reversionary legacy: Macnicoll v. Parnell, 36 W. R. 773.

Money deposited as bail, when debtor is entitled to return thereof: Elite Distributing Co. v. Schrul, 69 Misc. Rep. 206, 126 N. Y. Supp. 607.

Money due on a public contract: John Mulstein Co. v. City of New York, 213 N. Y. 308, 107 N. E. 651.

Money loaned to debtor and deposited with third party may be claimed as against the lender: Building & Loan Assoc. Harmonia

(5) Whatever property is taken is taken subject to all valid prior claims; the receiver has no better title than the debtor had.[10]

§ 289. Lien Acquired by Creditor.

By the proceedings the creditor acquires a lien upon such property of the debtor as may be properly affected by them. The rights of the creditor may be protected

v. Wolfskeil, 85 N. J. Eq. 218, 96 Atl. 89.

An equitable interest in real estate may be sold by the receiver, if such course can be followed without conflict with the legal title: Kiser v. Sawyer, 4 Kan. 503.

A seat in the stock exchange: Habenicht v. Lissak, 78 Cal. 351, 12 Am. St. Rep. 63, 5 L. R. A. 713, 20 Pac. 874.

Patent right: Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120.

Rents due to a tenant by courtesy: Beamish v. Hoyt, 2 Robt. (N. Y.) 307; Ellsworth v. Cook, 8 Paige (N. Y.) 643.

Or a widow entitled to dower: Payne v. Becker, 87 N. Y. 153; Stewart v. McMartin, 5 Barb. (N. Y.) 438.

A promissory note in hands of third party; and receiver may be ordered to collect the note: Hathaway v. Brady, 26 Cal. 581.

Where a policy of insurance on the life of the debtor named the debtor's wife as a beneficiary, but contained a clause permitting the insured to change the beneficiary, and it was claimed that the wife had paid certain of the latest annual premiums, it was ordered that the "debtor turn over to the receiver the policy . . . and apply so much of the surrender value of this insurance policy as has accrued to the judgment debtor as of the year 1912 [the year preceding the first year for which the wife had paid the premium] and apply the same on account of the judgment in the present proceeding." Clark v. Shaw, 91 Misc. Rep. 245, 154 N. Y. Supp. 1101.

The receiver may be given possession of pledged property for the purpose of determining whether or not it could be sold for sufficient to pay the pledgee's claim and leave a balance for the creditor; the result of his investigation to determine whether he should sell the property or redeliver it to the pledgee. Briggs v. Walker, 21 N. H. 72.

[10] Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; Willson v. Salmon, 45 N. J. Eq. 257, 17 Atl. 815.

If the debtor has a right to rents and profits pending redemption from an execution sale, the right to redeem both of these rights may pass to the receiver. Farnham v. Campbell, 10 Paige (N. Y.) 598.

The receiver may redeem pledged property. Armstrong v. McLean, 153 N. Y. 490, 47 N. E. 912; In re Flynn, 157 App. Div. 241, 141 N. Y. Supp. 807.

by an injunction until such time as possession may be acquired by the receiver.[1] The lien attaches as of the time provided in the statute; and if it attaches prior to the receiver's possession, it will relate back to the appointed time upon his acquiring possession.[2] The lien will not be displaced by rights accruing after it has once

1 Tomlinson & Webster Mfg. Co. v. Shatto, 34 Fed. 380; Sullivan v. United States, etc., Co., 134 App. Div. 658, 119 N. Y. Supp. 532; Smith v. Weed, 75 Wash. 452, 134 Pac. 1070.

2 Tomlinson & Webster Mfg. Co. v. Shatto, 34 Fed. 380; Rose v. Baker, 99 N. C. 323, 5 S. E. 919; Becker v. Torrance, 31 N. Y. 631; Stewart v. Foster, 1 Hilt. (N. Y.) 505; Campbell v. Genet, 2 Hilt. (N. Y.) 290, 295; Fillmore v. Horton, 31 How. Pr. (N. Y.) 424; Rogers v. Corning, 44 Barb. (N. Y.) 229; Conger v. Sands, 19 How. Pr. (N. Y.) 8; Moyer v. Moyer, 7 App. Div. 523, 40 N. Y. Supp. 258; Fitzpatrick v. Moses, 34 App. Div. 242, 54 N. Y. Supp. 426; Murphy v. Cram, 157 App. Div. 609, 142 N. Y. Supp. 972; Frieder v. Adlerman, 95 Misc. Rep. 259, 59 N. Y. Supp. 120.

In the absence of a showing as to the dates of preceding steps in the proceeding, the date of the receiver's appointment will be taken as the commencement of the receiver's claim to the judgment debtor's property. Steinert v. Van Aken, 165 App. Div. 206, 150 N. Y. Supp. 525.

The receiver's title, or claim, may date from the filing of a certified copy of the order appointing with the county clerk. Murphy v. Cram, 157 App. Div. 609, 142 N. Y. Supp. 972; Manning v. Evans, 19 Hun (N. Y.) 500; Smith v. Tozer, 11 N. Y. Civil Proc. Rep. 349, 3 N. Y. St. Rep. 164; Harrison v. Maxwell, 44 N. J. L. 316.

As against the receiver, claims to the property are to be determined as of the date when his claim, or title attached. Steinert v. Van Aken, 165 App. Div. 206, 150 N. Y. Supp. 525.

In regard to property that has been fraudulently conveyed by the debtor it may be that a lien is not acquired, at least as far as the rights of the transferee are concerned, until the receiver commences an action for the recovery of the property. Field v. Sands, 8 Bosw. (N. Y.) 685; Ward v. Petrie, 92 Hun (N. Y.) 605, 36 N. Y. Supp. 940; Mandeville v. Avery, 124 N. Y. 376, 21 Am. St. Rep. 678, 26 N. E. 951; Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11.

Where a deed was intended only as a mortgage and between an assignment by the debtor to the receiver and the beginning of an action by the receiver against the mortgagee, the latter sold the property to an innocent purchaser, the receiver could not pursue the land and could have only a judgment against the mortgagee for the difference between the mortgagee's claims against the debtor and the proceeds of the sale. Maples v. O'Brien, 116 N. Y. Supp. 175.

attached,[3] although subsequent rights, subject to the lien, may be acquired.[4] Several creditors, pursuing the same property, have priorities in the order in which their respective liens attach. The lien may be perfected by an assignment from the debtor to the receiver. Such an assignment will be ordered if necessary;[5] but if, under the statute, the title of the receiver is sufficient for all the purposes of the proceeding without an assignment, and an assignment might pass such rights as the debtor still retains in the property, an order directing an assignment would be erroneous.[6] The lien may lapse, under the

[3] The title of a qualified receiver in supplementary proceedings starts from the time of the commencement of the proceedings and is superior to subsequent liens. John Mulstein Co. v. City of New York, 213 N. Y. 308, 107 N. E. 651, affirming judgment John Mulstein Co. v. Banzhaf, 160 App. Div. 890, 144 N. Y. Supp. 1122; McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948.

The receiver was entitled to recover from bank, a bank deposit belonging to the debtor, the title to which was vested in the receiver, and which was paid by the bank to the debtor's wife without regard to the true ownership of the fund. O'Reilly v. Adams, 163 App. Div. 60, 148 N. Y. Supp. 441.

After notice of the appointment of a receiver over the assets of a partner, a partner deals with the interest of the judgment debtor at his own risk. Guild v. Meyer, 56 N. J. Eq. 183, 38 Atl. 959.

[4] St. Louis & S. Coal, etc., Co. v. Sandoval Coal, etc., Co., 111 Ill. 32; Scott v. Elmore, 10 Hun (N. Y.) 68; Wilson v. Wilson, 1 Barb. Ch. (N. Y.) 592; Chautauqua County Bank v. Risley, 19 N. Y. 369, 375, 75 Am. Dec. 347. See Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519; Faneuil Hall Nat. Bank v. Bussing, 147 N. Y. 665, 42 N. E. 345.

Any part of the debtor's property which is not, by the order of the court included in the receivership, remains at the disposal of the debtor. Commercial Nat. Bank of Salt Lake City v. Page & Brinton, 45 Utah 14, 142 Pac. 709.

[5] Newton v. Buck, 72 Fed. 777, Pacific Bank v. Robinson, 59 Cal. 520, 40 Am. Rep. 120; Habenicht v. Lissak, 78 Cal. 351, 12 Am. St. Rep. 63, 5 L. R. A. 713, 20 Pac. 874; Scott v. Elmore, 10 Hun (N. Y.) 68; Moak v. Coats, 33 Barb. (N. Y.) 498; Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Fenner v. Sanborn, 37 Barb. (N. Y.) 610.

[6] Graham v. Lawyers' T. I. Co., 20 App. Div. 440, 46 N. Y. Supp. 1055; Ball v. Goodenough, 37 How. Pr. (N. Y.) 479; Ten Broeck v. Sloo, 13 How. Pr. (N. Y.) 28, 2 Abb. Pr. 234.

laws relating to the estates of decedents if the debtor dies before a receiver is appointed.[7]

§ 290. Powers of Receiver in Supplementary Proceedings.

In consonance with the general purposes of supplementary proceedings, the statutes clothe the court with authority to give the receiver a wide range of power to make the proceedings effective. The receiver is, however, an officer of the court; he is not the representative of any of the parties; in all of his acts he is under the direction of the court and is limited to such authority as is expressed in the court orders specifying his duties and powers or as is necessarily implied in these orders. We have already seen some of the ways in which the receiver, as a practical proposition, will be authorized to proceed.[1] Generally speaking, the court will adopt, or authorize the receiver to adopt, any course that gives promise of being effectual. A few of the restrictions placed upon the court and the receiver are to be noticed.

In the proceedings themselves—that is, the examinations conducted for the purpose of discovering property—the court is not authorized to try the title to property, except in a very limited number of circumstances.[2] The court can not disturb the possession of

7 Rankin v. Minor, 72 N. C. 424.

1 See § 289, note 9, supra.

2 In some states the court may determine whether or not, as between husband and wife, property is the separate property of the husband. Smith v. Weed, 75 Wash. 452, 134 Pac. 1070.

When it appears that the debtor has kept his funds in his wife's name, he may be ordered to deliver them to the receiver. Matter of Weld (Weld v. Sage), 34 App. Div. 471, 54 N. Y. Supp. 253.

The court will order the surrender value of a life insurance policy, having a covenant permitting the debtor to change the name of the beneficiary to be placed at the disposal of the receiver, even though the debtor's wife has been named as beneficiary, the court believing that "the examination of the judgment debtor shows the usual history of assignments to the wife of property formerly owned by the judgment debtor in an effort to divest himself of property subject to the rights of creditors. Clark v. Shaw, 91 Misc. Rep. 245, 154 N. Y. Supp. 1101.

The evidence supporting the

any third party rightly in possession of the property and having a valid claim against it; the court may, however, authorize the receiver to satisfy the claim, if possible, and take possession, or to sell whatever interest the debtor may have in the property.[3] In case of a dispute as to the ownership of property, or as to the existence of a debt claimed to be due the judgment debtor from a third party, or as to whether or not a transfer of property by the debtor was fraudulent, the court can only authorize the receiver to seek a determination of the disputed issue by a proper suit.[4] The court may refuse

claim of a third person to property in his possession may be so unsubstantial as to warrant the court in ordering it turned over to the receiver. Murphy v. Cram, 157 App. Div. 609, 142 N. Y. Supp. 972.

The court can not order the receiver to sell land held by the wife as being the property of the husband and apply the proceeds to the payment of the judgment. McDowell v. Bell, 86 Cal. 615, 25 Pac. 128.

3 Voorhees v Seymour, 26 Barb. (N. Y.) 569, 585; Gardner v. Smith, 29 Barb. (N. Y.) 68; Campbell v. Fish, 8 Daly (N. Y.) 162.

Where a receivership has been established in a suit to dissolve a partnership, and there is no claim of intent to hinder and delay creditors through this proceeding, the receiver will not be ordered to turn over the property to a supplementary proceeding receiver of the partnership subsequently appointed; but the latter will be protected by an order directing that the dissolution proceeding shall not be discontinued nor the receiver discharged without due notice to the second receiver. Price v. Price, 21 App. Div. 597, 47 N. Y. Supp. 772.

4 Olney v. Tanner, 10 Fed. 101; McDowell v. Bell, 86 Cal. 615, 25 Pac. 128; Union Collection Co. v. Snell, 5 Cal. App. 130, 89 Pac. 859; Thomas v. Van Meter, 164 Ill. 304, 45 N. E. 405; Knight v. Nash, 22 Minn. 452; Ward v. Petrie, 157 N. Y. 301, 68 Am. St. Rep. 790, 51 N. E. 1002; Mandeville v. Avery, 124 N. Y. 376, 21 Am. St. Rep. 678, 26 N. E. 951; Thompson v. Sage, 47 Misc. Rep. 357, 94 N. Y. Supp. 31; In re Becker, 36 Misc. Rep. 322, 73 N. Y. Supp. 577; Underwood v. Sutcliffe, 77 N. Y. 58; Stiefel v. Berlin, 20 Misc. Rep. 194, 45 N. Y. Supp. 746; Bostwick v. Menck, 40 N. Y. 383; Kennedy v. Thorp, 3 Abb. Pr., N. S. (N. Y.), 131, 2 Daly 258; Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519; Wright v. Nostrand, 94 N. Y. 31; Teller v. Randall, 40 Barb. (N. Y.) 242, 26 How. Pr. 155; Thompson, etc., Mfg. Co. v. Guenthner, 5 S. D. 504, 59 N. W. 727; Smith v. Weed, 75 Wash. 452, 134 Pac. 1070; Hamlin v. Wright, 23 Wis. 491; First Nat.

permission for the receiver to sue if it is not sufficiently convinced that there is a probability that the suit will be successful, or if, without the suit, sufficient property may be obtained to satisfy the claims which he represents and for the satisfaction of which alone he is entitled to take property.[5] If the court acts, or threatens to act, without jurisdiction in any of these matters, a writ of prohibition will lie.[6]

The receiver acquires no right from the creditor except the right to enforce satisfaction of the judgment upon which the proceedings were founded.[7] If he sues to set

Bank v. Cook, 12 Wyo. 492, 2 L. R. A. (N. S.) 1012, 76 Pac. 674, 78 Pac. 1083.

A receiver, in proceedings supplementary to execution, can not maintain an action at law for the conversion of property claimed to have been fraudulently transferred, or mortgaged by the debtor. His remedy is only by a suit in equity to have the transfer or incumbrance set aside. Berliner v. Kuttner, 85 Misc. Rep. 461, 147 N. Y. Supp. 308; Stephens v. Meriden Brittania Co., 160 N. Y. 178, 73 Am. St. Rep. 678, 54 N. E. 781.

A debtor's claim against the administratrix of his deceased wife for a distributive share of the estate may be the subject of a suit by his receiver in supplementary proceedings against the sureties on the administratrix's bond, subject to such defenses as they might have against the debtor. Steinert v. Van Aken, 165 App. Div. 206, 150 N. Y. Supp. 525.

An order in supplemental proceedings authorizing the payment of the receiver's compensation and expenses in suits to set aside fraudulent transfers out of property received from other sources, is erroneous. Smith v. Weed, 75 Wash. 452, 134 Pac. 1070.

[5] Gifford v. Rising, 59 Hun 42, 12 N. Y. Supp. 428; Bostwick v. Menck, 40 N. Y. 383.

For a set of facts that will thoroughly warrant an order authorizing a suit to set aside a transfer, so far as a showing of fraud is concerned, see McMahon v. Shary, 62 Misc. Rep. 236, 114 N. Y. Supp. 852.

[6] McDowell v. Bell, 86 Cal. 615, 25 Pac. 128.

[7] If creditors, at whose instance he has been appointed, have waived the frauds by an affirmance of the contracts, as in the case of a suit thereon, the receiver can not attack the transactions as fraudulent. Kennedy v. Thorp, 51 N. Y. 174 (reversing 2 Daly [N. Y.] 258); cf. Parish v. Murphree, 54 U. S. 92, 99, 14 L. Ed. 65, 67; Savage v. Murphy, 34 N. Y. 508, 90 Am. Dec. 733.

The receiver can not maintain a suit based on a cause of action for damages that the creditor may have against the debtor and others

aside a fraudulent conveyance he must show in his complaint that he has a cause of action.[8] Since the judgment is still the property of the creditor he can not levy execution upon property claimed to have been fraudulently transferred, but must proceed by suit.[9] As far as property that might be used to satisfy the judgment is concerned the receiver succeeds to any cause of action that the debtor had.[10] The receiver may be sued by any third party claiming a superior right to any property of which he acquires possession.[11]

The receiver is virtually a trustee for all of the interested parties[12] and he can not take any step that will

caused by a conspiracy to hinder and delay the collection of his claim. Ward v. Petrie, 157 N. Y. 301, 68 Am. St. Rep. 790, 51 N. E. 1002.

8 Tvedt v. Mackel, 67 Minn. 24, 69 N. W. 475. But see also Sawyer v. Harrison, 43 Minn. 297, 45 N. W. 434; Pendleton v. Friedman, 135 App. Div. 420, 119 N. Y. Supp. 994.

9 Mich-Prescott v. Pfeiffer, 57 Mich. 21, 23 N. W. 477; Minn Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402; Bostwick v. Menck, 40 N. Y. 383, 384; Metcalf v. Del Valle, 64 Hun 245, 19 N. Y. Supp. 16; Ward v. Petrie, 157 N. Y. 301, 68 Am. St. Rep. 790, 51 N. E. 1002.

If, without an order directing him to do so, the receiver takes property, claimed to have been fraudulently transferred, from the transferee, against the will of the latter, he does so at his own risk. Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225.

It might be that the right to sue to avoid a fraudulent transfer would belong to an assignee in bankruptcy rather than to the receiver. This question would depend upon the provisions of the bankruptcy act and the time when the lien of the receiver's creditor attached to the property as compared to the time when the assignee was appointed. Olney v. Tanner, 18 Fed. 636, 21 Blatchf. 540; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394; Judd v. Bankers', etc., Tel. Co., 31 Fed. 182, 24 Blatchf. 420; Skip v. Harwood, 3 Atk. 564.

10 Prescott v. Pfeiffer, 57 Mich. 21, 23 N. W. 477; Masten v. Amerman, 20 Abb. N. C. 443; Weill v. Wilmington First Nat. Bank, 106 N. C. 1, 11 S. E. 277; Ward v. Petrie, 157 N. Y. 301, 68 Am. St. Rep. 790, 51 N. E. 1002; Armstrong v. McLean, 153 N. Y. 490, 47 N. E. 912.

11 Frieder v. Adlerman, 95 Misc. Rep. 259, 159 N. Y. Supp. 120.

12 Cumming v. Egerton, 9 Bosw. 684; Bostwick v. Beizer, 10 Abb. Pr. (N. Y.) 197; Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519.

injure the beneficiaries of the trust. He can not waive the creditor's right to attack a fraudulent conveyance.[13] He can distribute money or property only on an order of court; and if he does make distribution without such order he will be held personally accountable unless he can show that his action was proper.[14] In all matters relating to the procedure under statutes of this character resort must be had to the statute and the decisions interpreting its provisions.[15]

13 Mumford v. Crouch, 8 App. Div. 529, 40 N. Y. Supp. 878.

14 In re Hone, 153 N. Y. 522, 47 N. E. 798.

If a receiver has notice of an appeal from an order of court directing him to pay money to the judgment creditor and he makes the payment pending the appeal, he will, on a final reversal of the order, have to look to the judgment creditor for reimbursement. Johnson v. Joslyn, 47 Wash. 531, 92 Pac. 413.

15 Proceedings supplementary to execution are entirely statutory and decisions concerning them must be read in the light of the statutes under which they were had. A few citations are here added to illustrate some of the miscellaneous questions that may arise in connection with such proceedings:

Appointment of Receiver—A receiver should be appointed by the same judge who issued the order for the examination of the debtor. Ball v. Goodenough, 37 How. Pr. (N. Y.) 479; Smith v. Johnson, 7 How. Pr. (N. Y.) 39; Corbin v. Berry, 83 N. C. 27; Clark v. Bergenthal, 52 Wis. 103, 8 N. W. 865.

Proceedings by Several Creditors—When separate proceedings are instituted by several creditors against the same debtor, the same person should be appointed receiver in all the cases. Myrick v. Selden, 36 Barb. (N. Y.) 15; Bostwick v. Menck, 40 N. Y. 383; Andrews v. Glenville Woolen Co., 11 Abb. Pr. (N. S.) (N. Y.) 78; Sparks v. Davis, 25 S. C. 381.

Opposition to Appointment—Lien creditors of the debtor, who were not parties to the main action, are not entitled to object to the appointment. Their interests can not be affected by any action brought by the receiver to which they are not parties. First Nat. Bank v. Cook, 12 Wyo. 492, 2 L. R. A. (N. S.) 1012, 76 Pac. 674, 78 Pac. 1083.

Notice—If the debtor was examined before a referee and he is not without the state, he should be given notice of the application for a receiver. Wilhelm v. Hayman, 126 N. Y. Supp. 374.

When the statute was silent on the question of giving notice of the application for a receiver, the courts have ruled differently as to the necessity for notice. Ashley v. Turner, 22 Hun (N. Y.) 226; Morgan v. Von Kohnstamm, 9 Daly (N. Y.) 355; Terry v. Banges,

§ 291. Property in a Foreign Jurisdiction.

It is generally held that a court of equity has not authority to appoint a receiver in a judgment creditor's action, brought under the general equity jurisdiction, to sue for property in a foreign jurisdiction, or to take a conveyance thereof from the debtor.[1] This would cer-

9 N. Y. Supp. 311; Whitney v. Welch, 2 Abb. (N. C.) (N. Y.) 442.

When the appointment is liable to be erroneous for want of notice, the creditor may himself have the order vacated and the receiver's bond cancelled, at least prior to the time that the receiver takes possession of any property. Wilhelm v. Hayman, 126 N. Y. Supp. 374.

It was held that a corporation had actual notice of a motion for leave to sue when it appeared that the corporation to which the debtor had fraudulently, it was claimed, transferred his property, had been organized by the debtor, that it consisted solely of the debtor, his wife, and his attorney, and that the debtor and the attorney, both of whom were officers of the corporation; and it was held that no other notice to the corporation was necessary. McMahon v. Shary, 62 Misc. Rep. 236, 114 N. Y. Supp. 852.

Bond of Receiver—A receiver who has not filed his bond in the particular office expressly designated by the statute is not "the duly qualified" receiver required by the statute and does not take title to the debtor's property. Mulstein Co. v. City of N. Y., 213 N. Y. 308, 107 N. E. 651.

Attorney for Receiver—The receiver may employ as his attorney the attorney of the creditor at whose instance the proceedings were instituted. McMahon v. Shary, 62 Misc. Rep. 236, 114 N. Y. Supp. 852.

Attorney's Fees—A judgment creditor can himself institute a suit to set aside a fraudulent conveyance; therefore, if a receiver is appointed at the instance of a single creditor and this receiver institutes such an action, he is not entitled to an attorney's fee to be taxed as costs. In this case the attorney is in a different position from the attorney of a receiver of an insolvent concern, which receiver represents all the creditors. Small v. Anderson, 139 Minn. 292, 166 N. W. 340.

Receiver's Sales—One who buys property at a receiver's sale is bound to know whether or not the court had jurisdiction to order the sale. Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

A receiver's sale may be approved or rejected in the discretion of the court. Hall v. Knott, 69 Misc. Rep. 543, 125 N. Y. Supp. 299.

For a somewhat clear and full statement of the practice in these proceedings, see Coates v. Wilkes, 92 N. C. 376; cf. Spencer v. Cuyler, 9 Abb. Pr. (N. Y.) 382; People ex rel. Fitch v. Mead, 29 How. Pr. (N. Y.) 360.

1 Amy v. Manning, 149 Mass.

tainly be true if the property was of such a character or so conditioned that, if located in the home jurisdiction, the creditor would not be entitled to a receiver because he could reach it by legal process.[2] However, in proceedings supplementary to execution, if the statutes, as they frequently do, so provide, an assignment to the receiver of property situated in a foreign jurisdiction may be directed and he may pursue said property by suit or otherwise, although the court would refuse this authority in the case of property over which it would not appoint a receiver if it were located at home.[3]

5. Receiverships in Respect to Bulk Sales.

§ 292. General Discussion of Subject.

Another statutory aid that has been devised to protect creditors against fraud on the part of their debtors and to give them the assistance of receivers in attaining satisfaction of their claims is the law commonly known as the "Bulk Sales Law." Such statutes have been enacted in most of the states. They are practically similar and have been given similar force and effect by the interpretation placed upon them by the courts.

In general they provide that sales of merchandise stock by a merchant, in bulk and in a manner different from the ordinary course of trade, shall be deemed fraudulent as to creditors, unless certain requirements, designed to give notice of the proposed sale to creditors, are complied with; that, if such presumptively fraudulent sales are made, the purchaser shall upon application of any of the creditors of the seller become a receiver and be held accountable to such creditors for all the merchandise that came into his possession as a result of the sale.

487, 21 N. E. 943; Filkins v. Nunnemacher, 81 Wis. 91, 51 N. W. 79.

[2] Heyl v. Taylor, 137 App. Div. 641, 122 N. Y. Supp. 279.

[3] Toune v. Campbell, 35 Minn. 231, 28 N. W. 254; Harris v. Hibbard (N. J.), 71 Atl. 737; Smith v. Tozer, 42 Hun (N. Y.) 22.

The purpose of these statutes has been stated as follows: "The object of the act was to suppress a widespread evil, well known to current history and condemned by repeated adjudications in this court and in all the leading courts of the state from time out of mind. That evil is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors."[1]

It has been held that for the purpose of securing the benefits that follow to creditors from having a sale declared fraudulent the statute can be set in motion only by a plenary action brought by any creditor on behalf of himself and all other creditors.[2]

The action is on behalf of all of the creditors and may be instituted by any creditor. Mere contract creditors may establish their claims in the action, and participate in its benefits; the "judgment creditor" rule does not apply. In this respect the suit differs from the equity suits heretofore in this chapter considered.[3]

The purpose of the suit is not to set aside the sale, but to impound the proceeds for the benefit of the creditors of the seller. The statute in declaring the purchaser a "receiver" does not use that term in the ordinary sense. It simply indicates that the purchaser is a trustee for the benefit of the creditors of the seller. The sale is void

1 Wright v. Hart, 182 N. Y. 330, 3 Ann. Cas. 263, 2 L. R. A. (N. S.) 338, 75 N. E. 404.

2 In re Perman, 172 App. Div. 14, 157 N. Y. Supp. 971; Apex Leasing Co. v. Litke, 93 Misc. Rep. 353, 158 N. Y. Supp. 21.

The act can not be set in operation on the basis of testimony taken in proceeding supplementary to execution against the debtor. Kaphan v. Rogers, etc., Co., 169 App. Div. 63, 154 N. Y. Supp. 753.

The statute does not apply to sales of fixtures. Saqui v. Wiricks, 167 N. Y. Supp. 661.

Creditors may proceed notwithstanding the death of an insolvent debtor. Scheve v. Vanderkolk, 97 Neb. 204, 149 N. W. 401.

3 Coffey v. McGahey, 181 Mich. 225, Ann. Cas. 1916C, 923, 148 N. W. 356; Touris v. Karantzalis, 170 App. Div. 42, 156 N. Y. Supp. 526; Matter of P. Partene & Co., 156 N. Y. Supp. 524.

and the purchaser holds the property with the obligation of accounting for it and its proceeds. The creditors may have, at the institution of the action, an injunction forbidding the purchaser from disposing of the goods or the proceeds thereof. On proving their case, a receiver, in the ordinary sense, may be appointed and the seller will be ordered to account to this receiver for the goods and their proceeds.[4]

[4] Coffey v. McGahey, 181 Mich. 225, Ann. Cas. 1916C, 923, 148 N. W. 356; Apex Leasing Co. v. Litke, 93 Misc. Rep. 353, 158 N. Y. Supp. 21; Touris v. Karantzalis, 170 App. Div. 42, 156 N. Y. Supp. 526, 528; Matter of P. Pastene & Co., 156 N. Y. Supp. 524.

CHAPTER XIII.

PRIVATE CORPORATIONS.

1. *General Rules Respecting Corporation Receiverships.*

§ 293. General Nature of Receiverships of Corporations.

It has appeared, from many of the authorities cited in preceding chapters, that some of the receiverships therein considered have been held to be applicable to the affairs of a corporation equally as well as to the affairs of an individual. A corporation may be a mortgagor or a mortgagee, a lessor or a lessee, a creditor or a debtor, or may assume any of the numerous relationships caused by business transactions between individuals. In these relationships a corporation has, of course, the same rights and liabilities as and is treated as an individual. Such receiverships as those created in mortgage foreclosure suits and in suits by judgment creditors to reach equitable assets, not accessible by execution, are allowed without reference to the character of the party or the nature of the property involved.[1] In such cases the receiver is appointed to impound property for a "specific" purpose,[2] and the property he seizes may be that of a corporation as well as that of an individual.[3]

1 Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814.

2 Equitable Trust Co. v. Great Shoshone, etc., Co., 245 Fed. 697, 158 C. C. A. 99.

3 Where the defendant in a mortgage foreclosure action was a corporation it was held that the fees of the receiver were to be determined under the provisions of a statute relating to receivers generally and not of a statute relating specially to receivers of corporations. Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814; United States Trust Co. v. New York, etc., R. Co., 101 N. Y. 478, 5 N. E. 316.

A judgment creditor of a corporation, without levying execution, commenced suit in an Arkansas state court, alleging among other things, that, because the company's properties were heavily

It is not our purpose in this chapter to enlarge upon the consideration that has formerly been given to these

mortgaged it would be useless to collect his judgment by execution and that the company was using its income for betterments, instead of paying its debts. A receiver was appointed by the state court. The case was transferred to a federal court and the receivership was vacated on the ground that the action was collusive. The case reached the U. S. Supreme Court on a question connected with distribution. That court held that the state court had jurisdiction to appoint a receiver because the action was in the nature of a creditor's suit to reach equitable assets; that the company had waived the defense that there had not been a return of execution nulla bona; that the fact that the receivership was due to fraudulent collusion between the plaintiff and the company did not defeat the former's rights on distribution; and that he was entitled, as far as the earnings of the property in the receiver's hands were concerned, to priority over the mortgagee on the ground that, although the mortgage expressly covered earnings, the mortgagee was not entitled to them until he had secured a lien upon them by the appointment of a receiver, at his instance. Sage v. Memphis, etc., R. Co., 125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. 887.

A stockholder of a corporation commenced a suit against another company to collect money due the former. A receiver was appointed, "in aid of a judgment" in favor of the plaintiff, to receive the money and pay it over to the corporation, the real party in interest. Fox v. Hale & Norcross, etc., Min. Co., 108 Cal. 475, 41 Pac. 328.

In a mortgage foreclosure suit against a corporation creditors intervened. In a suit by the receiver over a disputed claim as to the ownership of certain stock, the question of jurisdiction on the ground of diversity of citizenship being raised, the action was held to be ancillary to the receivership proceedings, on the ground that the receivership was "general," for the benefit of creditors, and not simply "special," for the benefit of bondholders. Vallery v. Denver & R. G. R. Co., 236 Fed. 176, 177, 149 C. C. A. 366.

Upon the favorable outcome of an action to recover stock in a corporation, a receiver, "in aid of the judgment," was appointed to see that the stock was issued, and a referee appointed to conduct an election of directors. King v. Barnes, 113 N. Y. 655, 21 N. E. 184, affirming 51 Hun 550, 4 N. Y. Supp. 247.

Although it was held that a certain creditor's suit based upon liability for unpaid stock subscriptions of stockholders in a foreign corporation could not be maintained under a certain state statute, it was suggested that, by proper amendment as to parties, it could be maintained as an action to reach equitable assets. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

In an action to foreclose a corporation mortgage, on the inter-

special receiverships. We are here to be concerned with strictly corporation receiverships. These receiverships are created to protect rights and interests that develop because the business engagements concerned are conducted by and the properties are owned by an organization cast in corporate form. They grow out of the relation between the corporation and its officers, on the one hand, and either its stockholders or its creditors on the other. It is the peculiar characteristic of these receiverships that the receiver assumes control of all of the property and the business of the corporation, "for the protection and preservation of all rights and interests therein

vention of creditors, the court properly extended the foreclosure receivership into a "general" receivership and attained jurisdiction to order the receiver to seize and sell all of the corporate property. Pilliod v. Angola Ry. & Power Co., 46 Ind. App. 719, 91 N. E. 829.

Two corporations, engaged in publishing newspapers, entered into an agreement under which they combined their properties and published a single paper. Dissensions arose between the two interests and an action was commenced in which a receiver was prayed for. It was held that the agreement created a partnership between the two corporations and that a receiver could be appointed under principles governing such a relationship. News-Register Co. v. Rockingham Pub. Co., 118 Va. 140, 86 S. E. 874.

In Bouker Contracting Co. v. W. H. Callahan Contracting Co., 218 N. Y. 321, 113 N. E. 257, it was held that the statute concerning "supplementary proceedings" was not applicable to a corporation debtor because of the existence of a statute specially concerning receivers of corporations.

In other words a receiver appointed for a corporation under the General Corporation Law acts for the benefit of all creditors, whereas a receiver in supplementary proceedings represents only the creditor who procured his appointment together with such other creditors who have had the receivership extended to cover their claims.

In Murray v. Keeley Institute, etc., 190 Mich. 295, 157 N. W. 87, a corporation receiver was prayed for. The court viewed the action as a contest between partners. A receiver was appointed to take possession of and sell the stock that was counted to be the assets of the partnership, and to protect the value of the stock pendente lite the corporation was enjoined from disposing of, sequestering, or encumbering its assets.

In many opinions we find courts justifying the appointing of a receiver over the affairs of an ordi-

existing at the time of the appointment.'"[4] In connection with these corporation receiverships certain peculiar points arise with reference to the powers and duties of the receiver and these matters will be presented in this chapter. Certain corporations, such as railroads, banks, and the various public utilities, have a sort of public character and, in connection with receiverships of such corporations, special points arise, growing out of the fact that the general public has a certain interest in the conduct and continuance of their business. These special points will be considered in separate chapters, although cases involving such corporations are here used as authority, where the points involved are applicable to corporation receivers in general. Certain matters of application to all classes of corporation receiverships are presented in this opening division of the chapter.

§ 294. Receiverships at the Instance of a Corporation or With Its Consent.

It has appeared in connection with the special receiverships heretofore discussed that a corporation may be the successful applicant for the appointment of a receiver. It will also appear that a corporation may be the successful applicant for the appointment of a corporation receiver of another corporation. Either for practical reasons,[1] or from the nature of the matter, it does not

nary business corporation on the ground of an analogy between such corporations and partnerships and on the ground of the well recognized jurisdiction of courts to appoint receivers over partnership affairs. Benedict v. Columbus Construction Co., 49 N. J. Eq. 23, 23 Atl. 485; Booth v. Summit Coal Min. Co., 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

4 Equitable Trust Co. v. Great Shoshone, etc., Co., 245 Fed. 697, 158 C. C. A. 99.

1 Creditor's or stockholder's receiver actions against corporations are frequently brought by prearrangement with the corporation and, unless actual fraud is involved, such an arrangement is considered legitimate. The arrangement is frequently made for the purpose of bringing the action within the jurisdiction of a federal court on the grounds of diversity

frequently appear that a corporation has applied for the appointment of a corporation receiver of its own affairs. It has, however, been held that, when its affairs were in such shape that a receiver might properly be appointed at the instance of a creditor or a stockholder, the corporation might itself present its condition to a court and have a receiver appointed to handle its own affairs.[2]

Doubtless in many instances a corporation which is in failing financial circumstances has sought the instrumentality of a creditor in instituting proceedings against it, which will result in the appointment of a receiver over its affairs, for the purpose of preserving them for the benefit of all creditors. In such circumstances the corporation generally admits the receivership facts. It is the duty of the court where such a procedure takes place to be astute in its examination of the facts to ascertain

of citizenship. In re Reisenberg (Receivership of Metropolitan St. Ry. Co.), 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219.

For an interesting comment on this practice from the point of view of the amount of work it has thrown on federal courts, see Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787.

2 In an action against a street railway company, which was the lessee of another company as to most of the lines which it was operating, and in which a receiver of the lessee company was appointed, the lessor company intervened and, on the ground of the complete merging of its affairs with those of its lessee, had the receivership extended to its own affairs. In re Reisenberg (Receivership of Metropolitan St. Ry. Co.), 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219.

A corporation, making a bondholder a defendant, having asked for a receiver, the bondholder on cross-complaint for foreclosure, asked for a receiver and the appointment was made regardless of the propriety of the corporation's application. Lewis' Administrator v. Bowling Green Ry. Co., 155 Ky. 681, 160 S. W. 242.

It has, however, been held that, in the absence of special statutory authority, a corporation can not with propriety appeal to a court of equity for a receiver to wind up its affairs. White v. Davis, 134 Ga. 274, 67 S. E. 716.

A statute that denies to a corporation the right to apply for a receiver over its own affairs prohibits its directors from making such an application. Floore v. Morgan (Tex. Civ. App.), 175 S. W. 737.

A corporation suing to recover property of its own on the claim

whether the appointment of the receiver will operate as a hardship upon other creditors of the corporation.[3]

The practice, however, of a corporation which, though not insolvent in a bankrupt sense but temporarily embarrassed financially, admitting receivership facts set forth in a petition asking for a receiver is quite universal and is looked upon by the courts as proper and commendable, where no improper collusion exists and where it is obvious that the receivership will operate as a protection to not only the creditors but also the stockholders of the corporation in preserving its assets from loss or waste in litigation or the payment of judgments obtained by some creditors at the expense of other creditors whose claims have not yet matured.[4]

that it had been wrongfully disposed of by its officers may have a receiver of the property appointed. American & British Mfg. Co. v. Hoadley, 97 Misc. Rep. 200, 162 N. Y. Supp. 836; Leigh v. National Hollow, etc., Co., 224 Ill. 76, 79 N. E. 318.

3 Where the rights of others would be interfered with by the appointment of a receiver, and an insufficient showing for a receiver is made the court will refuse to make the appointment even though the litigants are willing to consent to the court making it. Whelpley v. Erie Ry. Co., 6 Blatchf. 271, Fed. Cas. No. 17,504.

Inasmuch as the application for a receiver always calls for the exercise of judicial discretion, the chancellor should so mold his order that while favoring one creditor, injustice is not done to another. If this can not be done the application should ordinarily be denied. Fosdick v. Schall, 99 U. S. 235, 253, 25 L. Ed. 339, 343. See, also, New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219.

Even though the directors consent to the appointment of a receiver on an application made by a stockholder under statutory provisions, other stockholders may intervene and show fraud in the appointment. Thayer v. Kinder, 45 Ind. App. 111, 89 N. E. 408, 90 N. E. 323.

4 In the case of Durand & Co. v. Howard & Co., 216 Fed. 585, L. R. A. 1915B, 998, 132 C. C. A. 589, a receiver was appointed upon the defendant corporation's answer admitting the truth of plaintiff's allegations and in its prayer joining with plaintiff for the appointment. It was alleged that the corporation had about $140,000 of debts owing to a large number of creditors and without sufficient funds to meet its obligations or the necessary credit with which to borrow money and that unless a receiver were appointed its stock of merchandise would be sold at the instance of other cred-

We see no objection to a corporation, in circumstances as above stated, setting forth its condition by way of answer in a suit by a hostile creditor and asking for the

itors at judicial sales at a great loss. The case was one illustrative of the losses in assets which result from a scramble of various creditors for a preference payment of claims and the action of the corporation in admitting the facts was for the purpose of preserving its assets for the benefit of all of its creditors without going into bankruptcy.

A receiver was appointed upon the answer of the defendant corporation admitting the allegations of the bill in the case of Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. 456, 164 C. C. A. 380. The defendant was engaged in manufacturing explosives. Its property at a fair valuation was more than sufficient to pay all of its debts, but it had a large amount of bonded indebtedness and also a large indebtedness for supplies. Its credit, however, was impaired and it was unable to obtain money with which to meet its obligations as they matured in the ordinary course or to conduct its business in an efficient manner. It was alleged that an attempt by the complainant to enforce its claim at law as a general creditor would precipitate some action by other creditors which would lead to wasteful strife and controversy which could be avoided by a receivership. The petition for a receiver was granted. It may also be noted that the receivers so conducted the affairs of the company that it became not only free from its general debts but produced dividends and was in a position to soon retire its bonded indebtedness.

The case of Wood v. Todd, 251 Fed. 530, is another instance where a receivership was successfully employed in making a profitable business out of one which was insolvent at the time of being placed under a receivership.

In American Can Co. v. Erie Preserving Co., 171 Fed. 540 (affirmed in 183 Fed. 96, 105 C. C. A. 388), the jurisdiction of the court was alleged as arising from a diversity of citizenship of the parties, the insolvency of the defendant corporation and the fact that unless a receiver was appointed for the corporation its property would be sacrificed, and asked for a dissolution of the corporation. The corporation answered admitting the allegations and, consenting that a receiver be appointed, a receiver was appointed. The complainants were contract creditors. The court said: "Ordinarily a receiver can not be appointed for a corporation at the instance of a creditor who has not recovered judgment upon his claim and exhausted his legal remedy. Yet where a defendant who is confessedly insolvent has waived the objection that a complainant is not a judgment creditor, there is no longer room for doubting the jurisdiction of a federal court of equity to appoint a receiver. In re Reisenberg (Metropolitan Railroad Receivership), 208 U. S. 90, 52 L. Ed. 403, 28 Sup.

appointment of a receiver for the purpose of protecting all of its creditors and preventing an improper preference of some of its creditors. It seems to us that such is

Ct. 219, Cook on Corporations (6th ed.), § 863; Tompkins Co. v. Catawba Mills (C. C.), 82 Fed. 780.

The allegations in the bill that the defendant could not pay its current obligations as they matured, and that it was unable in the ordinary course of its business to pay its existing and enforceable liabilities, was a proper and sufficient allegation of insolvency. Brouwer v. Harbeck, 9 N. Y. 589, 593, 16 Am. & Eng. Ency. of Law 636; Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280; Herrick v. Borst, 4 Hill (N. Y.) 650, 652.

Insolvency as the term is used in equity, is clearly differentiated from the meaning which is given to it in the bankruptcy act."

In Dickerman v. Northern Trust Co., 176 U. S. 181, 44 L. Ed. 423, 20 Sup. Ct. 311, a receiver was appointed with the consent of the defendant in a suit to foreclose a mortgage securing a bond issue. The question of collusion arose in the case.

In Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. Ed. 1021, 10 Sup. Ct., 604, the bill was by several creditors for the appointment of a receiver to take charge of the property of defendant. The defendant corporation on the same day accepted service of the motion and entered its appearance. An order pro confesso was subsequently entered. One of the complainants held claims not yet due and the other a judgment. The bill showed that vexatious litigation had been commenced against defendant and accompanied by attachments and that other similar litigations were threatened and that such attachments and seizures will give to those creditors an unfair advantage and priority over the complainants whose claims are not yet due and cause them irreparable injury and damage and that the property of the defendant will be to a great extent destroyed and their long established business destroyed to the detriment of complainant and other creditors unless protected by a receiver. The defendant corporation raised no objection to the appointment of a receiver until a considerable time had elapsed. The equity of the bill was insisted on the ground that upon the insolvency of a corporation its properties become a trust fund for the benefit of its creditors which can be seized and disposed of by a receiver in equitable proceedings and that the vast interests and properties of the corporation were threatened with disintegration by the attachment suits. In support of these propositions counsel cited Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365; Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; Sage v. Memphis, etc., R. R. Co., 125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. 887; Mellen v. Moline M. Iron Works, 131 U. S. 352, 33 L. Ed. 178, 9 Sup. Ct. 781; Barbour v. National Exchange Bank, 45 Ohio St. 133, 12 N. E. 5, and Rouse v. Merchants Nat. Bank, 46 Ohio St.

the spirit of the decisions in which receivers were appointed with the consent of the corporation.

In so far as very large corporations are concerned and particularly those engaged in a public service or those

493, 15 Am. St. Rep. 644, 5 L. R. A. 378, 22 N. E. 293.

The court, while not conceding that the bill was defective, held that objection came too late after such a long acquiescence in proceedings which obviously had been taken with its consent. In justifying the appointment of the receiver, the court, speaking through Mr. Justice Brewer, said: "The corporation was insolvent. Its extensive and scattered properties had been brought into single ownership, and so operated together that large benefits resulted in preserving the unity of ownership and operation. Disintegration was threatened through separate attacks, by different creditors, on scattered properties. The preservation of this unity, with its consequent value, and the appropriation of the properties for the benefit of all the creditors equally, were matters deserving large consideration in any proper suit. Certain creditors, acting for all, initiated proceedings looking towards this end. In such proceedings the corporation acquiesced. Substantially all of the creditors came into the proceedings. After months had passed, much business had been transacted and large responsibilities assumed, the corporation, for the benefit of a few creditors and to destroy the equality between all, comes in with the technical objection that the creditors initiating the proceedings should have taken one more step at law before coming into equity. But the maxim, "He who seeks equity must do equity," is as appropriate to the conduct of the defendant as to that of the complainant; and it would be strange if a debtor, to destroy equality and accomplish partiality, could ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant.

In New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219, the complainant was the holder of a few first mortgage bonds and a few shares of the capital stock of the defendant railroad company. The bill alleged that defendant was insolvent and that its system was in danger of being broken up, and asked no final relief and no relief except the appointment of receivers to hold the system intact and to protect it against its creditors. The receiver was appointed and the Circuit Court of Appeals, in commenting upon the appointment, said: "It was one of those anomalous proceedings, so common in such cases, which the Supreme Court has never formally approved or disapproved, and which has been tolerated on ac-

involving rights and liabilities of many persons it is admitted by the courts that the practical effect of a

count of the public and general interests involved, for which legislatures have given no protection under such emergencies. Occasional criticism has been expressed against the courts for retaining proceedings of this class; yet, as is usual under such circumstances, no formal objections appear to have been brought to the attention of the court in this case. While, therefore, we can justly presume that the appointment of receivers was found to have been for the common interest, yet we must refer to the state of the record in these particulars for the purpose of explaining that the receivers, at that stage, stood practically for the corporation itself, with all of its rights and powers, subject to such limitations and directions as might be given by the court."

In this connection see, also, Scott v. Farmers' Loan etc. Co., 69 Fed. 17, 16 C. C. A. 358.

In Burton v. R. G. Peters Salt etc. Co., 190 Fed. 262, a receiver was appointed over an insolvent corporation which had consented to the appointment.

See, also, Moe v. Thomas McNally Co., 138 App. Div. 480, 123 N. Y. Supp. 71; Union Trust Co. v. Southern etc. Lumber Co., 166 Fed. 193, 92 C. C. A. 101; Horn v. Pere Marquette R. Co., 151 Fed. 626; Ex parte Equitable Trust Co., 231 Fed. 571, 145 C. C. A. 457; In re Reisenberg (Metropolitan Railroad Receivership), 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219.

In this connection see, also, section 20, supra.

As to whether the president of the corporation may consent to the appointment of a receiver. See Nesbit v. North Georgia etc. Co., 156 Fed. 979.

But it has been held that a receivership will not be continued for the mere purpose of giving a corporation an opportunity to finance itself in order to pay its debts. Duncan v. George C. Treadwell Co., 82 Hun 376, 31 N. Y. Supp. 340.

And where it is not claimed that the corporation is insolvent or mismanaged, a receiver will not be appointed merely because suits against it are threatened and its assets for that reason liable to be depreciated and wasted. Nowell v. International Trust Co., 169 Fed. 497, 94 C. C. A. 589.

Upon a showing that the receiver was appointed at the instance of the corporation to tide it over difficulties, he may be discharged and a new one appointed. Phinizy v. Augusta etc. R. Co., 56 Fed. 273.

And other creditors may intervene where the corporation has fostered a collusive suit for its dissolution and the appointment of a receiver. Taber v. Royal Ins. Co., 124 Ala. 681, 26 So. 252.

Where the corporation is solvent and a going concern a receiver should not be appointed over it where it is obvious that the only purpose of the appointment is to prevent creditors from enforcing their claim through the ordinary processes of the law. The object of a receivership should be to preserve the assets for the ben-

receivership in such cases is in most cases an instrument for consummating plans of reorganization.[5]

The basic principle underlying the action of the courts in cases of this kind is the preservation of the assets of the corporation for the benefit of all interested parties in the face of a threatened loss by preferential and wasteful litigation. Such a situation very frequently arises in respect to large business concerns during critical financial times. The elastic powers of a court of equity in such circumstances was very aptly expressed by Judge Manton of the Circuit Court of Appeals in a well considered case[6] in which he said: "A court of equity's modes of relief are not fixed and rigid. It can mold its remedies to meet the conditions with which it has to deal. The jurisdiction of equity is the whole domain of conscience, limited only by legislative enactment. The faculty of equity must be energetic, productive, and progressive. But to exercise this right of the court of equity there must be some show of an injustice attempted or about to be perpetrated upon the petitioners. . . . In the absence of power created by legislation in this country, the federal judges, sitting in courts of equity, have endeavored to secure the rights of those interested, including the stockholders at the time of readjustment of large corporations, a protection to meet the needs of the occasion. Changing times, with change in economic needs, require the courts of equity to mold remedies to meet the conditions with which they have to deal."

§ 295. Discretion of Court in Making the Appointment.

The general rule, that the appointment of a receiver is not a matter of right, but is a matter to be decided by the

efits of creditors. Cronan v. District Court, 15 Idaho 184, 96 Pac. 768.

[5] Guaranty Trust Co. v. Missouri Pac. Ry. Co., 238 Fed. 812. The above case was also cited approvingly on this point in Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. 456, 164 C. C. A. 380.

[6] Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. 456, 164 C. C. A. 380.

court in the exercise of a non-arbitrary, judicial discretion, applies to the appointment of a corporation receiver as well as to the appointment of other classes of receivers.[1] Indeed, it is probably true that in corporation cases, even though the propriety of an appointment might go unquestioned, the necessity for the appointment requires greater scrutiny than in other cases. It is to be remembered that a corporation receiver generally assumes control of all of the property and of the business of the corporation, and that his appointment has a drastic effect upon the right of creditors to collect their debts. From a purely technical point of view it is to be considered that by law this control is placed in certain corporate officers and it is a drastic measure to deprive them of their legal authority.[2] The appointment, when without the consent of the corporation itself, is likely to impair seriously the credit of the corporation. It imposes a heavy burden upon the court, an institution not well equipped nor disposed to carry on a business.[3] The receiver represents not the applicant alone but all interested parties; and the desire of the applicant deserves no greater consideration, perhaps, than that of others in the same relation to the corporate affairs.[4] In the case of a corporation supplying a widely used commodity or service the interests of the public may be properly consid-

1 Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660.

2 Laurel Springs Land Co. v. Fougeray, 50 N. J. Eq. 756, 26 Atl. 886. Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499.

3 Shera v. Carbon Steel Co., 245 Fed. 589.

4 Heitkamp v. American Pigment & Chemical Co., 158 Ill. App. 587; Frost v. Puget Sound Realty Associates, 57 Wash. 629, 107 Pac. 1029.

"The doctrine which justifies the drastic intervention of equity courts in corporate affairs . . . is grounded on the theory that the valuable rights of minority stockholders can be rescued, along with those of a recalcitrant majority, from a common ruin. It does not contemplate the infliction of any loss or injury upon the majority stockholders in order that the minority may be benefited. To help the one class by hurting the other would be an indefensible

ered.[5] In the case of stockholders it is to be considered that they have contracted to abide by the decision of the majority and, for the most part, if they are dissatisfied or disappointed they are privileged to sell their stock and retire.[6]

Even where there is a statute authorizing the appointment under certain conditions, the appointment is held to be discretionary and dependent as much upon its necessity as upon its propriety;[7] except in the case of a statute

wrong." Phinizy v. Anniston City Land Co., 195 Ala. 656, 71 So. 469.

In Aldrich v. Union Bag etc. Co., 81 N. J. Eq. 244, 87 Atl. 65, a receiver was sought by minority stockholders on the ground that the board of directors were fraudulently mismanaging the business by means of commissions and agency contracts, all of which acts extended over a period of years. The court refused to make the appointment pending the suit on the ground that no irreparable injury would result the awaiting of the few months which would elapse until the final hearing on the complaint.

5 A receiver was refused over the property of a large corporation controlling the tobacco industry on the ground of not only injury to the general public but of widespread loss to innocent persons. United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632 (reversing decree in 164 Fed. 700).

The court will not appoint a receiver upon the dissolution of a combination in violation of the Anti-Trust Act where it is not necessary to accomplish this purpose. United States v. Great Lakes Towing Co., 217 Fed. 656.

6 Metropolitan Fire Ins. Co. v. Middendorf, 171 Ky. 771, 188 S. W. 790; Inscho v. Mid-Continent Development Co., 94 Kan. 370, Ann. Cas. 1917B, 546, 146 Pac. 1014.

"The Independent Brewing Assoc. was a prosperous, solvent, going concern, and the evidence does not show that it was necessary for the preservation of the rights of appellants (minority stockholders) that it should be taken from control of its officers who had managed it successfully for many years notwithstanding their wrongful conduct in the purchase of certain property." Klein v. Independent Brewing Assn., 231 Ill. 594, 83 N. E. 434.

7 Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84, 77 Atl. 720; McMullin v. McArthur Electric Mfg. Co., 73 N. J. Eq. 527, 68 Atl. 97; In re People's Surety Co. of New York, 82 Misc. Rep. 518, 144 N. Y. Supp. 131.

If there be doubt as to the proof of the insolvency under a statute allowing receivers upon a showing of insolvency the court should refuse to make the appointment. Whitmer v. William Whitmer & Sons, Inc., (Del. Ch.), 99 Atl. 428.

Where a corporation is in a prosperous condition and its offi-

providing for the dissolution of a corporation and leaving a receivership as the only means of winding up its affairs and distributing its assets.[8]

The appointment will not be made if the applicant has been guilty of laches, or of acquiescence in the wrong complained of;[9] when the expense, or other disadvantage, will outweigh the advantage;[10] when some other remedial relief is open to plaintiff;[11] or when preventive relief will

cers in a position to respond in damages, the court should refuse to appoint a receiver at the instance of minority stockholders who claim that the officers are violating their duties. Metzger v. Knox, 77 Misc. Rep. 271, 136 N. Y. Supp. 681 (affirmed in 153 App. Div. 911, 137 N. Y. Supp. 1129).

8 Conlan v. Oudin, 49 Wash. 240, 94 Pac. 1074.

9 Brookshire v. Farmers' Alliance Exchange, 73 S. C. 131, 52 S. E. 867; Baltimore Trust Co. v. George's Creek Coal & Iron Co., 119 Md. 21, 85 Atl. 949; Ridpath v. Sans Poil etc. Transportation Co., 26 Wash. 427, 67 Pac. 229; Eggleston v. Pantages, 93 Wash. 221, 160 Pac. 425; Grant v. Monterey Gold Mining Co., 93 Wash. 1, 159 Pac. 895.

Thus where there has been no change in the affairs since the plaintiff was president of a corporation, a receiver will not be appointed over it at the instance of such former president upon his allegations of conspiracy on the part of certain stockholders to sell its property at less than its value and especially after the lapse of six years. Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485.

10 Feess v. Mechanics' State Bank, 84 Kan. 828, L. R. A. 1915A, 606, 115 Pac. 563.

Nor will a receiver be appointed over a corporation if relief from the alleged mismanagement can be had by injunction. United Electric etc. Co. v. Louisiana Electric Light Co., 68 Fed. 673; Commonwealth Title Ins. etc. Co. v. Seltzer, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

11 Chilton v. Bell County Coke & Improvement Co., 153 Ky. 775, 156 S. W. 889; Hartnett v. St. Louis Min. & Mill. Co., 51 Mont. 395, 153 Pac. 437.

A lienholder must resort to his lien, rather than to receivership. Galvin v. McConnell, 53 Tex. Civ. 486, 117 S. W. 211.

Where relief other than by receivership could be had for dissipation of its assets, the appointment of a receiver will be refused. Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466.

The fact that majority stockholders of an insolvent corporation increased the salary of one of its officers at a time when business was run at a loss is not ground for the appointment of a receiver since if the increase of salary is illegal, upon a proper showing the plaintiff may cause an action to be instituted for the pur-

be effective.[12] Although an attempt is made to bring a case within some well recognized ground of appointment, a receiver will, of course, be denied if the facts stated are

pose of restraining its future payment, and for the purpose of recovering to the corporation any illegal salary which may have been previously paid. Curtiss v. Dean & Curtiss, 85 Wash. 435, 148 Pac. 581.

See, also, Alabama Coal & Coke Co. v. Schackelford, 137 Ala. 224, 34 South. 833, 97 Am. St. Rep. 23; Schaffhauser v. Arnholt & S. Brewing Co., 218 Pa. 298, 67 Atl. 417, 11 Ann. Cas. 772.

Where the offending directors have retired from office, the appointment of a receiver based upon their mismanagement should be refused. Halpin v. Mutual Brewing Co., 91 Hun 220, 36 N. Y. Supp. 151.

A receiver should not be appointed because of irregularities or misconduct of the officers of the corporation where there is a way to correct them through the board of directors or through injunctional orders. Feess v. Mechanics' State Bank, 84 Kan. 828, L. R. A. 1915A, 606, 115 Pac. 563.

The fact that the officers refuse to allow the stockholders access to its corporate books and papers and refuse to disclose facts concerning its business affairs, is not ground for the appointment of a receiver. Alabama Coal etc. Co. v. Shackelford, 137 Ala. 224, 97 Am. St. Rep. 23, 34 So. 833.

Mere failure of the secretary of a corporation to keep its minutes properly is no ground for the appointment of a receiver, especially where it has not been shown that any harm resulted from his actions. Semple v. Frisco Land Co., 124 La. 663, 50 So. 619.

Insolvency would be insufficient ground for the appointment of a receiver where the remedy under the statute is the liquidation of the corporate affairs by commissioners. Hero v. Consumers' Lumber Mfg. & Export Co., 123 La. 359, 48 So. 989.

Nor is a receiver needed where the creditor may enforce his demands by means of attachment proceedings. Gabbert v. Union Gas & Traction Co., 140 Mo. App. 6, 123 S. W. 1024.

In a suit to enforce stockholders' liability to creditors, it is not necessary to appoint a receiver to wind up its affairs. American Spirits Mfg. Co. v. Eldridge, 209 Mass. 590, 95 N. E. 942.

See, also, Forsell v. Pittsburg etc. Copper Co., 42 Mont. 412, 113 Pac. 479.

Thus where the claim of the plaintiff was less than $2500 and defendant corporation's property was worth about $40,000, against which liens were filed to the amount of about $30,000 more than a year before the commencement of plaintiff's action, and no suits had been brought to enforce such liens, a receiver was improperly appointed since the plaintiff could have enforced his claim by legal process. Prudential Securities Co. v. Three Forks, etc. Ry. Co., 49 Mont. 567, 144 Pac. 158.

[12] Parrish v. Reese, 165 Ala. 638, 51 So. 824; Laurel Springs

insufficient to warrant the appointment or if the stated facts are not proved.[13] The appointment may be denied

Land Co. v. Fougeray, 50 N. J. Eq. 756, 26 Atl. 886; Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499.

Although under some statutes it has been held a receiver could be appointed for a corporation whenever it found sufficient cause for injunction. Van Oss v. Premier Petroleum Co., 113 Me. 180, 93 Atl. 72.

13 Baker v. Backus' Adm'r, 32 Ill. 79; First Nat. Bank v. Gage, 79 Ill. 207; Chicago Mut. Life Indemnity Ass'n v. Hunt, 127 Ill. 257, 274, 2 L. R. A. 549, 20 N. E. 55; Heitkamp v. American Pigment & Chemical Co., 158 Ill. App. 587; Manufacturers' Land & I. Co. v. Cleary, 121 Ky. 403, 89 S. W. 248; Felix v. Kenner Canning & Packing Co., 123 La. 188, 48 So. 884; Semple v. Frisco Land Co., 124 La. 663, 50 So. 619; Trahan v. Broussard Cotton Oil Co., 125 La. 785, 51 So. 898; Fuller v. McCormick, 156 Mich. 518, 121 N. W. 280; Nevada Consol. Min. & Mill Co. v. Lewis, 34 Nev. 500, 126 Pac. 105; Einstein v. Rosenfeld, 38 N. J. Eq. 309; Kean v. Colt, 5 N. J. Eq. 365; Blake v. Blake & Knowles Steam Pipe Works, 84 N. J. Eq. 363, 94 Atl. 419; Forest Oil Co. v. Wilson, (Tex. Civ. App.) 178 S. W. 626; Secord v. Wheeler Gold etc. Co., 53 Wash. 620, 17 Ann. Cas. 914, 102 Pac. 654; Curtiss v. Dean & Curtiss, 85 Wash. 435, 148 Pac. 581; Carson v. Allegany Window Glass Co., 189 Fed. 791.

Where a cemetery was as well maintained as others in the vicinity and the officers of the cemetery associations were performing their duties in a suitable manner, a receiver will not be appointed to take charge of the cemetery in a suit against the corporation for an accounting and disclosure of the names of its officers. Youngers v. Exeter Cemetery Ass'n, 85 Neb. 314, 123 N. W. 95.

Irregular acts of officers in the absence of fraud will not justify the appointment. Hardee v. Sunset Oil Co., 56 Fed. 51.

Where it is not shown that the proceeds from the sale of goods by the president of a corporation in the name of another corporation were fraudulently diverted from the corporation, it will not be sufficient ground for the appointment of a receiver. Howeth v. Colbourne Bros. Co., 115 Md. 107, 80 Atl. 916.

Where the directors of a corporation repudiated the unlawful acts of another director when discovered, compelled a partial restoration by him, undertook to institute criminal proceedings against him, and removed him from his position as treasurer and general manager, and no further waste was threatened, and the stockholders appointed a committee, not composed of any of the directors, to preserve the assets, the court, in a representative action by a stockholder, a receiver should be denied and especially when the good faith of the plaintiff is in doubt. Sedgwick v. Seward Development Co., 144 App. Div. 455, 129 N. Y. Supp. 209 (rehearing denied, 144 App. Div. 935, 129 N. Y. Supp. 1145).

The mere fact that some of its stockholders are also stockholders

on condition[14] or without prejudice to a later application.[15]

2. *Inherent Jurisdiction of Courts of Equity to Appoint Corporation Receivers.*

§ 296. Ground of Equity Jurisdiction.

There are numerous cases in which it has been held, both by courts of England and by federal courts of the United States and state courts in many of the states of the United States, that courts of equity have jurisdiction in the exercise of their inherent powers, and without the aid of statutes, to appoint receivers to take charge of the affairs and the assets of corporations. In reviewing a case from a United States Circuit Court, in which the decree expressly stated that the appointment of the receiver was made pursuant to the provisions of a New Jersey statute the Circuit Court of Appeals struck from the decree this express reason for making the appointment.[1] In another case, a federal court said: "It can

in another corporation is not sufficient ground for a receiver upon a theory that a sale of property from one corporation to the other would be in fraud of the stockholders. Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485.

Where a corporation was in the possession of large assets and during the past year its income had exceeded its expenses, it will not be dissolved on the ground that its business could not be conducted with profit. Phinizy v. Anniston City Land Co., 195 Ala. 656, 71 So. 469.

In an action against a corporation and its officers based upon fraudulent representations of such officers to purchasers of stock, in the absence of any allegations of insolvency or that the plaintiffs are likely to be harmed, it is improper to appoint a receiver for the corporation. Georgia Portland Cement etc. Co. v. Jackson, 139 Ga. 668, 77 S. E. 1055.

[14] Shera v. Carbon Steel Co., 245 Fed. 589.

Where a corporation has large interests which may be jeopardized by the appointment of a receiver, it is proper for the court to allow it, on an application for a receiver by a judgment creditor, to furnish a bond or other security in lieu of having a receiver appointed. Barclay v. Quicksilver Min. Co., 9 Ab. Pr. N. S. 283.

[15] Hunnewell v. New York Cent. & H. R. R. Co., 196 Fed. 543.

[1] United States Shipbuilding Co. v. Conklin, 126 Fed. 132, 60

not be doubted that the federal court in the exercise of its general equity jurisdiction has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency, and distribute its assets, and that no state statute can impair or destroy that power."[2] The general jurisdiction of the courts to entertain the cases is referred to the jurisdiction of equity when the wrong complained of is due to fraud, mistake, accident, or some other similar equitable consideration; or to a violation of some trust obligation, the corporate directors or majority stockholders being considered trustees for stockholders and creditors. Fundamentally, the ground upon which the special jurisdiction to appoint the receiver is based is the broad one of the necessity of preserving and protecting, pending the litigation, and for the benefit of all interests, property that is liable to be lost, removed, or materially injured.[3]

C. C. A. 680. The court said: "Upon the whole we are of opinion that the bill presented a case of which the circuit court sitting in equity had jurisdiction and that the appointment of a receiver was within the authority of the court." For the reference to the statute, the court of appeals substituted: "The receiver to be subject at all times to the orders and directions of this court." The higher court also added the provision: "The foregoing order to stand until the further order of the court."

2 O'Neil v. Welch, 245 Fed. 261, 157 C. C. A. 453; Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. Ed. 447; Miltenberger v. Logansport etc. Ry. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140; Sage v. Memphis etc. Ry. Co., 125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. 887; Hollins v. Brierfield etc. Iron Co., 150 U. S. 371, 382, 37 L. Ed. 1113, 14 Sup. Ct. 127; Pilliod v. Angola Ry. etc. Co., 46 Ind. App. 719, 91 N. E. 829; Thompson v. Greeley, 107 Mo. 577, 589, 17 S. W. 962.

3 A receiver may be appointed for the purpose of preserving its assets. Mitchell Min. Co. v. Emig, 35 App. Cas. (D. C.) 527; John H. McGowan Co. v. Ingalls, 60 Fla. 116, 53 So. 932; Van Vleet v. Evangeline Oil Co., 129 La. 406, 56 So. 343; Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, Ann. Cas. 1912A, 897, 70 S. E. 820.

"The property must be preserved pending this litigation and the conduct of the president and his associates in the direction has been such that they can not be permitted to retain control of the affairs of the company." Avery v. Blees Mfg. Co., 27 N. J. Eq. 412.

"In my judgment the objections that have been urged against this application at the existing stage of

§ 297. Recognition of Equity Powers by Statutory Provisions.

The appointment has sometimes been based upon a statutory provision authorizing a receivership in cases in

the cause might be urged with as much force if this were an application to restrain the felling of timber or the destruction of a house. It is a case of waste partly accomplished and imminent." Evans v. Coventry, 5 De Gux, M., & G., 911.

The receiver is appointed "for the sole and exclusive purpose of having the assets and property of the defendant company preserved for the best interests of all of its creditors and stockholders." Welch v. Union Casualty Ins. Co., 238 Fed. 968. The threatened conduct of the defendant "would practically destroy the business of the company and greatly depreciate the value of its property; and under such circumstances the court was authorized to appoint a receiver. Guthrie v. Arents, 109 Fed. 1058, 48 C. C. A. 765. A receiver will be appointed to preserve the corporate property in danger of being lost. Pride v. Pride Lumber Co., 109 Me. 452, 84 Atl. 989.

"The power of equity (to appoint a receiver) is within its power to grant relief to prevent injuries to property rights." Thoroughgood v. Georgetown Water Co., 9 Del. 84, 77 Atl. 720.

The power of a court of equity to appoint a receiver over a corporation under the exercise of its equitable jurisdiction in receivership facts does not rest upon the character of the parties but upon the existence of the equitable facts necessary for its exercise. United States Trust Co. v. New York etc. R. Co., 101 N. Y. 478, 482, 5 N. E. 316; Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814.

In the absence of statutory authority enlarging the jurisdiction of a court of equity, a receiver will not be appointed by a court of equity over a corporation except in the same circumstances which would authorize one for an individual. Barber v. International Co., 73 Conn. 587, 48 Atl. 758; Vila v. Grand Island etc. Co., 68 Neb. 222, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 63 L. R. A. 791, 797, 94 N. W. 136, 97 N. W. 613.

In Union State Bank v. Mueller, (Okla.) 172 Pac. 650, the court said: "A court of equity has the inherent power to appoint a receiver for the property of a corporation, and to require the officers to make an accounting therefor upon the petition of minority stockholders. The officers of a corporation in the management and control of its assets are the trustees of the stockholders, and are charged with the faithful management of the corporate property for the accomplishment of the purposes for which the corporation was chartered; and, under a state of circumstances such as the evidence tends to establish, it would amount to a denial of justice if courts of equity were unable to afford a remedy where no adequate remedy could be had at law. If the foregoing facts are established upon final trial, there

which such an appointment would be in accordance with the usage and practice of equity,[1] or when in the discretion of the court the appointment was necessary to secure complete justice to the parties.[2] A statute providing for the appointment of a receiver under certain specific cir-

will be shown a gross mismanagement of the affairs of the corporation, which has resulted in wrecking its business and wresting from the stockholders its property, and the court was justified in reaching out its arm and taking charge of the property and placing it in the hands of a receiver until these matters could be investigated upon final trial and the rights of the minority stockholders could be determined and an accounting had." Exchange Bank of Wewoka et al. v. Bailey, 29 Okla. 246, 116 Pac. 812, 39 L. R. A. (N. S.) 1032.

In Kahle v. Industrial Loan etc. Co., 103 Wash. 273, 174 Pac. 23, the court said: "It is apparent upon the face of the complaint and upon the face of the showing made that these trustees have so mismanaged the company since it has been formed that, if it is not now insolvent, there is no question that it will necessarily shortly become so, and that the stockholders who have purchased stock and paid money therefor will receive nothing from the corporation unless a receiver is appointed and immediately takes charge of the few assets remaining belonging to the company. The statute, at section 741, Rem. Code, provides:

"'A receiver may be appointed by the court: . . .

"'2. In an action between partners, or other persons jointly interested in any property or fund. . . .

"'5. When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights. . . .'

"We think there can be no question in this case, especially under the showing made at the hearing, that this corporation is in imminent danger of insolvency if it is not so at this time. In the case of Cameron v. Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26, we held, under the statute above quoted, that where the property of a corporation is being mismanaged, and is in danger of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors, or mismanagement and waste, courts of equity have inherent power to appoint receivers. See, also, Van Horn v. New Western Shingle Co., 54 Wash. 117, 103 Pac. 42; Kennedy Drug Co. v. Keyes, 60 Wash. 337, 111 Pac. 175.

"We are satisfied, therefore, that the trial court properly appointed a receiver."

1 Boyle v. Superior Court, 176 Cal. 671, L. R. A. 1918D, 226, 170 Pac. 1140.

2 Boothe v. Summit Coal Mining Co., 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

cumstances "is not to be construed to mean that the ordinary jurisdiction to appoint a receiver has thereby been withdrawn."[3]

3. Appointments by Equity Court at the Instance of Stockholders.

§ 298. Circumstances and Conditions Essential to Proceeding.

In order that a plaintiff may maintain an action as a shareholder of a corporation it is essential that he shall be a bona fide shareholder and acting in good faith.[1] A stockholder's suit, however, is a representative one. The stockholder sues on behalf of himself and all other stockholders. The corporation is usually a defendant and the wrongs complained of are such that the corporation itself could maintain an action to have them remedied. The action is, therefore, necessarily in equity and the equitable rule is that one who commences a representative action must establish his capacity to sue by showing why his principal, the party really in interest, is not the complainant. This rule would apply whether the shareholder asked for a receiver or not. "There may be a great many wrongs committed in a company, there may

3 Merrifield v. Burrows, 153 Ill. App. 523; Northwestern Nat. Bank v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948. See contra, People v. District Court, 33 Colo. 293, 80 Pac. 908.

In this connection see, also, Morse v. Metropolitan S. S. Co., 88 N. J. Eq. 325, 102 Atl. 524.

1 One who has the legal title to stock simply to qualify him to act as a director but has no beneficial interest in the stock is not entitled to sue. Hoopes v. Basic Co., 72 N. J. Eq. 426; 65 Atl. 1118.

The answer may be construed as leaving undenied the allegation that plaintiff is a stockholder. Van Horn v. New Western Shingle Co., 54 Wash. 117, 103 Pac. 42.

One having the equitable, though not the legal title, to stock, may be permitted to maintain the action, especially if defendant does not raise the question until a late stage in the proceedings. Ashton v. Penfield, 233 Mo. 391, 135 S. W. 938.

See Mitchell v. Anlander Realty Co., 169 N. C. 516, 86 S. E. 358.

One who receives stock simply for the purpose of qualifying himself as a litigant may be held not entitled to sue. Von Schlemmer v. Keystone, etc., Ins. Co., 121 La. 987, 46 So. 991.

be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to take steps to prevent the wrong from being done."[2] Accordingly, if the stockholder, in the absence of corporate action, attempts, himself, to act, he must show that he has first made every effort to obtain relief within the company by appealing to the directors and, if time, to the stockholders as well; or he must show that such attempts would be useless or that for some other sufficient cause it would not be reasonable to require them.[3] It is an objection to his capacity to sue,

Although it has also been held that the fact that the obligations, such as stocks or bonds of the corporation, were transferred to the plaintiff for the purpose of the receivership suit, is immaterial. Cole v. Philadelphia, etc., Ry. Co., 140 Fed. 944.

2 MacDougall v. Gardiner, 1 Ch. D. 22.

3 Hawes v. City of Oakland, et al., 104 U. S. 450, 26 L. Ed. 827. This was an action by a stockholder to enjoin the defendant company from delivering water free to the City of Oakland. In addition to setting forth the rule as above stated, the court pointed out four sets of circumstances under which a stockholder's representative suit might be maintained, assuming that the stockholder first qualified himself to sue. These circumstances are as follows: (1) Some action, or threatened action, on the part of the directors beyond the authority conferred by the charter or other source of organization; (2) Such fraudulent transaction, or threatened transaction, by the managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation or to the interests of the other stockholders; (3) Where the directors or the majority stockholders are acting for their own interests, in a manner destructive of the corporation itself or of the rights of the other shareholders; (4) Where the majority stockholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of other stockholders and which can only be restrained by the aid of a court of equity.

Where the corporation is under the control of the wrongdoing defendants, no demand on them is necessary. Sage v. Culver, 147

based upon this rule, that has most frequently been raised against a stockholder's right to maintain an action for a receiver.[4]

Since a corporation receiver is appointed to preserve the property for the benefit of all stockholders and creditors, either stockholders or creditors may intervene in a stockholder's representative suit.[5]

§ 299. Necessity for Existence of an Independent Cause of Action.

It has been pointed out in our earlier chapters that strictly speaking there is no such thing as an action simply and solely for the appointment of a receiver. A receivership is merely an ancillary remedy created in aid of the main remedy sought by the action itself. Sometimes it happens that a stockholder, suing in his representative capacity, has a special grievance of his own, such as a claim for stock which the directors or officers refuse to issue; occasionally the action seeks the redress

N. Y. 246, 41 N. E. 514; Loftus v. Farmers', etc., Assn., 8 S. D. 206, 65 N. W. 1078; Wenzel v. Palmetto Brewing Co., 48 S. C. 83, 26 S. E. 2; Boyd v. Sims, 87 Tenn. 777, 11 S. W. 949; Saunders v. Bank of Mecklenberg, 113 Va. 661, 75 S. E. 96.

A demand for redress from the corporation as a preliminary to a suit is not necessary where it has no governing body upon whom such a request could be made. Sheridan, etc., Works v. Marion Fruit Co., 157 Ind. 292, 61 N. E. 666.

Where by collusion suits directors are seeking to wreck the corporation, application by stockholders to the corporation is unnecessary. Excelsior Pebble Phosphate v. Brown, 74 Fed. 323.

4 Brewer v. Boston Theater Proprietors, 104 Mass. 378; Miner v. Belle Isle Ice Co., 93 Mich. 97, 112, 17 L. R. A. 412, 53 N. W. 218.

See Exchange Bank v. Bailey, 29 Okla. 246, 39 L. R. A. (N. S.) 1032, 116 Pac. 812.

The U. S. equity court rule which specifies the manner in which a stockholder must justify his representative action is not applicable to an action brought to obtain the appointment of an ancillary receiver to assist a primary receiver by bringing suit in the ancillary jurisdiction. Bluefields S. S. Co. v. Steele, 192 Fed. 23, 112 C. C. A. 411.

5 Thayer v. Kinder, 45 Ind. App. 111, 89 N. E. 408, 90 N. E. 323; State ex rel. Connors v. Shelton, 238 Mo. 281, 142 S. W. 417.

of a corporate wrong, the return, for instance, to the corporation of money wrongfully received by an officer; and redress may be adjudged in the decree by which the receiver is appointed.[1] For the most part, however, the wrongs complained of are wrongs to the corporation itself; the remedies sought are on behalf of the corporation itself; the complete remedy requires action, either by litigation or otherwise, on the part of a receiver; redress can not be granted in the decree appointing the receiver. For the most part then the receiver has only a sort of indirect interest in the ultimate purpose for which the action is brought and is not in a position to pray for any direct relief for himself. It is recognized, however, that this indirect interest of the stockholder is sufficient to satisfy the requirements of the rule concerning an independent cause of action.

§ 300. General Rule Respecting Circumstances Under Which the Appointment is Made.

In a well considered case[1] from New Jersey in which a receiver was appointed Vice-Chancellor Lane observed: "I do not find all the circumstances under which the court may intervene have ever been definitely determined. In the nature of things they could not be." His statement is undoubtedly correct. The particular circumstances which form the basis for an application for a receiver are naturally varied since with the increasing complexity of business transaction the opportunities and

1 Bates v. Werries, 198 Mo. App. 209, 199 S. W. 758.

1 Morse v. Metropolitan S. S. Co., 87 N. J. Eq. 217, 100 Atl. 219.

The Vice-Chancellor further said: "I do not find that the courts of this state have in any wise limited the general doctrine which prevails in England and throughout this country that, wherever, because of gross abuse of trust, because of dissensions among the members of the board of directors or the stockholders, because there is no properly constituted board, or because the company has failed of its purpose, there is necessity for judicial intervention, a court of equity may intervene under its general jurisdiction and appoint a receiver."

devices of fraud are correspondingly more varied. It is the duty, however, of the courts of equity to keep abreast of the needs of society in the way of furnishing appropriate remedies for all character of injuries. This elastic function of courts of equity was well expressed by Lord Cottenham, as follows:[2] "I think it is the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to rules and forms established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy."

Inasmuch as the decisions of the United States Supreme Court on the subject of receivers have always been rendered with a view to formulating a harmonious body of jurisprudence upon the subject, its decisions on the subject are given great consideration. Resort is frequently had to the federal courts in receiverships of great magnitude in respect to corporations on account of the ease with which a suit based on diversity of citizenship may properly be brought in that forum. The general principles upon which receiverships may be sought in corporation cases, together with the preliminary procedure, have in no case, which we have observed, been set forth with greater clearness than in the leading case of Hawes v. City of Oakland.[3] In that case the court said:

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

2 Wallworth v. Holt, 4 Mylne & C. 635.

3 104 U. S. 450, 26 L. Ed. 827. The principles laid down in the above case have been frequently reaffirmed by the federal courts. See Wathen v. Jackson Oil, etc., Co., 235 U. S. 635, 639, 59 L. Ed. 395, 397, 35 Sup. Ct. 225; Hyams v. Calumet, etc., Min. Co., 221 Fed. 529, 542, 137 C. C. A. 239.

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremedial injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an

honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

"The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

As is usual in matters in which action is based upon variant facts founded upon their effect upon the complainant, the courts frequently express themselves to the effect that the decision as to granting or denying the prayer for a receiver must be determined "with reference to the special circumstances of each case as it arises."[4] But it will generally be found that whatever the facts may be found to be, the decision of the court in each case will be founded upon the idea whether those facts are considered sufficient or insufficient to constitute what may be well described as receivership facts and which are of a nature to come within those general equitable principles which form the basis of receivership law.[5]

Aside from setting forth the principles which will justify a court of equity to appoint a receiver to protect and preserve property pending some litigation, it is, of course, impossible to set forth the particular circum-

[4] Sage v. Memphis, etc., R. R. Co., 125 U. S. 361, 31 L. Ed. 694, 8 Sup. Ct. 887; Boothe v. Summit Coal Min. Co., 55 Wash. 167, 19 Ann. Cas. 1255, 104 Pac. 207.

[5] See § 296 supra.

stances in complete detail which would be deemed sufficient for the appointment of a receiver.

All that we can do is to set forth some of the sets of circumstances that will lead to the appointment of a receiver as developed from some of the decided cases. It may be remarked that it seldom happens that all of the matters complained of in any case will fall under one of these sets of cases; and it frequently happens that they will belong to several sets. In discussing the cases we have placed them according to our judgment as to what particular circumstances seemed to have had the most weight in making the appointment. We will group the circumstances that create an effective situation to make a receivership necessary in the sections immediately following:

§ 301. Cessation of Corporate Business or Failure to Maintain Active Officers.

The cessation of all corporate business for a sufficient length of time and under such circumstances as to show that it will probably not be resumed will authorize the appointment of a receiver.[1] This situation is usually

[1] Zeckendorf v. Steinfeld, 12 Ariz. 245, 100 Pac. 784.

Where the corporation is insolvent and without assets, and the officers have ceased to act. Ford v. Kansas City & I. Short Line R. Co., 52 Mo. App. 439.

Where one of the only two stockholders of a corporation dies and his administrator takes possession of the assets of the corporation as if it belonged to the estate of the decedent, the other stockholder may have a receiver appointed. Re Belton, 47 La. Ann. 1614, 30 L. R. A. 648, 18 So. 642.

Although the general rule is that courts of equity have no power to wind up a corporation in the absence of a statutory authority, still where the corporation has utterly failed to attain the purposes of its creation, one of which is the pecuniary gain of its stockholders, a court of equity will intervene where such failure is the result of the fraudulent acts of the majority stockholders. Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

If it has become impossible for even a solvent corporation to perform the purposes of its creation and it thus fails of its purposes, a court of equity under its general powers aside from any statutory

accompanied by the fact that the officers have abandoned the business or that there are no officers with authority to conduct it. Temporary cessation of business, adopted for business reasons and in accordance with the best judgment of those in authority, will not warrant the appointment on the demand of a minority having a different opinion as to the wisdom of the policy.[2]

The fact that the officers of the company have abandoned its business and property or that the majority of stockholders refuse or neglect to elect officers so that there are no officers to care for the property may create a situation that will justify the appointment of a receiver.[3] The abandonment may consist in the fact that the officers place themselves entirely under the control of outsiders who develop a policy exceedingly injurious to

provisions in that respect would be authorized to wind up its business and affairs for the benefit of its creditors and stockholders, although not dissolving or terminating its corporate franchise. Carson v. Allegany Window Glass Co., 189 Fed. 791.

A receiver was appointed in a case where the corporation had ceased doing business for 25 years, maintained no organization and had no offices. Greenleaf v. Land & Lumber Co., 146 N. C. 505, 60 S. E. 424.

2 Bartow Lumber Co. v. Enwright, 131 Ga. 329, 62 S. E. 233.

Failure to elect officers, or want of sufficient officers occasioned by death, or the destruction of the corporate property by fire will not of themselves work a dissolution. But where there is a refusal or neglect to replace the necessary officers, and the administrator of a deceased officer takes possession of the corporate property, a receiver may be appointed. Re Belton, 47 La. Ann. 1614, 30 L. R. A. 648, 18 So. 642.

Merely ceasing to do business is not sufficient. Murray v. Superior Court, 129 Cal. 628, 62 Pac. 191.

3 Central Land Co. v. Sullivan, 152 Ala. 360; 15 Ann. Cas. 420, 44 So. 644; Baker v. Louisiana Portable R. Co., 34 La. Ann. 754, 755; Pride v. Pride Lumber Co., 109 Me. 452, 84 Atl. 989; Lawrence v. Greenwich Fire Ins. Co., 1 Paige (N. Y.) 587; Williams v. United Wireless Telegraph Co., 131 N. Y. Supp. 41; Dobson v. Simonton, 78 N. C. 63; Tennessee Mt. P. & Min. Co. v. Ayers (Tenn.) 43 S. W. 744; Finney v. Bennett, 27 Gratt. (Va.) 365; Cramer v. Bird, L. R. 6 Eq. 143.

the corporation.[4] The fact that the directors are non-residents does not, however, constitute a lack of officers.[5]

§ 302. Inability to Attain the Business Purposes of the Corporation.

The failure of the corporation to attain its purpose or the impossibility of its attaining its purpose presents a situation warranting the appointment of a receiver. This situation may be brought about by the company's reaching such a financial condition that continuance of a profitable business is impossible[1] or by the fact that it will be impossible for the company to acquire from the state permission to conduct the kind of business for which it was organized.[2] In commenting on the rule in this particular when stated to be: "If it is clear that the business can not be profitably continued the petition of a minority for a dissolution will be granted," Judge Somerville of the Alabama Supreme Court said: "The chief trouble with this test is that its terms require fur-

4 Ames v. Goldfield Merger Mines Co., 227 Fed. 292.

5 Hunnewell v. New York Cent. & H. R. R. Co., 196 Fed. 543.

1 Winona Portland Cement Co. v. Reese, 167 Ala. 485, 52 So. 523; Decatur Land Co. v. Robinson, 184 Ala. 322, 63 So. 522; Ross v. American Banana Co., 150 Ala. 268, 43 So. 817; Sellman v. German Union, etc., Ins. Co., 184 Fed. 977.

Where the purposes for which a corporation was formed can not be attained, it is the duty of the company to wind up its affairs. The ultimate aim of every ordinary trading corporation is pecuniary gain to its stockholders. Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

The mere fact that the business of a corporation has not been prosperous during its first year of business is not ground for the appointment of a receiver and especially where the petitioner is partially responsible for its condition. Von Schlemmer v. Keystone Life Ins. Co., 121 La. 987, 46 So. 991.

Where the insolvency of a corporation is alleged as ground for a receiver, the appointment should be refused in case of doubt of the insolvency. Whitmer v. William Whitmer & Sons, (Del. Ch.) 99 Atl. 428.

2 Metropolitan Fire Ins. Co. v. Middendorf, 171 Ky. 771, 188 S W. 790.

ther definition since even the wisest men may differ as to what is a 'profitable' business, and future results that may appear 'questionable' to one man may seem unquestionable to another. . . . While it is proper enough to observe the past history of the respondent corporation as indicative to some extent of its future tendencies, it must be remembered that our real inquiry is as to the impossibility of its future success, not the certainty of its past failure. . . . The respondent is a 'going concern' with unincumbered assets worth $300,000 and with no liabilities other than its capital stock. . . . Its future success or failure is a simple speculation, just as it was twenty-five years ago, and we can not justify the substitution of our judgment on that question for the judgment of its directors and majority stockholders by a judicial affirmance of the impossibility of a comparatively profitable issue of this business.''[3]

It is apparent that where the impossibility of conducting its business in a profitable manner is alleged as a ground for the appointment of a receiver to preserve its assets pending a dissolution, a very strong showing on that point is required in view of the large amount of discretion allowed to the directors in the conduct of the business and the wide powers given to the majority in

[3] Phinizy v. Anniston City Land Co., 195 Ala. 656, 71 So. 469.

"Every one purchasing or subscribing for stock in a corporation impliedly agrees that he will be bound by the acts and proceedings done or sanctioned by a majority of the shareholders, or by the agents of the corporation duly chosen by such majority, within the scope of the powers conferred by the charter. And courts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted, and the business be more successful if other methods were pursued. The majority of shares of its stock, or the agents by the holders thereof lawfully chosen, must be permitted to control the business of the corporation in their discretion, when not in violation of its charter, or some public law, or corruptly and fraudulently subversive of the rights and intent of the corporation or of a shareholder." Wheeler v. Pullman Iron, etc., Co., 143 Ill. 197, 207, 17 L. R. A. 813, 32 N. E. 420.

interest in determining by their choice of directors the policy of the corporation.

§ 303. Disastrous Dissensions or Deadlock Among Officers or Stockholders.

Dissensions among the stockholders or the members of the board of directors may lead to the appointment of a receiver. Such a situation can exist usually only when there is an equal or nearly equal division of the stock between the contending parties and the courts in appointing receivers in this situation of affairs have frequently relied upon what they characterize to be an analogy between business corporations and partnerships. To warrant the appointment of a receiver the dissensions must have been of such a serious character as to have led to a practical deadlock in the management of the business, the cessation of the business, and consequent loss and injury to the property and good will of the corporation; and it must appear that the wrongful situation will continue unless the court intervenes to straighten out the muddle.[1]

1 Merrifield v. Burrows, 153 Ill. App. 523; Schmidt v. Mitchell, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; Sternberg v. Wolff, 56 N. J. Eq. 389, 67 Am. St. Rep. 494, 39 L. R. A. 762, 39 Atl. 397; Featherstone v. Cooke, L. R. 16 Eq. 298.

Where the dissensions among the officers of the corporation are of such a nature that it is apparent that they can not be removed, a receiver may be appointed even though the corporation is not insolvent. Tompkins Co. v. Catawba Mills, 82 Fed. 780.

Under the statute (Code Civ. Proc., § 564, subd. 6) a receiver may be appointed where a board of directors consisting of an even number are at a deadlock resulting in an inability to do business. Boyle v. Superior Court, 176 Cal. 671, L. R. A. 1918D, 226, 170 Pac. 1140.

A receiver in the case of dissensions amongst the governing board should be appointed only as far as necessary to preserve the corporate property or protect the rights of stockholders. Howze v. Harrison, 165 Ala. 150, 51 So. 614.

Where two persons each own one-half of the capital stock of a corporation, but one has control of the board of directors and at the annual stockholders' meeting a deadlock occurs resulting in the old officers holding over, and they thereupon, in violation of an agree-

It has been, however, held that a deadlock in the affairs of a corporation will not warrant a receivership unless

ment of the controlling stockholder, increase salaries, and there is no likelihood of a reconciliation between the two stockholders, a receiver is properly appointed. Boothe v. Summit Coal Mining Co., 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255.

In Gibbs v. Morgan, 9 Idaho 100, 72 Pac. 733, the business of the corporation was at a standstill owing to an equal holding of stock by contending factions who were unable to elect a new board of directors and the court appointed a receiver, under the authority of the statutory clause allowing appointments of receivers in cases "where receivers have heretofore been appointed by the usages of courts of equity." The receiver was directed to collect the insurance upon the mill property of the company which had been burned, and hold it until further order of the court.

In Powers v. Blue Grass Bldg., etc., Co., 86 Fed. 705, Judge Lurton, then Circuit Judge, held that where there was a board of directors and another board irregularly and illegally elected by the stockholders before the term of the old board had expired, and the old board had done acts which forfeited the confidence of the stockholders, it was proper that the corporate assets should go into the hands of a receiver until there can be elected a directorate which will lawfully represent those interested in the corporation.

So also where deep rooted dissensions existed between the few stockholders who owned the stock of the corporation, and the business was in no condition to be conducted on account of deadlock conditions, it was held proper to dissolve the corporation, under statutory provisions, and appoint a receiver for that purpose. Weymouth v. Oudin, 56 Wash. 315, 105 Pac. 1027; State v. Oudin, etc., Mfg. Co., 48 Wash. 196, 93 Pac. 219.

Under some statutes it is held that it is ground for the dissolution of a solvent corporation that there was a condition of deadlock among the stockholders as to election of officers, which resulted in an impossiblity to transact business, and there was as a consequence a financial loss, and especially where one of the stockholders was organizing a competing business which would materially interfere with the business of the corporation. State v. Oudin, etc., Mfg. Co., 48 Wash. 196, 93 Pac. 219.

In Archer v. Am. Water Works Co., 50 N. J. Eq. 33, 24 Atl. 508, the court stated that it would appoint a receiver if the state of affairs was not remedied by the contending parties. The dissensions were over the ownership of certain large holdings of stock which governed the selection of the directorate.

But even where the court feels that it should interfere it will do so for only a limited time and to as small an extent as possible. Trade Auxiliary Co. v. Vickers, L. R. 16 Eq. 303.

And in Jasper Land Co. v.

complainants are able to show some fraud or wrongdoing in the conduct of their opponents.[2]

Wallis, 123 Ala. 652, 26 So. 659, the court was of the opinion that where such a deadlock condition exists a receivership should be created until there is a recognized board of directors elected which is competent to faithfully and efficiently conserve the interests of all of the stockholders.

In Edison v. Edison United Phonograph Co., 52 N. J. Eq. 620, 29 Atl. 195, the court though refusing the appointment recognized the power to do so but stated that the power should be exercised with great caution and only for such time and extent as was necessary for preservation purposes. In this there was a lawfully constituted governing body in peaceable possession of the corporate property.

2 Birmingham Disinfectant Co. v. Smith (Smith v. Birmingham Disinfectant Co.), 174 Ala. 374, 56 So. 721; Wallace v. Pierce-Wallace Pub. Co., 101 Iowa 313, 63 Am. St. Rep. 389, 38 L. R. A. 122, 70 N. W. 216; Sternberg v. Wolff, 56 N. J. Eq. 389, 67 Am. St. Rep. 494; 39 L. R. A. 762, 39 Atl. 397.

Where the board of directors consisted of three members, and upon the death of one, the other two were unable to agree upon his successor or upon the election of any one to be president of the corporation and as a consequence the business of the corporation was being seriously injured, it is proper to appoint a receiver pending the settlement of the affair by the courts. Sheridan Brick Works v. Marion Trust Co., 157 Ind. 292, 87 Am. St. Rep. 207, 61 N. E. 666.

See Boyle v. Superior Court 176 Cal. 671, L. R. A. 1918D, 226, 170 Pac. 1140, which, however, was a case arising under statutory provisions where a receiver was appointed because of a deadlock among the board of directors.

In Little Warrior Coal Co. v. Hooper, 105 Ala. 665, 17 So. 118, the stock of the corporation was owned by three persons, one of whom owned one half of it. It was solvent and owed but a small amount. No fraud was alleged but it was alleged that its affairs were mismanaged. The evident purpose of the bill was to stave off creditors. The court refused to appoint a receiver. It was also alleged that the other two stockholders between whom one-half of the stock was equally divided would not agree with complainant in selecting directors.

In Alabama Coal, etc., Co. v. Shackelford, 137 Ala. 224, 97 Am. St. Rep. 23, 34 So. 833, the court refused to appoint a receiver on the ground of a deadlock in its affairs because the board of directors which held over were in undisputed possession of the property of the corporation, but the court stated that if the corporation had no directors and none could be elected, or if there were such dissensions among them that no business could be transacted, a receiver should be appointed.

In Einstein v. Rosenfeld, 38 N. J. Eq. 309, the court refused to appoint a receiver, but was largely

§ 304. Mismanagement on Part of Majority Stockholders.

The circumstance most commonly relied upon by minority stockholders as a basis for an application for a receiver is mismanagement of the corporate affairs. Under the law and the implied contract of an individual

influenced in its refusal by the fact that notwithstanding the deadlock condition as to the election of officers the business of the corporation was still continued in operation.

In Katz v. De Wolf, 151 Wis. 337, Ann. Cas. 1914B, 237, 138 N. W. 1013, there was a deadlock in the affairs of the corporation because of an equal division of the stockholdings. The court refused to appoint a receiver but upon the ground that there was no imminent danger threatened. The court, speaking through Judge Timlin, said: "The development of corporation law began with a strictness of analogy between municipal and stock corporations which is no longer fully observed. The change from the ancient mode of creating corporations by special act to permit organizations by public declarations or contractual undertakings acknowledged and filed in a public office, and the great multiplication of corporations thereunder, caused some further change. There is unquestionably a broad power of equity applicable wherever wrong is shown of such a nature as to arouse the equitable jurisdiction. Whether in case of a mere deadlock between two or more contending groups of stockholders a court of equity would by final decree appoint a receiver and decree a sale of the corporate property and a distribution among the shareholders is not before us, and the disposition of this motion is not to be taken to affect that question. But where there is no imminent danger of loss of the corporate property or of any other injury to the moving which can not be fully compensated by the final decree, the courts will not, upon affidavits and in advance of a trial on the merits, by placing the property in the hands of a receiver, wrest the possession of the corporate property from the corporation and from those officers who are duly elected and who prima facie are entitled to administer the affairs of the corporation."

The court in the above case laid considerable stress upon the fact that the complainant had not made any strenuous efforts to agree to the election of any controlling director and that the defendant had offered, when it became apparent that his choice for directors could not be elected, to submit a list of competent and unbiased men for selection, but we think that neither faction to a deadlock need forfeit their rights by reason of failing to compromise the situation at the instance of the other faction. The decision, however, was justified upon the ground of no imminent threatened danger to the property of the corporation.

when he becomes the owner of shares of stock in a corporation, the majority shareholders are entitled to the control and management of the corporate affairs; this implied contract is for the legal life of the organization. The right of the majority will not be lightly interfered with by judicial action. Mere differences of opinion on questions of policy will not lead to the displacement of majority control by that of an outsider. Mistakes, inadvertence, or bad business policy, if honestly pursued, will not lead to ouster of this legal management; nor will mere irregularities, nor minor and comparatively trivial faults of commission or omission on the part of the legal managers; nor will the possibility of loss or injury that is not so imminent but that it may possibly be prevented pending other action by the court.[1]

When all has been said that may be said along this line it still remains a fact, according to numerous decisions of many courts, that mismanagement of corporate affairs by the majority may justify a demand on the part of a minority that an officer of the court be placed in control. "A majority of the stockholders of a corpora-

1 Metcalfe v. Johnson, 151 Ky. 823, 152 S. W. 951; Secord v. Wheeler Gold Mining Co., 53 Wash. 620, 17 Ann. Cas. 914, 102 Pac. 654; Katz v. De Wolf, 151 Wis. 337, Ann. Cas. 1914B, 237, 138 N. W. 1013.

The fact that the directors of a corporation disagree among themselves as to whether the business should be conducted on a cash basis or not is not sufficient to warrant the appointment of a receiver at the suit of a dissenting stockholder. Jacobs v. Jacobs Mercantile Co., 37 Mont. 321, 96 Pac. 723.

In a suit based upon fraud or mismanagement on the part of the officers of a corporation, a receiver may be appointed. Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84, 77 Atl. 720; Brent v. B. E. Brister Sawmill Co., 103 Miss. 876, Ann. Cas. 1915B, 576, 43 L. R. A. (N. S.) 720, 60 So. 1018; Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167; Vila v. Grand Island, etc., Co., 68 Neb. 222, 232, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 63 L. R. A. 791, 94 N. W. 136, 97 N. W. 613; Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499.

A receiver will be appointed at the instance of a minority stockholder, although the corporation is not insolvent, where the majority of the stockholders are attempting to divert its assets to

tion, no matter how large, has no right to divert to themselves assets of the company to the detriment of its creditors and stockholders. . . . Although the majority of the stock of a company may vote and vote as self-interest dictates and under ordinary circumstances the relation of trustee and *cestui que* trust does not exist and the ordinary rules in respect to trusts are not to be applied, yet such power is not unlimited.'"[2]

The law requires of the majority the utmost good faith in the control and management of the corporation as to the minority. It is the essence of this trust that it shall be so managed as to produce for each stockholder the best possible return for his investment.[3]

To warrant the appointment of a receiver the mismanagement complained of must be of a gross or very serious

themselves. Morse v. Metropolitan S. S. Co., 87 N. J. Eq. 217, 100 Atl. 219.

A receiver will not be appointed at the instance of a minority stockholder where there is no allegation of mismanagement of funds and merely that the defendants induced plaintiff to purchase stock in the corporation while not paying for their own stock. Fuller v. McCormick, 156 Mich. 518, 521, 121 N. W. 280, 282.

A mere difference of opinion among stockholders or directors as to the best business methods or policy of the corporation is not ground for the appointment of a receiver. Carson v. Allegany Window Glass Co., 189 Fed. 791.

2 Morse v. Metropolitan S. S. Co., 87 N. J. Eq. 217, 100 Atl. 219.

3 Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

In Ervin v. Oregon Ry., etc., Co., 27 Fed. 625, 23 Blatchf. 517, the court in answer to the contention of the defendants that they as a majority in control of the corporation had a right to control its affairs according to their discretion regardless of whether they secured personal profit to themselves, said: "They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority.

"Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery."

character; it must be due to fraud in law, if not actual fraud, or to extreme incompetence; it must have caused and threaten, if continued, to cause serious impairment of the stockholder's investment through loss of dividends or the destruction of the investment through insolvency.[4]

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261, 61 L. Ed. 1119, 37 Sup. Ct. 509.

[4] Van Vleet v. Evangeline Oil Co., 127 La. 919, 54 So. 286; Brock v. Automobile Livery & Sales Co., 130 La. 414, 58 So. 25; Sant v. Perronville Shingle Co., 179 Mich. 42, 146 N. W. 212; Brent v. B. E. Brister Sawmill Co., 103 Miss. 876, Ann. Cas. 1915B, 576, 43 L. R. A. (N. S.) 720, 60 So. 1018; State ex rel. Connors v. Shelton, 238 Mo. 281, 142 S. W. 417; Bates v. Werries, 198 Mo. App. 209, 199 S. W. 758; Exchange Bank v. Bailey, 29 Okla. 246, 39 L. R. A. (N. S.) 1032, 116 Pac. 812; Van Horn v. New Western Shingle Co., 54 Wash. 117, 103 Pac. 42; Powers v. Blue Grass B. & L. Assn., 86 Fed. 705, 707; Welch v. Union Casualty Ins. Co., 238 Fed. 968.

Where the policy of the majority is alleged to constitute gross mismanagement and to result in insolvency, it is not necessary to prove that the corporation is already insolvent. Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358.

A receiver may be appointed over the property of a corporation to prevent it being wasted and misappropriated in pursuance of a fraudulent conspiracy. State v. Second Judicial District Court, 15 Mont. 324, 48 Am. St. Rep. 682, 27 L. R. A. 392, 39 Pac. 316.

A receiver will not be appointed at the instance of a minority stockholder because of alleged misappropriation of funds where there is no showing that the corporation will not protect its funds or that it is insolvent. Howze v. Harrison, 165 Ala. 150, 155, 51 So. 614, 615.

Where the officers of the corporation are prosperous and the officers who are alleged to be violating their trust are financially able to respond in damages, a receiver will not be appointed at the instance of a minority stockholder. Metzger v. Knox, 136 N. Y. Supp. 681, 77 Misc. Rep. 271; order affirmed 137 N. Y. Supp. 1129, 153 App. Div. 911.

In Kennedy Drug Co. v. Keyes, 60 Wash. 337, 111 Pac. 175, the defendant had without consideration appropriated to himself more than one-half of the stock of the corporation and thereby obtained control over it. A receiver was appointed over the company on the ground that the defendant was mismanaging it and that insolvency was imminent.

Where the directors allow the president to handle the funds of the corporation in a manner not authorized by the charter and without exacting a proper accounting of them, a receiver may be appointed. In re Receivership of Leidigh-Dalton Lumber Co., 136 La. 39, 66 So. 390.

Directors whose conduct is complained of are necessary parties to the suit.[5] The acts complained of must be set out with particularity, definitely, positively, and not in the form of conclusions; and must be strictly proved.[6] If the directors complained of are liable for damages or for return of property, or otherwise, and a recovery from them would furnish a substantial relief, it must be shown that they could not be made to respond to a judgment against them.[7] A receiver will not be appointed at the instance of a stockholder who was a participant in the wrongdoing complained of.[8]

Incompetency to properly attend to the corporate affairs together with allegations of a conspiracy on their part to loot it of its profits and drive it into insolvency may be sufficient. Hall v. Nieukirk, 12 Idaho 33, 118 Am. St. Rep. 188, 85 Pac. 485.

Where the officers of the corporation through fraud or collusion with third persons are sacrificing or about to sacrifice the interests of the corporation, a stockholder may intervene and bring the guilty parties to an accounting in a court of equity. Forbes v. Memphis, etc., Ry. Co., 2 Woods (U. S.) 323, Fed. Cas. No. 4926.

Where the majority of the stockholders of a corporation, who are also the directors, are clearly violating the charter rights of the minority, as by diverting all the earnings of the company to themselves, either directly or indirectly, a court of equity will appoint a receiver at suit of a minority stockholder, although the company is solvent; there being no complete, prompt, and efficient remedy at law. Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co., 136 Fed. 710.

An assignment of creditors made for the purpose of forcing certain stockholders to concur with a certain policy may be sufficient. Collins v. Williamson, 229 Fed. 59, 143 C. C. A. 653.

A stockholder who is being injured by the fraud or collusion of the officers of the corporation with third persons may properly bring the guilty parties to account in a court of equity. Forbes v. Memphis, etc., Ry. Co., 2 Woods. 323, Fed. Case No. 4926.

5 Bliss v. Linden Cemetery Assn., 81 N. J. Eq. 394, 87 Atl. 224.

6 Carson v. Allegany Window Glass Co., 189 Fed. 791; Heitkamp v. American Pigment & Chemical Co., 158 Ill. App. 587; Curtiss v. Dean & Curtiss, 85 Wash. 435, 148 Pac. 581.

7 Birmingham Disinfectant Co. v. Smith (Smith v. Birmingham Disinfectant Co.), 174 Ala. 374, 56 So. 721; Howeth v. Colbourne Bros. Co., 115 Md. 107, 80 Atl. 916.

8 Hyde Park Gas Co. v. Kerber, 5 Ill. App. 132; Alabama Coal, etc., Co. v. Shackelford, 137 Ala. 224, 97 Am. St. Rep. 23, 34 So. 833.

§ 305. Insolvency as a Ground for the Appointment.

The appointment of a receiver at the instance of a stockholder is justified under the various circumstances above mentioned even though the corporation is solvent. Insolvency is, however, often the controlling circumstance that points to the propriety of a receivership. In such a situation there is usually a creditor ready or easily persuaded to take the initiative and there are but few instances in which stockholders have asked for a receiver on this ground. If a receiver's management is likely to be the most successful method of handling a corporation's assets, a stockholder is entitled to this remedy in case of an insolvent corporation both for the purpose of saving as much as possible of his investment or of reducing as much as possible his liability to creditors on unpaid stock subscriptions or under the provisions of a double liability law.[1]

4. Appointments by Equity Courts at the Instance of Creditors.

§ 306. What Status of Creditor is a Necessary Condition.

Corporation receivers may be appointed at the instance of creditors. It is a general rule in equity that a general creditor, not having a lien upon any specific property, can not successfully apply for the appointment of a receiver.[1] A defense on the ground that the plaintiff

1 Towle v. American Bldg., etc., Soc., 60 Fed. 131; United States Shipbuilding Co. v. Conklin, 126 Fed. 132, 60 C. C. A. 680; State ex rel. Connors v. Shelton, 238 Mo. 281, 142 S. W. 417.

Since, on the distribution of the assets of a corporation by a receiver, creditors are preferred to stockholders, a preferred stockholder, entitled to have his stock redeemed by the corporation, states himself out of court by asking for a receiver on the ground of insolvency. Rider v. John G. Delher & Sons Co., 145 Ky. 634.

1 Etowah Min. Co. v. Wills, etc., Mfg. Co., 106 Ala. 492, 17 So. 522; Hobson v. Pacific States, etc., Co., 5 Cal. App. 94, 89 Pac. 866; Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; Atlanta & C. R. Co. v. Carolina Portland Cement Co., 140 Ga. 650, 79 S. E. 555; Guilbert v.

creditor is not a judgment nor a lien creditor may be waived by the corporation either by express consent or by failure to raise the point without constituting collusion.[2] A consent given by an officer not duly authorized

Kessinger, 173 Mo. App. 680, 160 S. W. 17; Leary v. Columbia River, etc., Nav. Co., 82 Fed. 775.

The general rule is that before a receiver will be appointed for an insolvent corporation at the instance of a creditor, an unsatisfied execution issued on a judgment in favor of the creditor must be returned. Minkler v. United States Sheep Co., 4 N. D. 507, 33 L. R. A. 546, 62 N. W. 594.

Where the corporation is solvent, a simple creditor is not in a position to ask for the appointment of a receiver upon the ground of mismanagement of its affairs. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 L. Ed. 682, 29 Sup. Ct. 404.

The judgment may have been obtained in another state. Merchants Nat. Bank v. Chattanooga Const. Co., 53 Fed. 314.

See also § 271 et seq., supra.

2 Where the corporation itself has not objected to the appointment of a receiver at the instance of a judgment creditor on the ground that he did not have an execution returned unsatisfied, another creditor is not in a position to object. Enos v. New York, etc., R. Co., 103 Fed. 47.

Where the corporation appears in the proceeding and admits the debt of plaintiff and its own insolvency, the objection that only a judgment creditor has a right to institute proceedings resulting in a receivership can not be urged by other creditors in the absence of fraud or collusion. Citizens Bank & Trust Co. v. Union Mining, etc., Co., 106 Fed. 97; Union Trust Co. v. Southern Sawmills & Lumber Co., 166 Fed. 193, 92 C. C. A. 101; American Can Co. v. Erie Preserving Co., 171 Fed. 540; Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262; Equitable Trust Co. v. Great Shoshone, etc., Power Co., 245 Fed. 697, 158 C. C. A. 99; In re Reisenberg (Metropolitan Railway Receivership), 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219; Northwestern Nat. Bank of Minneapolis v. Mickelson-Shapiro Co., 134 Minn. 422, 159 N. W. 948.

A corporation having waived this defense in one district can not successfully raise it in a suit in another district when the second receivership is really designed to be ancillary to the first. Walker v. United States Light, etc., Co., 220 Fed. 393.

The appointment of a receiver for a corporation was not subject to collateral attack, even if erroneous, because no judgment in favor of plaintiff had been rendered against the corporation and execution returned unsatisfied. Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

Consent of the corporation will not give jurisdiction to a court that is otherwise without jurisdiction. Elliott v. Superior Court, 168 Cal. 727, 145 Pac. 101.

Where the defendant corporation was insolvent at the time of

to give it is void.[3] The right to proffer this defense may, however, be lost by laches.[4] A creditor's action may be maintained even though the debt is not due.[5] Stockholders may intervene,[6] but the right to intervene may be lost by laches.[7]

§ 307. Circumstances Necessary to Warrant the Appointment.

Creditors, generally speaking, have as much right to have their interests protected by a receiver as have stockholders.[1] Since, however, it usually happens that minority stockholders are ready to protect their interests by commencing suits under most of the other circumstances that, as above shown, will warrant the appointment of receivers, and since the rights of all creditors must be protected in such suits, we find that creditors' actions are usually based upon the fact that the corporation is insolvent. Frequently, however, the corporation's insolvency is due to mismanagement on the part of its officers, or to the abandonment of its affairs by the

the filing of the bill in which the receiver was asked and the creditor bringing the suit was selected by one of the officers of the corporation with a view to showing a diversity of citizenship in order to confer federal jurisdiction the fact that the corporation admitted the allegations of the bill, consented to the appointment of the receiver and agreed as to the person to be appointed was held not to show collusion. Burton v. R. G. Peters Salt, etc., Co., 190 Fed. 262.

3 Pearson v. Levy Carpet Co., 137 La. 223, 68 So. 421; Nesbit v. North Georgia Electric Co., 156 Fed. 979; Bassett v. Bickford Bros. Co., 232 Fed. 895.

4 American Can Co. v. Erie, etc., Co., 171 Fed. 540.

5 Lively v. Picton, 218 Fed. 401, 134 C. C. A. 189.

6 Jones v. Ezell, 134 Ga. 553, 68 S. E. 303.

A stockholder held not entitled to prevent a dismissal of creditor's suit based on insolvency and restoration of the property on an agreement between the creditors and the corporation. Shaffer v. McCulloch, 192 Fed. 801, 113 C. C. A. 535.

7 Hutchinson v. Philadelphia & G. S. S. Co., 216 Fed. 795.

1 Adams v. Farmers' Nat. Bank, 167 Ky. 506, 180 S. W. 807; Dalsheimer v. Graphic Arts Co., 86 N. J. Eq. 49, 97 Atl. 497; Kelso v. American Inv. & Imp. Co., 50 Wash. 381, 97 Pac. 294; Howland v. Corn, 232 Fed. 35, 146 C. C. A. 227.

officers, or to some other similar cause, and allegations concerning such matters are embodied in the complaints even though insolvency may be the controlling circumstance relied upon as the basis for the request for a receiver.

§ 308. Insolvency as a Controlling Circumstance.

In this connection it is usually held that insolvency is shown by the inability of the corporation to pay its current obligations as they mature in the ordinary course of its business; and it is not necessary to show an actual deficit of assets as compared with liabilities.[1] The insolvency must, however, be serious in extent to warrant a receivership. Mere failure or inability to pay a few matured claims will not be sufficient.[2] It is to be remem-

1 Equipment Co. v. Degnan, 184 Fed. 834, 107 C. C. A. 158.

The federal courts at an early date took the theory that a receiver appointed in equity could settle the affairs of insolvent corporations in the same manner as was contemplated by certain state statutes which made provision for the appointment of receivers in such circumstances. Davis v. Gray, 16 Wall 203, 21 L. Ed. 447.

In cases of insolvency the obtaining of a judgment at law and return of an unsatisfied execution are regarded as an idle ceremony and one sometimes dispensed with as a preliminary to the appointment of a receiver. Chicago, etc., Ry. Co. v. Kenney, 159 Ind. 72, 62 N. E. 26.

2 Cassels Mills v. First Nat. Bank of Gadsden, 187 Ala. 325, 65 So. 820; Banta v. Hubbell, 167 Mo. App. 38, 150 S. W. 1089.

Mere insolvency not sufficient where no fraud alleged. Galvin v. McConnell 53 Tex. Civ. 486, 117 S. W. 211; Pond v. Framingham, etc., R. Co., 130 Mass. 194; Lawrence Iron Works Co. v. Rockbridge Co., 47 Fed. 755.

Insolvency of a corporation combined with gross mismanagement and breach of trust on the part of the officers of the corporation will constitute sufficient ground for the appointment. United States Shipbuilding Co. v. Conklin, 126 Fed. 132, 60 C. C. A. 680.

Where the assets of an insolvent corporation are scattered in different states and its affairs are mismanaged, a receiver will be appointed. Towle v. American Bldg., etc., Soc., 60 Fed. 131.

Where the concern is not only insolvent but conducting an illegal business, such as running a bucket shop, a receiver may be appointed at the instance of a simple creditor to wind up its affairs. Weiss v. Haight, etc., Co., 148 Fed. 399.

bered in this connection that a creditor's suit for a strictly corporation receiver is a representative action. The creditor sues on behalf of himself and all other creditors.[3] Other creditors are not necessarily expressly made parties because they are represented by the plaintiff; and, if they are opposed to the creation of a receivership, they may intervene and in that way voice their opposition;[4] and, since the receiver acquires full charge of the affairs of the corporation, all creditors will be given notice and an opportunity to present their claims. Accordingly the insolvency that furnishes sufficient ground for the appointment of a receiver is a very serious embarrassment that has already caused or threatens to cause at an early date a practically complete cessation of its business and a wiping out of its assets. If the complaint shows the existence of numerous and pressing demands for unpaid claims and the probability of harassing litigation and forced sale of assets, to the disadvantage of most, if not all, of the creditors, coupled with the probability that an impartial management by an officer of the court will produce a distribution more just to all concerned, a receiver will be appointed; and if such a show-

3 It was held to be an action on behalf of all creditors based upon an equitable claim which the defendant company ought to enforce and which it refused to enforce. A receiver was appointed with power to sue the English corporation, either in his own name or that of the defendant company, in England or anywhere else where assets could be found. Barber v. International Co., 73 Conn. 587, 48 Atl. 758.

A Connecticut corporation sold all of its assets to an English corporation for a consideration which was not paid and payment of which the officers of the selling company refused to enforce. The assignee of a foreign judgment creditor brought suit for a receiver of the selling company in a Connecticut state court. The action was held not to be a strictly creditor's bill seeking non-executionable assets for the reason that, under a statute such an action could be based only on a domestic judgment; nor was it a "winding-up" action because such an action was within the exclusive jurisdiction of a bankruptcy court.

4 See Carrington v. Thomas C. Bassbor Co., 121 Md. 71, 88 Atl. 52.

ing is accompanied also by proof that the embarrassed condition of the company is due to mismanagement, amounting to fraud or gross incompetency, on the part of those in control of its affairs, or an abandonment of their duties and obligations by such persons, and the probable enhancement of the assets by recovery of misappropriated property or damages for negligence, the appointment of a receiver will be regarded as an absolute necessity.[5]

5. *Duration and Extent of Equity Corporation Receiverships.*

§ 309. General Rule Respecting the Matter.

It has been remarked several times in the preceding sections that the distinctive characteristic of corporation receiverships is that the receiver is appointed to preserve the property involved for the benefit of all interests existing at the time of the appointment and that for this purpose the receiver is empowered to control all of the assets of the corporation and to conduct its business.

[5] Excelsior White Lime Co. v. Rieff, 107 Ark. 554, 155 S. W. 921; American Lumber Co. v. Day Brick & Lumber Co., 138 La. 1, 69 So. 853; Barnard Mfg. Co. v. Ralston Milling Co., 71 Wash. 659, 129 Pac. 389; Weiss v. Haight & Freese Co., 148 Fed. 399; American Can Co. v. Erie Preserving Co., 171 Fed. 540; Equitable Trust Co. v. Great Shoshone, etc., Power Co., 245 Fed. 697, 158 C. C. A. 99; Evans v. Coventry, 5 De Gux M. & G. 911.

Where property is sequestered by the sheriff upon an execution against an insolvent corporation as part of a conspiracy between the directors of the corporation and the execution creditor in order to give the latter an illegal preference over other creditors, a receiver of the corporation is proper. Ford v. Plankinton Bank, 87 Wis. 363, 58 N. W. 766.

See, also, cases cited under preceding section and following section.

Where a decree adjudged a corporation actually insolvent, and appointed a receiver, it can not be modified on motion so as to place the appointment of the receiver on another ground, particularly where the affidavits in support of the motion disclosed that the corporation's liabilities exceeded its assets. Karst v. Black Diamond Range Co., 82 N. J. Eq. 231, 88 Atl. 692.

There may, however, be instances where existing circumstances make it unnecessary to give such an extensive scope to the remedy. It may be that the purpose of the receivership will be simply to recover, for the corporation and the consequent benefit of its creditors and stockholders, property that has been illegally disposed of or the purchase price that has not been paid, or damages for misconduct or negligence on the part of officers, or money from shareholders on liability for stock subscriptions, or some other purpose not requiring the usual extensive powers.[1]

The receiver will not operate the business of the corporation, or any particular part of it, as, for instance, the carrying out of any executory contract of the company, if to do so will entail loss.[2] It may happen that, pending the proceedings, a foreclosure receivership will be created that will terminate the general receivership

1 Barber v. International Co., 73 Conn. 587, 48 Atl. 758; Tatum v. Leigh, 136 Ga. 791, Ann. Cas. 1912D, 216, 72 S. E. 236.

Under proper circumstances, the court may appoint a receiver for the purpose of instituting suits to enforce the stockholders liability. Way v. Barney, 116 Minn. 285, Ann. Cas. 1913A, 719, 38 L. R. A. (N. S.) 648, 133 N. W. 801.

The receiver may be appointed to seek a restitution of property improperly appropriated by the directors where the corporation itself has practically gone out of business. Hammar v. St. Louis Motor Carriage Co., 155 Mo. App. 441, 134 S. W. 1060; Latta v. Catawba Electric Co., 146 N. C. 285, 59 S. E. 1028.

The remedy of receivership is appropriate where the corporation has transferred its assets to another corporation without protecting its creditors. Dalsheimer v. Graphic Arts Co., 86 N. J. Eq. 49, 97 Atl. 497.

Where suit has been commenced on a note and mortgage claimed by certain shareholders to have been illegally issued by the corporation and the corporation refuses to defend the action, shareholders may have a receiver appointed for the purpose. Avery v. Blees Mfg. Co., 27 N. J. Eq. 412.

Since shareholders are liable to creditors on their subscriptions only in case of a deficiency of assets a receiver will not be appointed to collect unpaid subscriptions until such a deficit is made to appear. Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485.

2 Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503.

as far as the property affected by the lien is concerned. Though circumstances may warrant the appointment of a receiver on a preliminary hearing, a sale of assets will not be ordered in advance of a hearing on the merits, unless the peculiar nature of the property necessitates an earlier sale.[3]

Just how long the receivership will be continued is a matter concerning which no definite general rule can be stated. It is recognized that a court is not an agency well adapted to conducting a business.[4] The decree usually provides that it shall be effective until further order of the court and that the receiver shall at all times be subject to the control and orders of the court. The latter provision would exist even if not expressly set forth in the decree. The receivership may be vacated at any time by the court.[5] Rules concerning the presentation of claims have been adopted with reference to the necessity for expediting the closing up of the receivership.[6] Just how long—that is to what point in the straightening out of the affairs of the corporation—it will be continued is usually a question that can not be answered by the court at the time of making the appointment.[7] It may be stated that the receivership will be terminated whenever the court can feel that the affairs of the corporation can be restored to corporate manage-

3 California Fruit Growers' Assn. v. Superior Court, 8 Cal. App. 711, 97 Pac. 769; Carpenter v. Landman, 192 Mich. 544, 159 N. W. 322; Boothe v. Summit Coal Mining Co., 63 Wash. 630, 116 Pac. 269.

4 In re Reisenberg (Metropolitan Ry. Receivership), 208 U. S. 90, 111, 52 L. Ed. 403, 28 Sup. Ct. 219.

5 If the receivership proves useless for the purpose in mind or the situation changes the appointment may be revoked. Krotz v. Louisiana Const. Co., 120 La. 356, 363, 45 So. 276, 278.

6 Pennsylvania Steel Co. v. New York City Ry. Co. (Metropolitan Railway Receivership), 198 Fed. 721, 117 C. C. A. 503.

7 Merrifield v. Burrows, 153 Ill. App. 523; Morse v. Metropolitan S. S. Co., 87 N. J. Eq. 217, 100 Atl. 219.

The general subject of revoking the appointment and discharging a receiver will be treated in a separate chapter.

ment with due regard to the safety of all interests.[8] Just what sort of a situation will justify such a confidence on

[8] In Featherstone v. Cooke, L. R. 16 Eq. 298, where the gravamen of the complaint was discussions among the directors, the receiver was appointed until a new governing body could be elected.

In a similar case, Trade Auxiliary Co. v. Vickers, L. R. 16 Eq. 303, it was said: "In such a case the court will interfere but only to as small an extent as possible." A receiver was appointed under a prayer "to continue the business until the assets could be applied in satisfaction of the company's debts," Wm. Filene's Sons Co. v. Weed, 245 U. S. 597, 62 L. Ed. 497, 38 Sup. Ct. 211.

An action was brought, among other things, for the cancellation of an alleged fraudulent and void assignment for the benefit of creditors and for a receiver. On appeal the court said: "With the deed of assignment set aside and the proceedings thereunder enjoined, there seems no occasion, so far as appears from the record before us, for winding up the corporation or withholding from the directors the control of its assets, for it can not be presumed that the directors will mismanage the corporate business or act otherwise than in conformity with law. Should the retirement of the company's bonds be still desired, no obstacle intervenes to prevent an appropriate action to accomplish that result. The differences between the stockholders are not such as reasonable persons may not adjust. . . . But, two years have elapsed since this record was made up, and it is possible that something may be presented to the court below justifying a temporary continuation of the receivership. However, we can not now do as appellants ask and make a peremptory direction that it be terminated." Collins v. Williamson, 229 Fed. 59, 143 C. C. A. 653.

In a discussion case, involving questions of the ownership of stock and of a claim against one of the defendant directors in favor of the corporation for the purchase price of stock, Justice Dibell of the Illinois Court of Appeal said: "Upon the present appeal it must be taken to be absolutely true that the Burrows brothers are indebted to Mrs. Merrifield and to the company in the amounts stated and it must be presumed that she and the company will recover judgments therefor and, there being no other property available for the collection of those judgments, it must be assumed that Mrs. Merrifield will take steps to cause her judgment to be made out of the stock pledged to her and that the company will levy upon those shares of stock to make its judgment and that the Burrows brothers will either find other means to pay for their stock or will cease to be stockholders. In the latter case there will be no difficulty in disposing of this suit. If they find means to pay these debts and become possessed of their certificates of stock and no change occurs in the feeling of the different parties toward each other a serious question will arise as to what shall be done with the re-

the part of the court can be told only by a consideration of the circumstances of each case.

The extent and duration of a corporation receivership, as distinguished from a mere receivership of corporate property, brings out phases of one of the questions which we have already discussed relating to the inherent right of

ceivership; but meanwhile the property and business will have been preserved for the just and equal benefit of all. We do not think it necessary to solve uncertain problems now. We think it was the duty of the court below to preserve this valuable property and business from the destruction which was impending because of the equal ownership of its stock between two warring factions." Merrifield v. Burrows, 153 Ill. App. 523.

Speaking of a dissensions receivership, a New Jersey court said: "As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body and such body is ready to take possession of the property of the corporation and proceed in the proper discharge of its duties, the court must lift its hands and retire." Edison v. Edison United Phonograph Co., 52 N. J. Eq. 620, 29 Atl. 195.

In creating a fraudulent management receivership, Vice Chancellor Lane of New Jersey said: "I am willing to say that, if it were necessary to sustain the jurisdiction of this court upon the present bill, I would, as presently advised, hold that this court may, if circumstances indicate that the corporation can not properly be conducted by reason of the fact that no competent, proper board of directors can ever be elected under its general equity power, actually wind up the corporation and divide its assets." Morse v. Metropolitan S. S. Co., 87 N. J. Eq. 217, 100 Atl. 219.

A mismanagement receiver was appointed at the instance of minority stockholders. A new board of directors was elected and plaintiffs moved for a vacation of the receivership. The motion was denied on a showing made by creditors, who had intervened, to the effect that the reorganization was only colorable and that the new board was entirely under the control of the management that had been ousted by the receivership. Adams v. Farmers' National Bank, 167 Ky. 506, 180 S. W. 807.

After having decided upon the appointment (mismanagement) the court should move with due care and in full consideration of the interests of the persons concerned." Brent v. B. E. Brister Sawmill Co., 103 Miss. 876, Ann. Cas. 1915B, 576, 43 L. R. A. (N. S.) 720, 60 So. 1018.

"We may venture to assume that it (the receivership) will not be continued any longer than necessary to enable the affairs and conditions of the corporation to be disentangled and understood and

a court of equity to appoint a receiver over a corporation. As has been intimated before, there are courts which take the position that a court of equity has no such inherent powers and that appointments in which the effect has been the winding up of the affairs of the corporation are to be made only under the authority to be found in some statute.[9] It is, of course, true that a corporation is cre-

the conflicting claims of the different shareholders (as to ownership of stock) to be properly and impartially adjusted, which the disruption of the entente cordiale that should exist among them has heretofore rendered and now renders wholly impossible except through the interposition of a court of equity." Bates v. Werries, 198 Mo. App. 209, 199 S. W. 758.

9 Chancellor Kent, in an early New York decision (Attorney General v. Utica Ins. Co., 2 Johns. Ch. [N. Y.] 371), raised, unwittingly perhaps, a lot of trouble for state courts in the United States. The federal courts seemingly were not affected by the trouble, or, it they were, shook it off at an early date.

The case was one by which the attorney general sought to have the defendant enjoined from continuing to exercise certain banking functions on the charge that it had no special franchise to do so and that it was violating a certain statute that forbade corporations to exercise such functions without a franchise and provided a penalty for its violation. The Chancellor ruled that "the whole question upon the merits is one of law and not of equity." The troublesome statement was made in answering plaintiff's contention that the matter of the suit was within the equity court's visitorial powers over corporations, and was as follows: "At the same time I admit that the persons who from time to time exercise the corporate powers may in their character of trustees be accountable to this court for a fraudulent breach of trust and to this plain and ordinary head of equity the jurisdiction of this court over corporations ought to be confined.".

Two remarks may be made in passing. In the first place, courts that have relied upon this ruling as a precedent and used the quotation as a guide in refusing to create corporation receiverships, have not considered it proper to quote the very next sentence in the opinion: "Thus, for instance, if the directors of the Utica Ins. Co. were to appropriate the funds or capital of the company to their own private emolument, or if, disregarding the business of insurance, they were to divert the funds to the destruction of that object by making roads and canals or building theatres or churches, I have no doubt this court would have a right and would be bound to interfere and check the abuse." The Chancellor did not say just how equity might interfere nor did he fortify this statement by precedents from English decisions, as he might have done, and as he

ated by statute and that the extent of its existence as a corporate entity is also fixed by statute. But an exam-

did do in connection with other statements in his opinion. The statement was, however, hardly necessary for his decision; and perhaps that is the reason why our courts have not used the statement in considering the jurisdiction of an equity court to create a corporation receivership.

In the second place it may be stated as a proposition of universal acceptance that where the question at issue is simply and solely whether or not a corporation has acted in such a way as to be deserving of a judgment decreeing its dissolution or a forfeiture of its franchise the matter being one in which the authority that granted the charter is alone primarily interested, the action in which the matter can be properly settled is one at law and not in equity, unless jurisdiction to entertain it has by statute been bestowed upon a court of equity. But the same facts that raise the question may, as Chancellor Kent pointed out, in the second quotation, be looked at from an entirely different point of view. They may be considered as a violation of the rights of some individual and as giving that individual a cause of action based upon some injury caused him. Gay v. Hudson River Electric Power Co., 187 Fed. 12, 109 C. C. A. 66. Chancellor Kent returned to this distinction when he completed his argument by saying: "But when the question is, whether a corporation has forfeited its charter, or has usurped a franchise, or has broken a penal law, the case is widely different. This court is not the proper tribunal to sustain the prosecution or to inflict the punishment."

However, it is certain that many of our state courts, following the Utica Insurance Co. case as a precedent, either directly or indirectly, through precedents that are descendants of that decision, have refused to exercise the jurisdiction to appoint corporation receivers unless they were able to base such action upon statutory authority. They have taken their position on the ground that equity courts have not authority to dissolve a corporation, or to decree a winding up of its affairs or a forfeiture of its franchise and that a receivership is tantamount to doing these things because a receiver displaces the corporate management. There is undoubtedly a conflict of opinion on this question. It is not simply that different courts have taken a different view of the weight of facts presented as the basis of a demand for a receiver, assuming that it would be possible to make a case sufficiently strong to warrant an appointment. With facts before it, that would probably lead a court, recognizing the right to make an appointment on a proper showing, to deny the receivership for the reason that the showing was not sufficient, another court has refused the request on the express ground that it had not jurisdiction. We find courts expressly stating that there is a conflict of opinion among the decisions and expressly basing their own conclusions on what they conceived to be the "weight of author-

ination of the cases in which courts of equity have appointed receivers over corporations will always disclose

ity." In many cases we find divided courts, with dissenting conclusions and opinions. An interesting instance of this situation is found in an important early case before the United States Supreme Court. Dodge v. Woolsey, 18 How. 331, 341, 15 L. Ed. 401, 405.

The point at issue was whether or not the plaintiff, a stockholder in a corporation, was entitled to maintain the action in a representative capacity. The decision was by a four to three division of the court, the majority upholding the plaintiff's right to sue. In a later case, Hawes v. City of Oakland, et al., 104 U. S. 450, 26 L. Ed. 827, the court unanimously decided that, under the facts of the case, the representative action could not be maintained. After a somewhat lengthy review of the opinion on tht Dodge case, it is stated that, "on principle," the majority decision there was not different from the decision to be reached in the case then before the court. It may be noted, however, that many of the precedents employed in the Hawes case in support of the court's conclusion were used in the dissenting opinion in the earlier case to support the conclusion of the minority. These were not receivership cases but they illustrate a certain divergence of opinion that has arisen among courts as to the inherent power of equity courts to deal with corporate affairs, a divergence of opinion that has cropped out with reference to the question of appointing corporation receivers, as well as with reference to other questions. It is not our purpose to attempt to solve this conflict; nor do we think that we know exactly how a balance is to be struck in order to determine what is the "weight of authority." Perhaps, as judges have been known to say unofficially, just how the judicial mind will lean is in some cases, a matter of "temperament." However that may be, we have, in the text, attempted to "echo" (Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121) the decisions of courts that have exercised what they thought was the inherent power of courts of equity to appoint corporation receivers and the circumstances under which they have made such appointments, without reference to the fact that other courts have expressly disclaimed jurisdiction so to act. It is of course necessary to call attention to the position that has been taken by these other courts and to the conflict of opinion. We do not think that it is correct to say that the entire conflict of opinion on this question can be eliminated on the theory that, while there is a general rule adverse to the jurisdiction of equity to make the appointment, except on the basis of statutory authority to do so, there are "exceptions" to the rule. On such a theory it would have to be admitted that at least some of the exceptions are "as broad as the rule itself." We have thought it advisable, in order to avoid confusion, to set forth one side of the matter in the text, and the other

some condition or circumstance which appeals to the equitable conscience of the court with the result that

in a note. We proceed now to mention certain interesting facts concerning this conflict of opinion.

We believe that it would be the unanimous opinion that Chancellor Kent's decision in the Utica Insurance Company case was correct. However, we believe that there is not in the decision nor the opinion anything to show that the decisions in the cases cited as authority for what has been stated in our text were wrong. Certainly the courts that did not base their decisions expressly on the "exceptions" theory, did not think so. It may be remarked that the Utica Ins. Co. case was an injunction case and not a receiver case. However, the latter is much the more drastic remedy, and, in fact, is usually accompanied by the former, so that, if the case is authority for the proposition that the remedy of injunction is never available as against corporate action, it is also authority to the effect that a corporation receivership is never proper. We find some courts, holding that equity courts have not inherent power to appoint receivers over corporations, admitting, however, that they may enjoin certain kinds of corporate action. People's Inv. Co. v. Crawford (Tex. Civ.), 45 S. W. 738.

In some cases, particularly minority stockholders' actions on the ground of mismanagement, courts, disclaiming any power in equity to make the appointment, have also rested their decisions on the ground that the complaints presented simply a case for a receiver and not an independent cause of action, with a receivership necessary as auxiliary relief. Forest Oil Co. v. Wilson, (Tex. Civ. App.), 178 S. W. 626.

In California there is quite a long line of cases in which a receiver was denied on the express ground that equity has not inherent power to appoint one. A very early case was Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508. The lower court appointed a receiver, using Evans v. Coventry, 5 De G. M. & G. 911, as a precedent. The matter was taken to the Supreme Court on certiorari and that court decided that the lower court was without jurisdiction to make the appointment. The action was a stockholder's suit on the ground of mismanagement. The decree appointed a receiver to hold the property and conduct the business until further orders of the court. Perhaps the showing was not very strong but the Supreme Court based its ruling entirely on jurisdictional grounds, as of course it had to do in a certiorari proceeding. It held that to appoint a receiver of a corporation was equivalent to granting a dissolution and that the court had no power to do that. Some of the other cases in this line are: The French Bank Case, 53 Cal. 495; Elliott v. Superior Court, 168 Cal. 727, 145 Pac. 101; State Investment, etc., Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

In some of these cases we think the showing was equally as strong as in many cases in which receivers have been appointed by

equity once having taken the matter in hand will finish the litigation with a view to doing justice to all concerned.

courts holding that they had inherent power to do so. In all of them it was held that a court of equity had no inherent power to decree dissolution, or "the winding up of the affairs of a corporation," and that to appoint a receiver was equivalent to making such a decree because the receiver necessarily "supersedes the corporate power." However, in 1917, the Supreme Court of the state sustained the appointment of a receiver by a lower court, the appointment having been made on the express ground that there "is now and ever since the commencement of this action has been a deadlock in the board of directors of said corporation, as a consequence of which the business of said corporation is not carried on and the mine of such corporation is not operated." Boyle v. Superior Court, etc., 176 Cal. 671, L. R. A. 1918D, 226, 170 Pac. 1140. Plaintiffs were stockholders. The court said. "It is declared that under the decisions of this court such an appointment, based upon the stated ground, is in excess of the jurisdiction of the court and therefore void. With this contention, however, we can not agree. The Code of Civil Procedure declares that a receiver may be appointed by the court 'in all cases where receivers have heretofore been appointed by the usages of courts of equity.' That courts of equity, both English and American, have appointed receivers under precisely the situation here presented is beyond all controversy. These receivers are not appointed to close up the affairs of a corporation, to work its dissolution, but to preserve its properties, and, where possible, continue its corporate functions. . . . In California Fruit Growers' Assn. v. Superior Court, 8 Cal. App. 711, 97 Pac. 769, where a receiver was asked for on the ground of fraudulent mismanagement, the court declared that the trial court had jurisdiction to appoint a receiver under the allegations of the complaint, and pointed out that the proceeding was not directed toward the closing of the affairs of the corporation or toward an attempt to dissolve it, but was designed merely to place the assets of the corporation in safe hands. . . . They (California cases in the line above referred to) were cases where the receiver was appointed to wind up the affairs of the corporation—in effect to dissolve it and to distribute its assets, a power which under our laws equity does not possess and a power which equity in the case at bar did not attempt to exercise."

It may be noted that the code section referred to in this opinion was in force when all of the cases in the line adverse to the appointment were decided, except the first. It may be noticed also that in this Boyle case, as well as in the Fruit Growers' Association case, referred to in the opinion, there was either pending or about to be begun litigation over the ownership of stock in the corporation and the muddle in the corporate affairs might be straightened out as a result of this litiga-

A winding up of its affairs with a view to preserving its assets for the satisfaction of some judgment to be ren-

tion, on which event, if it occurred, the court could "lift its hand and retire." In this respect the California cases are similar to the Illinois case (Merrifield v. Burrows, 153 Ill. App. 523), from which we quoted in the section to which this note is appended.

In Missouri there are a number of cases in which corporation receivers were appointed. Two cases from that jurisdiction, however, are of interest. In a case entitled Watkins v. Donnell Mfg. Co., a receiver was appointed at the instance of a stockholder on the ground of mismanagement. The lower court decreed the dissolution of the corporation and the receiver was appointed to conduct the business and to liquidate. The matter was taken to the Supreme Court in prohibition proceedings entitled State v. Foster, 225 Mo. 171, 125 S. W. 184. A permanent writ of prohibition was ordered as to that portion of the decree which ordered dissolution and liquidation. The court said: "That the court, upon the facts as disclosed by the record in that proceeding, had full power to appoint a receiver to take charge of the assets of the corporation and that such receiver may recover if the facts so warrant it any sum of money which might have been wrongfully appropriated by John W. Donnell as an officer or manager of such corporation is clear. . . . Our conclusions are by no means to be construed as in any way affecting the power of the courts in the exercise of their well recognized jurisdiction to control and regulate the official conduct of trustees, officers, and managers of corporations to the end that the minority stockholders, as well as the creditors, of such corporations may be fully protected. One member, Justice Lamm, dissented, holding that the decree of the lower court was correct. Shortly afterwards a case reached the court on appeal from a similar decree. Ashton v. Penfield, 233 Mo. 391, 135 S. W. 938. The decision was by four members of the court, with three dissenting. The complaint prayed for a dissolution of the corporation. The majority opinion held that this part of the prayer could be regarded as surplusage and that the action could be considered as one for a receiver. The opinion said: "The rule in this jurisdiction is that a court of equity is without jurisdiction in any extreme case put to dissolve a corporation and make distribution of its assets. . . . Accordingly, the decree should be reversed and the cause remanded with directions that the court enter a decree confirming the appointment of a receiver, overruling the motions to revoke the order appointing him; that the receiver should be kept in charge until such time in the future as the court may find full equity done and that it should then lift its hand and retire, otherwise proceeding in accordance with this opinion, reserving the right to itself in said decree to make such further and other orders and judg-

dered, if a winding up of its business is necessary for the purpose, is not necessarily a legal dissolution of the

ments from time to time as equity and good practice call for." The minority opinion held that the complaint stated a cause of action simply for dissolution, and, because of the want of power in the court to decree dissolution, the action should be dismissed.

In a case earlier than either of the two cases above mentioned, Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167, which decreed the dissolution and appointed a receiver, and which reached the Supreme Court on appeal from an order denying a motion to revoke the order appointing a receiver, the Supreme Court unanimously sustained the lower court. Two of the dissenting justices in the Ashton v. Penfield case were members of the court at that time. In the dissenting opinion in the Ashton v. Penfield case it was said, concerning the Cantwell case: "While it is true the petition for the appointment of a receiver did pray for the dissolution of the corporation, it will be observed that that case reached this court by appeal from an order refusing to revoke the appointment of a receiver, and no conclusion was announced in the case except that the court had jurisdiction to appoint a receiver. The proposition of the power of a court of equity to dissolve a corporation was not in judgment before the trial court in the Cantwell case."

In a late Missouri case, Bates v. Werries, 198 Mo. App. 209, 199 S. W. 758, a decree, made after a full hearing, appointing a receiver to take immediate charge of the properties of said mine of every kind and character, to take charge of all its records, books, moneys, and evidences of debt of every kind; to proceed immediately to collect, sue for, and recover all moneys and property due said company; to continue said mine in operation; to employ such assistance as may be required; to borrow money on the credit of the defendant company to continue operations, if necessary; to ascertain as soon as may be the financial condition of the defendant company and to report the same, together with a report of the administration of this trust, to the court at each regular term thereof until the further order of the court was held to create a receivership pendente lite, because it was necessary that the business of the corporation should go on during the litigation.

In Illinois we find a number of cases in which a corporation receiver was refused on the ground that equity had no jurisdiction to dissolve a corporation. Of these cases, Heitkamp v. American Pigment & Chemical Co., 158 Ill. App. 587, is an instance.

However, we have the case of Merrifield v. Burrows, 153 Ill. App. 523, from which we quoted in the text. This was an action by holders of one half of the stock against those holding the other half, on the ground of dissensions. Concerning an Illinois statute specifying certain circumstances under

corporate entity. If, after the object of the litigation has been accomplished, it still has assets the court upon ap-

which a corporation receiver might be appointed, the opinion says: "The statute is not to be construed to mean that the ordinary jurisdiction to appoint a receiver has thereby been withdrawn." Also, "The object of the bill is to preserve the property and business and credit of the company for the benefit of every shareholder alike."

In speaking of certain earlier cases, in which receivers had been denied, and in which the court had not placed its decision on the express ground of lack of jurisdiction, but on the ground that the complaints or proofs had not shown sufficient injury or threatened injury through fraud, mismanagement, or otherwise to warrant a receivership, the opinion speaks of them as implying that a receiver might be appointed under a sufficient showing. A later case to this same effect is Schmidt v. Johnson, 163 Ill. App. 622. In Baker v. Backus, Adm'r, 32 Ill. 79, where the decision refusing a receiver was based on the ground, in part at least, of an insufficient showing, we think it might very well have been held, in line with the case of Attorney General v. Utica Insurance Co., that the matters complained of were violations of the company's duties to the State to be corrected only by the State or some one duly authorized by statute to do so. (See Alabama Coal, etc., Co. v. Shackelford, 137 Ala. 224, 97 Am. St. Rep. 23, 34 So. 833.)

Other cases taking a position adverse to the jurisdiction to appoint are:

Vila v. Grand Island, etc., Storage Co., 68 Neb. 222, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 63 L. R. A. 791, 94 N. W. 136, 97 N. W. 613; Wills v. Nehalem Coal Co., 52 Or. 70, 96 Pac. 528.

A court has no power to appoint a receiver for corporate property upon the grounds which would not authorize such appointment if the defendant were a natural person.

The jurisdiction of a court of equity does not extend to the dissolution of a corporation and the appointment of a receiver to wind up its affairs. Town v. Duplex-Power Car Co., 172 Mich. 519, 138 N. W. 338; Stacy v. McNicholas, 76 Or. 167, 144 Pac. 96, 148 Pac. 67; Union Sav. & Invest. Co. v. District Court, 44 Utah 397, Ann. Cas. 1917A, 821, 140 Pac. 221.

A court of equity is limited to preserving the property of a corporation and is not authorized to carry on a business as a going concern in order to pay off the creditors. Cronan v. District Court of Kootenai County, 15 Idaho 184, 96 Pac. 768.

The process of receivership is an ancillary remedy in aid of the primary object of the litigation which must be one of an equitable character, and a bill can not be maintained for the appointment of a receiver apart from some distinct ground of equitable jurisdiction. Cassells Mills v. First Nat. Bank of Gadsden, 187 Ala. 325, 65 So. 820.

plication would undoubtedly discharge the receiver and restore the property to the corporation for such further

It will thus be seen that although in some cases, where the complaint prayed for a dissolution, or something equivalent to a dissolution, of the corporation, the denial of a receiver was placed on the ground that there was no cause of action shown to which the receivership could be made ancillary, the real ground of the jurisdictional objection to making an appointment has been that a receivership would necessarily lead to a dissolution or a winding up of the corporate affairs; and that a court having no authority directly to decree such a result can not decree it indirectly through a receivership. The jurisdictional objection, then, has centered around the question of the "duration and extent of the receivership." Some courts, like the California and the Illinois courts, have made appointments only when they saw, in the circumstances of the cases, a probability that the receivership would be terminated short of a complete sale of the corporate assets. Others, like the Missouri courts, have made appointments expressly disavowing the intention to bring about dissolution, but not foreseeing just how far the receivership would lead. Some courts have held that a managing receivership is always intended to lead to a sale of the assets as a whole (Gutterson, etc., v. Lebanon Iron, etc., Co., 151 Fed. 72), and it has been said that such a winding up of the corporate affairs does not involve a dissolution or a termination of the corporate franchise. Sellman v. German Union Fire Ins. Co., 184 Fed. 977. From this point of view it has been held that a corporation receivership would not be created just to tide a corporation over a period of financial stress. Burton v. R. G. Peters Salt, etc., Co., 190 Fed. 262; see Continental Trust Co. v. Brown (Tex. Civ.), 179 S. W. 939.

It has been stated that the mere appointment of a receiver does not ipso facto work a dissolution of the corporation, because the members can still make transfers of stock among themselves or to strangers, and can meet to transact business that does not interfere with the operations of the receivership. Butler v. Beach, 82 Conn. 417, 49 Atl. 748; and that, while the appointment does not necessarily mean dissolution, the mere possibility that such might be the result should not be held as a reason for denying the receivership in a proper case. Falfurrias Immigration Co. v. Spielhagen, 61 Tex. Civ. 111, 129 S. W. 164. In some cases it has been expressly held that the receivership might, if necessary, extend to the dissolution of the corporation or "of the trust relations." In Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N. W. 1056, it was said:

"While it is clear that the court may, as a necessary step in the proceedings, appoint a receiver to take charge of the corporate business and affairs, to convert the property and effects into

action as its stockholders may determine. If, after such objects have been accomplished, it has no assets left, it is

money, the question whether there should be a final dissolution of the company should not be left to the receiver to determine, but should be definitely declared by the court, and a time set for the sale and disposal of the property and a distribution of the proceeds among the stockholders. There should be reasonably prompt action in a case of this kind, to the avoidance of a long-continued operation of the business of the company under the guidance and supervision of the court. If within the time fixed by the court for a sale the parties come to some amicable arrangement which will obviate further judicial proceedings, matters can readily be adjusted to that end."

See also Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; Morse v. Metropolitan S. S. Co., 87 N. J. Eq. 217, 100 Atl. 219.

In Stokes v. Williams, 226 Fed. 148, 141 C. C. A. 146, it was held, concerning the confirmation of a receiver's sale of the entire assets, upon objection by certain stockholders on the ground that the sale would foreclose the possibility of recovering damages from directors for mismanagement, that the sale would be confirmed unless the objecting stockholders furnished a bond in an amount practically equal to the proposed selling price, to protect creditors and stockholders against a deficiency on any subsequent sale, and the fact that the opposing stockholders were not financially able to furnish the bond was not evidence that the order was oppressive or prohibitive.

In many instances we find the appointment of a receiver justified on the ground of "keeping up with the times"—that there has been such a vast development in the matter of casting large business enterprises into corporate form as to necessitate the release of courts of equity from the shackles of narrow and technical objections and to require an extension of their methods to meet new situations to the end that justice may be done. It is true we find such suggestions in cases that can hardly be called recent. Evans v. Coventry (1854), 5 De Gux, M. & G., 911; Wallworth v. Holt (1841), 4 Myl. & Cr. 635. Something of the same sort is found in Davis v. Gray (1872), 16 Wall. 203, 21 L. Ed. 447, although what is said there about "progress" and "growth" is not in relation to the question of the jurisdiction of equity to appoint a receiver. The suit was one in foreclosure, in which a foreclosure receiver had been appointed. The question at issue was as to the power of a receiver to prosecute a certain action in his own name, instead of in the name of the corporation. The action was justified on the ground of development in the matter of allowing power to receivers. In Pennsylvania Steel Co. v. New York City Ry. Co. (receivership of the Metropolitan St. Ry.) (1912), 198 Fed. 721, 117 C. C. A. 503, we find some-

apparent that a mere corporate shell only remains, which may, however, be given new vitality by the stockholders levying an assessment upon its stock if they desire to re-

thing about the development of the jurisdiction, although it was said, as a foundation for laying down a rule for the presentation of claims: "Apart from statutes, moreover, the law of receivers has gone through a curious course of development with respect to corporations. The rule has been uniformly stated in the books and is still insisted upon that in the absence of statutory authority a court of equity has no power to appoint a receiver, even of an insolvent corporation. It is said that such a court has no inherent power to wind up a corporation and that it can not accomplish by indirection that which it can not do directly. And it is perfectly true that the administration of the affairs of a corporation by a receiver and the distribution of its assets, while not destroying its corporate existence, does leave it a mere shell. Nevertheless, exceptions to the rule have been evolved which are in some aspects as broad as the rule itself. One of these exceptions is in the case of creditors' bills. In these suits no distinctions were drawn between corporations and individuals, and out of them the practice has grown up and become established of permitting creditors having judgments to apply to courts of equity to take possession of the assets of corporations and undertake through receivers their general administration. And now that which was formerly regarded as the essential thing—the judgment—is unnecessary unless the corporation objects. Thus is illustrated anew the vainness of saying what courts of equity can not do." In a note to the above statement it is said: "Whatever doubts may have existed as to the broad authority of courts of equity stated in the text must now be regarded as settled by the action of the Supreme Court in this very case." In re Reisenberg (Receivership of the Metropolitan Ry. Co.), 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219.

Other cases in which we find references to this development theory, "later decisions," etc., are: Green v. National, etc., Co., 137 Minn. 65, 162 N. W. 1056; Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; Brent v. B. E. Brister Sawmill Co., 103 Miss. 876, Ann. Cas. 1915B, 576, 43 L. R. A. (N. S.) 720, 60 South. 1018, and Morse v. Metropolitan S. S. Co., 87 N. J. Eq. 217, 100 Atl. 219. Occasionally we find criticism of this tendency. Roberts v. Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26; and see dissenting opinion in Ashton v. Penfield, 233 Mo. 391, 135 S. W. 938.

In view of what some courts have said about the lack of authority in equity to dissolve or wind up the affairs of a corporation indirectly through a receivership, we think it proper to refer to what frequently happens in foreclosure suits. Courts of equity have never doubted their power

engage in business. In other words, it is not necessary for a court of equity to interfere with the legal fetich raised by the rule against the dissolution of a corporate

to appoint foreclosure receivers of the property affected by the mortgage, on a proper showing, even though the mortgagor is a corporation. Large corporation mortgages frequently cover all of the assets of the company, and a foreclosure sale means a "winding up of its affairs." It is to be remembered that insolvency is a necessary condition for the appointment of a receiver in a foreclosure suit. It is also to be noticed that such a receivership necessitates the managing of the business pendente lite by the receiver, in order that the property may be sold as that of a "going concern." In other words, we have all the conditions present that would be found in a corporation receivership. In Title Ins. & Trust Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542, which was a foreclosure suit, the defendant company had created and was operating a very extensive irrigation proposition. The mortgage covered practically all of the property of the company, both real and personal. A managing receiver was appointed and it might incidentally be remarked that receiver's certificates to the amount of more than $300,000 were issued in the course of the proceedings. The property was sold as a whole and without right of redemption. "Where there is a mortgage covering real and personal property comprising parts of a single working plant or utility, in which each part is necessary to give value to the others and where a dismemberment of the system would destroy or greatly impair the usefulness or value of its component parts, the propriety of a decree like the one here made is well settled. The statute giving a right of redemption upon execution sales of real property is held to have no application to such cases." The Court cited authority to show that the principle of this quotation is as broad as stated in the quotation and is not confined in its application to a railroad or other public utility. Thus a secured creditor was able to bring about the winding up or practical, if not legal, dissolution of a corporation that had allowed itself to become insolvent and unable to pay the debt when it became due. A receiver was appointed without any question as to the power of equity to make the appointment, and through the receivership something was saved for other creditors.

In the case of the receivership of the Metropolitan Street Railway Company the proceedings were commenced by contract creditors (Pennsylvania Steel Co. v. New York City Ry. Co.). A showing of very heavy embarrassment was made; inability to pay maturing debts, numerous secured and unsecured creditors and tort claimants demanding their rights, etc. A managing receiver was appointed. It was a case of various large properties united under one management by leases. In

entity by a court of equity. As is shown by the extended note attached to this section much of the conflict of authority on this subject has arisen from a blind devotion

the course of the proceedings various of the properties were segregated and put under separate receiverships. Eventually the properties of the Metropolitan, by far the greatest portion of those originally included in the case, were sold as a whole under a foreclosure decree. Concerning this receivership the United States Supreme Court said (208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219):

"There are cases where, in order to preserve the property for all interests, it is a necessity to resort to such a remedy. A refusal to appoint a receiver would have led in this instance almost inevitably to a very large and useless sacrifice in value of a great property operated as one system through the various streets of a populous city, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims, and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives. The orders appointing the receivers and giving them instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions, when those who may be the owners of the property shall be in possession of and operate it." "Who may be," not who are, the owners. The Court foresaw that a reorganization was the necessary purpose of the proceeding. As between these two cases is there much difference in regard to what equity undertook to do?

As a unique instance of what a court of equity has done, we cite Arents v. Blackwell's Durham Tobacco Co., 101 Fed. 338; affirmed in Guthrie v. Arents, 109 Fed. 1058, 48 C. C. A. 765. All of the stockholders except the owner of one share desired to accept an offer for the entire assets and good will of the corporation. The recalcitrant member threatened political action of a serious character against the corporation. On the petition of the members desiring to sell, and on the ground that the threatened action of the nonassenting member, whether successful or not, would practically destroy the business of the company, a receiver was appointed to sell the property of the corporation for the benefit of its stockholders.

We think it proper here to call attention to this point. Many of the statutes authorizing the appointment of corporation receivers are very meager as to the details that follow the appointment, while some are quite full. Manifestly it is practically impossible to cover every detail that may arise. When the statutes are silent as to details, resort is had to the practices of equity. A court that appoints a receiver under statutory power must go to equity rules to know what to do with him after the appointment, if the

to precedent instead of an adherence to the elastic and growing powers of a court of equity to right whatever wrongs growing society may find to exist without the necessity of statutory authority to do so.

It is apparent that under the practice followed by courts of equity a receivership is discontinued whenever the objects of the primary litigation are accomplished or the necessity for a continuance of the receivership has ceased.

statute does not give instructions. (See § 311, infra.)

We close this note with words of Lord Chancellor Eldon found in a case that antedates the Attorney General v. Utica Insurance Co. case (Adley v. The Whitstable Co., 17 Vesey Jr. 315, 1810). Plaintiff was a member of the defendant corporation. For violation of a by-law of the company he was deprived of his share of the dividends. He sought to bring the action in a court of equity for an accounting and for a judgment awarding him the amount of money he would have received as dividends, claiming that the by-law was illegal. After a full consideration of the nature of the case the Lord Chancellor ruled that, because of the necessity for an accounting, plaintiff's only remedy was in equity, if the by-law was illegal. Answering the objection that equity would not take cognizance of the matter because it could not enforce against a corporation any decree that it might make, he said: "How can the decree be executed against the corporation? The course against a corporation is by sequestration or distringas. I do not conceive it to be impossible to lay hold of their property. . . . The Courts must deal with it as well as they can to prevent a failure of justice altogether, and if by resisting the demands of justice they expose their property to ruin, the mischievous consequence must be attributed to themselves . . . The effect might be that the Court would be under the necessity of carrying on the business; yet that difficulty would not prevent the decree, though it might induce the Court to modify it, so as to do as little injury as possible. . . . If a court of law will inform me that this is not a good by-law . . . I shall find the means of giving to plaintiff the benefit resulting from his title in this concern."

6. Appointment of Corporation Receivers Under Statutory Authority.

§ 310. General Discussion of the Subject.

In many, if not all of the states of the United States, statutes have been enacted conferring upon courts the power to create corporation receiverships. While in many instances the statutes of one state have been copied from or patterned after those of another state, still they have been subjected to such frequent amendment that it may be said that in regard to their various terms the statutes are almost as varied as they are numerous. It may almost be said that there is not much greater similarity among them than is contained in the fact that they all have a similar purpose. That purpose is to give courts the power to appoint receivers who shall take possession of all of the assets of a corporation to protect and preserve them for the benefit of all interested parties, stockholders and creditors, and who, as incidental to this purpose, are, usually, granted authority to conduct the business of the corporation. Of course it is necessary that the statutes shall designate the parties at whose instance and the circumstances under which receiverships may be created and in regard to these matters there is a certain broad similarity among them. The right to apply for a receiver is usually given to both stockholders and creditors. There are, however, statutes conferring upon courts the power to create receiverships, in actions that can not strictly be called *quo warranto* proceedings at the instance of the attorney-general of the state[1] or, usually in regard to special classes of corporations, such as banks, insurance companies, and the like, at the instance of a commissioner or other state officer. In

1 People v. Hasbrouck, 57 Misc. Rep. 130, 107 N. Y. Supp. 257. See United States Trust Co. v. New York, W. S. & B. Ry. Co., 101 N. Y. 478, 5 N. E. 316; McKinney, et al. v. Landon et al., 209 Fed. 300, 126 C. C. A. 226.

regard to the circumstances under which statutes have provided for corporation receivers, it has sometimes been said that the legislation on the subject has been prompted by the fact that some courts of equity have disclaimed power to act without statutory support and that legislatures, coming to the assistance of the courts, have received their inspiration from requests upon which courts have refused to act as being without statutory authority.[2] However this may be, we think it may be said that there is no single circumstance provided by any statute as a reason for a receivership but that some court has, in the absence of statute, refused to consider it a proper basis for action, while some other court has concluded otherwise. The total number of circumstances established by all the statutes as proper reasons for this remedy is small. The differences among the statutes is due to the fact that not any one statute includes them all and the various statutes do not include the same ones. Because of the differences in the statutes themselves; because of the fact that it has generally been held that, in regard to the jurisdiction, or power, to appoint, the statutes are held to be strictly construed;[3] and because it

2 United States Trust Co. v. New York, W. S. & B. Ry. Co., 101 N. Y. 478, 5 N. E. 316; Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814.

3 Where the court is proceeding to make the appointment of the receiver of the corporation by virtue of the statute, it proceeds in strict accordance with the statute. Chamberlain v. Rochester, etc., Vessel Co., 7 Hun (N. Y.) 557; Cronan v. District Court, 15 Ida. 184, 96 Pac. 768; Mirabal v. Albuquerque Wool, etc., Mills, 23 N. M. 534, 170 Pac. 50.

Statutory requirements in regard to the verification of the complaint and service of papers should be strictly followed. Western Electric Co. v. National Automatic Electrical Supply Co., 135 La. 559, 65 So. 741.

Only parties mentioned in the statute as proper applicants can petition for the appointment. Arent v. Liquidating Com'rs, 133 La. 134, 62 So. 602.

Threatened insolvency is not sufficient ground under a statute naming insolvency as a ground. Berryman v. Billings Mut. Heating Co., 44 Mont. 517, 121 Pac. 280.

That the charter is liable to be forfeited is not sufficient under a statute requiring forfeiture. Pru-

has also generally been held that, even under the statutes, the appointment is not a matter of right on which the applicant can insist but is to be considered with reference to a certain judicial discretion,[4] it is not feasible to set forth many general rules or principles as to what has been done or may be done under statutory authority. Mere differences in phraseology or context often lead to divergent judicial interpretation; indeed, we do not always find members of the same court agreeing among themselves. Decisions under statutory authority, even with reference to the mere matter of the appointment, are not to be taken generally as precedents and must be considered with reference to the special statutes under which they were rendered. There are a few points, however, in regard to which it may be said there has been practically a unanimity of judicial opinion concerning the effect and meaning of the statutes.

§ 311. Equity Character of the Statutory Power.

Some statutes expressly confer the powers thereby created upon courts of equity.[1] In many it is provided that in so far as the statute does not take care of details, the proceedings shall be conducted in accordance with

dential Securities Co. v. Three Forks, etc., R. Co., 49 Mont. 567, 144 Pac. 158.

There being a statute providing for the appointment of a receiver and another providing for a stockholders' suit against directors for money wrongfully appropriated, the two causes of action can not be united in one suit. Nevins v. Brooklyn Citizen, et al., 157 N. Y. Supp. 96.

Plaintiff must bring himself strictly under the provisions of the statute, the statute being exclusive. Kokernot v. Roos (Tex. Civ. App.), 189 S. W. 505.

[4] Western Electric Co. v. National Automatic, etc., Co., 135 La. 559, 65 So. 741.

[1] See United States Trust Co. v. New York, W. S. & B. Ry. Co., 101 N. Y. 478, 5 N. E. 316; Morse v. Metropolitan S. S. Co., 88 N. J. Eq. 325, 102 Atl. 524.

See the note attached to section 309 discussing the opinion of Chancellor Kent in the case of Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371, which forms the basis of many of the decisions arising in the state of New York and which is probably the cause of the statutory provi-

the principles and practices of equity.[2] Even in the absence of such expressions in the statute it is held that the powers conferred on the court—the rights granted to litigants—are essentially equitable in their character, and that, in regard to details unprovided for in the statute, resort must be had to equity to discover practical ways of conducting corporation receiverships.[3] In fact, some courts, in speaking of the growth and development of equity power and practice, to keep pace with the advance and development of modern business methods, have stated that this movement has perhaps been greatest in connection with the handling of the details of such receiverships, as, for instance, the presentation and proving of claims against the estate.[4] In the nature of things statutes can not provide for all contingencies that may arise in matters of this sort; and it is a familiar proposition, rooted in the very foundation of equity, that having once taken jurisdiction, equity will find means to accomplish any purpose that it is called upon to achieve.[5]

The majority of statutes concerning the appointment of receivers, after setting forth various circumstances in which a receiver may be appointed, contain a clause allowing receivers to be appointed "in all other cases where receivers have heretofore been appointed by the usages of courts of equity,"[6] or similar language. It is obvious that such an omnibus clause does not in any

sions in that state upon the subject of corporation receivers.

2 See Anthony v. Anthony & Cowell Co., 40 R. I. 1, 99 Atl. 641. In this action the court speaks of its "combination of inherent and equitable powers."

3 Jacobs v. Mexican Sugar Co., 130 Fed 589; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962.

4 Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503.

5 Adley v. The Whitetable Co., 17 Vesey Jr. 315.

6 Insofar as corporations are concerned section 564 Code of Civil Procedure of California is perhaps characteristic of the provisions found in other statutes wherein it provides for the appointment of a receiver. " . . . 5. In the cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its cor-

manner impair the powers of courts of equity. As has been before remarked, many of the statutory provisions upon the subject are for the purpose of clarifying any doubts as to the right to appoint a receiver under certain specific circumstances or conditions. As a general rule most statutes on the subject of receiverships are mainly declaratory of the equitable rules on the subject and do not impair the ordinary jurisdiction of courts of equity.[7] In respect to receivers for corporations, statutory provisions have generally been enacted to provide a safe and certain rule respecting such appointments on account of the hesitancy and in some cases refusal of courts to appoint what we have termed a corporation receiver as distinguished from a receiver appointed over corporate property under the same circumstances where a receiver would have been appointed over the property of an individual.

Although it would be impracticable in a text book of this character to attempt to discuss the various statutes existing in the different states of the Union, it may be said that receivership statutes respecting corporations generally make provisions for receiverships for the following general purposes, namely: (1) Preservation of the corporate assets pending some litigation; (2) for winding up the business affairs of the corporation without affecting a dissolution of its corporate existence; (3) winding up its

porate rights; 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

See Ward v. Inter-Ocean Oil, etc., Co., 52 Okla. 490, 153 Pac. 115, when under such a statutory clause it was held that the court must look for guidance to the established usages and customs of courts of equity.

In this connection see, also, sections 21 and 22 supra, where the general subject respecting such clauses is discussed.

[7] The existence of statutory provisions in regard to circumstances in which a receiver may be appointed will not be construed to withdraw the ordinary jurisdiction of courts of equity to appoint a receiver. Merrifield v. Burrows, 153 Ill. App. 523.

affairs in dissolution proceedings; (4) and winding up its affairs after its corporate entity has been dissolved by operation of law or expiration of its charter. Some confusion has occurred among the decisions by reason of not keeping clearly in mind the purpose and particular occasion of the receivership. A mere conversion of the assets of a corporation into money does not necessarily dissolve its corporate entity, for its stockholders may re-embark into business of the same character at some other place or under different business circumstances. The real difficulty arises generally in respect to statutes which prescribe the manner and method of dissolving a corporation. A court of equity has no inherent power to dissolve a corporation where a statute prescribes the circumstances in which it may be dissolved and provides the method of procedure, although when the jurisdiction of a court of equity is properly brought in action by reason of one of the many grounds under which a receiver may be appointed by it, we do not apprehend that the court would not have the power to wind up its affairs even though its actions would leave a mere corporate shell of corporate entity in existence.

Under the provisions of some statutes the receiver is more in the nature of a mere agent than that of a court receiver and acts as an administrative officer of the court[8] or as a quasi assignee of the corporation.[9]

[8] In some circumstances a receiver under statutory provisions is in effect an administrative officer of the court, with limited power; and the restraint of such receiver amounts to no more than direction by the court to a statutory administrative officer of that court. Albright v. American Central Ins. Co., 147 Ga. 492, 94 S. E. 561.

[9] And in such circumstances he may maintain without the territorial limits of jurisdiction actions to enforce assessment against shareholders. John W. Cooney Co. v. Arlington Hotel Co. (Del. Ch.), 101 Atl. 879.

§ 312. Effect of State Statutes on the Jurisdiction of Federal Courts.

While federal equity courts have exercised jurisdiction under many circumstances to appoint corporation receivers on the ground of the inherent power of equity to do so, it has been held that a state statute conferring jurisdiction to make such an appointment on a court under circumstances under which equity might not do so would enlarge the power of a federal court having jurisdiction within the state.[1] Such would not be the effect of a statute, however, if the result would be to extend the federal court's jurisdiction contrary to some constitutional restriction upon it. For instance, a state statute providing that a receiver could be appointed at the instance of a general creditor of a corporation would not give that power to a federal court of equity because to do so would deprive a corporation of its right to a jury trial of the issue as to the validity and amount of the creditor's claim.[2] A state statute can not, however, restrict the jurisdiction of a federal equity court.[3]

§ 313. Constitutionality of Receivership Statutes.

Legislatures that have the power to create corporations and declare the conditions and terms upon which they may exercise their corporate functions, naturally have the power also to determine by whom and under what circumstances corporate conduct may be reviewed, even

1 Land Title & Trust Co. v. Asphalt Co., 127 Fed. 1, 62 C. C. A. 23; McGraw v. Mott, 179 Fed. 646, 103 C. C. A. 204.

In Maguire v. Mortgage Co., 203 Fed. 858, 122 C. C. A. 83, the court recognized that if state statutes provide for the liquidation of the affairs of corporations through receivers, the courts within the appropriate jurisdictions may enforce them.

2 Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 37 L. Ed. 1113, 14 Sup. Ct. 127; Jacobs v. Mexican Sugar Co., 130 Fed. 589. See Tompkins Co. v. Catawba Mills, 82 Fed. 780; also, § 372, et seq. supra.

3 Welch v. Union Casualty Ins. Co., 238 Fed. 968; O'Neil v. Welch, 245 Fed. 261, 157 C. C. A. 453.

to the extent of declaring that under certain circumstances the corporate charter, or franchise, may be revoked. In general, therefore, statutes providing for the appointment of receivers over corporations by courts are not unconstitutional. However, if a statute provides for a "winding-up receivership," and also provides that it may be created on such "notice, if any, as the court may direct," to hold that a receiver with power to wind up a corporation could be appointed without notice and to continue in power beyond a day certain, at which the corporation could come in and be heard on a motion to vacate the order appointing, would be to make the provision as to notice unconstitutional, because such action would be depriving a person of his property without due process of law.[1] Such an appointment would be void. Its invalidity would not be removed by the making of a motion

1 Shaw v. Standard Piano Co., 87 N. J. Eq. 350, 100 Atl. 167; Morse v. Metropolitan S. S. Co., 88 N. J. Eq. 325, 102 Atl. 524.

One who is a stockholder and a director in a corporation, and who is the administrator of an estate that owns nearly one-third of the stock of the company, is beneficially interested in proceedings instituted by another stockholder which result in ex parte orders dissolving the company and appointing a receiver and hence may bring certiorari to review such orders. Hettel v. First Judicial District Court, 30 Nev. 382, 133 Am. St. Rep. 731, 96 Pac. 1062.

A complaint that does not show any liability of injury or loss through delay incident to giving notice does not warrant an appointment without notice. Continental Clay & Mining Co. v. Bryson, 168 Ind. 485, 81 N. E. 210.

Under certain statutes an order appointing a receiver of an insolvent corporation on the application of the corporation and without notice to creditors is void. Jones v. Schaff Bros. Co., 187 Mo. App. 597, 174 S. W. 177.

Where the corporation itself joined as a plaintiff in the suit for the appointment of a receiver its statutory right to be served with 10 days notice prior to the hearing of the application is waived. Floore v. Morgan (Tex. Civ.), 175 S. W. 737; Ripy v. Redwater Lbr. Co., 48 Tex. Civ. 311, 106 S. W. 474.

In a proceeding brought under a statute that permits owners of 25 per cent of the stock of a company to bring a proceeding looking toward the dissolution of the company, but does not require notice to be given to the company, a receiver is not proper. Kokernot v. Roos (Tex. Civ. App.), 189 S. W. 505.

to quash the appointment.[2] However, if such an appointment was made and a motion to vacate was heard a renewal of the appointment after the hearing would be valid.[3] The unconstitutionality of the provision as to notice would not affect the balance of the statute and a court could make an appointment under its provisions on such notice as might be considered reasonable.[4] The legislature can not direct that upon dissolution a receiver be appointed, since that would be depriving the corporation of due process of law.[5]

Under the provision with reference to the paramount force of federal statutes regulating proceedings in bankruptcy, it has been held that a statute providing for the dissolution of a corporation on the ground of insolvency and the appointment of a receiver, being practically a bankruptcy statute, will remain unenforceable during the existence of a general federal bankruptcy act in force at the time the state statute was enacted.[6] It has, however, been held that proceedings could be had under the state statute if bankruptcy proceedings had not actually been begun; but if such proceedings are begun pending proceedings under the state statute, exclusive jurisdiction passes to the bankruptcy court.[7]

[2] Hettel v. First Judicial District Court, 30 Nev. 382, 133 Am. St. Rep. 731, 96 Pac. 1063; State ex rel Ridgely, et al. v. Superior Ct., 86 Wash. 584, 150 Pac. 1153.

[3] Joint receivers for a corporation were appointed without notice, and thereafter its directors entered an appearance, after which the court made a second order appointing one of the joint receivers sole receiver. Held, that such appearance before the second order cured any error in the appointment without notice. Ripy v. Redwater Lumber Co., 48 Tex. Civ. 311, 106 S. W. 474. See, also, Shaw v. Standard Piano Co., 87 N. J. Eq. 350, 100 Atl. 167.

[4] Shaw v. Standard Piano Co., 87 N. J. Eq. 350, 100 Atl. 167.

[5] People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255, 18 N. E. 692 (reversing, 45 Hun 519).

[6] Moody v. Port Clyde Development Co., 102 Me. 365, 66 Atl. 967.

[7] Shaw v. Standard Piano Co., 87 N. J. Eq. 350, 100 Atl. 167.

We append a note showing some of the questions that most commonly arise in connection with the appointment of statutory receivers, and decisions concerning them, with the reminder that these decisions have value only in relation to the statutory provisions which governed them.[8]

[8] A simple contract creditor may apply for a receiver. Warren v. Kilgroe, 176 Ala. 476, 58 So. 432; Sill v. Kentucky Coal & Timber, etc., Co. (Del. Ch.), 97 Atl. 617.

The corporation may waive the defense that the applicant is not a judgment creditor with return of execution unsatisfied. Moe v. Thomas McNally Co., 138 App. Div. 480, 123 N. Y. Supp. 71.

The corporation is the only necessary defendant. The complaint is not multifarious nor is their a misjoinder of parties, however, if there are charges of mismanagement against certain directors named as defendants if they are not served and the action is stated to be against the corporation. Hopper v. Fesler Sales Co. (Del. Ch.), 99 Atl. 82.

In an action brought by a stockholder other stockholders have a right to intervene and oppose the appointment and a delay of 3½ months in doing so does not necessarily constitute laches. Thayer v. Kinder, 45 Ind. App. 111, 89 N. E. 408, 90 N. E. 323.

Only the corporation is a necessary defendant in a stockholder's action on the ground of mismanagement, notwithstanding persons not members are charged in the complaint to have conspired with the directors to defraud the company. Van Vleet v. Evangeline Oil Co., 127 La. 919, 54 So. 286.

Directors as such have no authority to apply for a receiver. Western Electric Co. v. National Automatic, etc., Co., 135 La. 559, 65 So. 741.

One who has a claim against a corporation on which a money judgment might be based is a creditor; a company bought machinery on a conditional sale; the company failed to pay; the vendor was entitled to the return of the machinery, for its reasonable rental value, and for damages for injury to the machinery while it was in the company's hands; he was a creditor under the statute and entitled to a general receiver: he was not restricted to a special receiver for the machinery. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, Ann. Cas. 1912A, 897, 70 S. E. 820.

If the appointment of a receiver is binding on the corporation then no one else can question it. Whittlesey v. Frantz, 74 N. Y. 456; Peters v. Carr, 2 Dem. Sur. (N. Y.) 22; Barnett v. Nelson, 54 Iowa 41, 37 Am. Rep. 183, 6 N. W. 49; Thompson v. Greeley, 170 Mo. 577, 17 S. W. 962; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.

To be entitled to a receiver a stockholder must show that the appointment is imperatively necessary to protect him from threatened loss. Continental Trust

7. Receiverships on Dissolution of a Corporation.

§ 314. General Review of the Subject.

We have seen in preceding sections that it has been held, in numerous cases, that courts of equity have inher-

Co. v. Cowart (Tex. Civ. App.), 173 S. W. 588.

A receiver will not be appointed on a showing of minor irregularities, or even wrong-doing that may be remedied in some other way. Howeth v. Colbourne Bros. Co. 115 Md. 107, 80 Atl. 916.

Necessity for a separate cause of action.—Since a receivership is merely ancillary to some other action, one asking for a receiver over a corporation alleged to be insolvent must state a cause of action based on some claim against the corporation. Hobson v. Pacific States, etc., Co., 5 Cal. App. 94, 89 Pac. 866.

One who is both a stockholder and a creditor of a corporation need not base his claim for a receiver on some prior judgment, his interest as a stockholder being sufficient. In re receivership of Leidigh-Dalton Lumber Co., 136 La. 39, 66 So. 390. See, also, Van Vleet v. Evangeline Oil Co., 127 La. 919, 54 So. 286; Kerlin v. Bryceland Lumber Co., 134 La. 463, 64 So. 289.

It is otherwise as to a creditor—id. A creditor's petition need not contain a specific prayer for independent relief. Bellevue Farms Co. v. Orleans Kenner, etc., R. Co., 141 La. 528, 75 So. 230.

A stockholder to be entitled to a receiver must have some claim other than his stockholder's interest in the company, though not necessarily a judgment or a lien; but he may have an injunction against wrongs of which he complains without any such claim. Williams v. Watt (Tex. Civ. App.), 171 S. W. 266; People's Invest. Co. v. Crawford (Tex. Civ. App.), 45 S. W. 738; Kokernot v. Roos (Tex. Civ. App.), 189 S. W. 505.

Likewise a creditor can not have a receiver except as in aid of some independent cause of action against the company. Continental Trust Co. v. Brown (Tex. Civ. App.), 179 S. W. 939; Forest Oil Co. v. Wilson (Tex. Civ. App.), 178 S. W. 626; Floore v. Morgan (Tex. Civ. App.), 175 S. W. 737.

Under statutes providing for the appointment of a receiver if no defense is made against the showing made by the applicant for a receiver, the court will generally make the appointment. State v. Bank of New England, 55 Minn. 139, 56 N. W. 575.

A statute required that an action against a corporation should be commenced in the county in which it had its main office; a corporation note provided that it was payable in a certain county other than where it had its main office; suit on the note was commenced in the latter county and a receiver asked for, without objection by the company to the venue; since the court had jurisdiction of the principal subject of the action and the receivership was simply ancillary to that, the court had jurisdiction to appoint a receiver. Ripy

ent power, for the protection of creditors and stockholders, to appoint receivers over corporations; and that

v. Redwater Lumber Co., 48 Tex. Civ. 311, 106 S. W. 474.

Although a foreclosure suit would have been premature, a bondholder commenced a receivership action on the ground of insolvency, waste, mismanagement, etc.; since there was no main cause of action, the suit could not be maintained. Houston & B. V. Ry. Co. v. Hughes (Tex. Civ. App.), 182 S. W. 23.

Circumstances Warranting Appointment.—Insolvency means excess of liabilities over assets, not mere inability to pay debts in the ordinary course of business. Alabama Cent. Ry. Co. v. Stokes, 157 Ala. 202, 47 So. 336.

Whatever definition may be given by a court to the term "insolvency" as used in a receivership statute, when the statute itself does not define the term, insolvency alone will not be ground for the appointment; there must be some showing of danger of loss to give room for the functioning of the court's discretion; a bill alleging insolvency might not be open to demurrer, but will not furnish ground for a receivership. Sill v. Kentucky Coal & Timber Development Co. (Del. Ch.), 97 Atl. 617; Whitmer v. William Whitmer & Sons, (Del. Ch.), 99 Atl. 428.

A ruling denying a receivership on the grounds of insolvency in one case will not be res adjudicata in another case on the same grounds, since the showing might be entirely different. Sill v. Kentucky Coal, etc., Co. (Del.) supra.

A corporation whose assets, though not readily convertible, are of a value many times greater than the amount of its liabilities, is not in imminent danger of insolvency. Cronan v. District Court, 15 Ida. 184, 96 Pac. 768.

Insolvency serious enough to make it probable that creditors' suits and attachments will practically stop the company's business is ground for the appointment. Planter v. Kirby, 138 Iowa 259, 115 N. W. 1032.

A special statute giving the Attorney General a right to apply for the dissolution of a corporation and a receiver to wind up its affairs "for good cause shown" does not give a stockholder the right to apply for a receiver on a ground not specified in general statutes providing for receivers over corporations. Platner v. Kirby, 138 Iowa 259, 115 N. W. 1032.

A stockholder complaining of ultra vires transactions must show that his interests are being endangered thereby. Varnado v. Banner Cotton, etc., Co., 126 La. 590, 52 So. 777.

Where the capital has been very seriously impaired and directors have been guilty of concealment and misrepresentation, a stockholder is entitled to have a receiver appointed. In re Receivership of Webre-Steib Co., 136 La. 272, 67 So. 1.

As applied to a corporation engaged in trade, the term "insolvent" means inability to pay debts in the ordinary course of business. Woodman v. Butterfield, 116 Me. 241, 101 Atl. 25.

these proceedings, through the sale of the corporation assets and distribution of the proceeds among creditors

A creditor, without having execution returned unsatisfied may have a receiver on a showing that business has ceased for more than a year and of insolvency. Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17.

Insolvency alone does not warrant a receivership. Forsell v. Pittsburg, etc., Co., 42 Mont. 412, 113 Pac. 479.

If a corporation has a large amount of property subject to attachment a creditor can not have a receiver simply because most of its other property is heavily encumbered. Prudential Securities Co. v. Three Forks, etc., R. Co., 49 Mont. 567, 144 Pac. 158.

The court will determine for itself from the evidence whether or not a corporation has sufficient "quick" assets to be considered not insolvent. Wright v. American Finance & Securities Co., 85 N. J. Eq. 181, 96 Atl. 387.

Under a statute providing for a receiver in case of insolvency and suspension of the ordinary business of the company, a receiver may be had over a company whose financial condition practically makes impossible the particular object for which it was organized. Catlin v. Vichachi Min. Co., 73 N. J. Eq. 286, 67 Atl. 194.

It is not necessary, under a statute providing for the appointment of a receiver under a variety of circumstances, or conditions, listed in the statute, that it be shown that all of the mentioned elements exist; some of the elements, as, for instance, "insolvency" and "not about to resume its business in a short time," may be interpreted as being definitions, or explanations one of the other. Shaw v. Standard Piano Co., 86 N. J. Eq. 137, 97 Atl. 281. [On appeal this case was affirmed on this point, but overruled as to the necessity for notice to the corporation before a receiver could be appointed. Shaw v. Standard Piano Co., 87 N. J. Eq. 350, 100 Atl. 167.]

A showing of serious insolvency and that, after certain fires, the company was unable to procure insurance on its property, warranted a receivership on the ground of insolvency or suspension of the ordinary business. Department Store Co. v. Gauss-Langenberg Hat Co., 17 N. M. 112, 125 Pac. 614.

A claim that some of its indebtedness is illegal can not be urged against an application for a receiver on the ground of insolvency and inability to pay debts. Department Store Co. v. Gauss, etc., Co., 17 N. M. 112, 125 Pac. 614.

Charging grounds for a receivership merely in the language of the statute is not sufficient. Sacramento Valley Irr. Co. v. Lee, 15 N. M. 567, 113 Pac. 834.

Charges of mismanagement, etc., must show either injury or threatened injury to the interest of plaintiff. Fenn v. W. M. Ostrander, 132 App. Div. 311, 116 N. Y. Supp. 1083.

A transfer of all its property and an abandonment of business by its officers at a time when its liabilities exceeds its assets, constitutes insolvency of the company. Abrams v. Manhattan, etc.,

and stockholders, may be carried to such an extent as to result, if not in an absolute dissolution of the corporation,

Co., 142 App. Div. 392, 126 N. Y. Supp. 844.

Inability to pay debts in the ordinary course of business constitutes insolvency. Anthony v. Anthony & Cowell Co., 40 R. I. 1, 99 Atl. 641.

The fact that certain creditors are urging illegal or unreasonable claims is not grounds for the appointment of a receiver. Continental Trust Co. v. Brown (Tex. Civ. App.) 179 S. W. 939; Floore v. Morgan (Tex. Civ. App.), 175 S. W. 737.

Mere excess of liabilities over assets does not necessarily constitute insolvency. State v. Trinity, etc., Society (Tex. Civ. App.), 127 S. W. 1174; San Antonio Hardware Co. v. Sanger (Tex. Civ.), 151 S. W. 1104.

"Danger of insolvency," sufficient to warrant a receivership exists, even though the assets may exceed the liabilities, when numerous creditors will follow a creditor threatening to take the lead and through attachment proceeds will cause forced sales that will cause a heavy sacrifice of the assets. Hart-Parr Co. v. Alvin, etc., Nursery Co. (Tex. Civ. App.), 179 S. W. 697. See, also, Ripy v. Redwater, etc., Co., 48 Tex. Civ. App. 311, 106 S. W. 474.

Insolvency alone is not sufficient ground for the appointment of a receiver. Galvin v. McConnell, 53 Tex. Civ. 486, 117 S. W. 211.

Insolvency and danger of sacrifice of assets through forced sales warrant a receivership. Parr v. Blue Ridge Coal Co., 72 W. Va. 174, 77 S. E. 894; Waggy v. Jane Lew, etc., Co., 69 W. Va. 666, 72 S. E. 778.

Insufficiency of assets to pay debts in full constitutes insolvency. Harle-Haas Drug Co. v. Rogers Drug Co., 19 Wyo. 35, Ann. Cas. 1913E, 181, 113 Pac. 791.

Duration and Extent of the Receivership.—It may be stated that most of the state statutes authorizing the appointment of a corporation receiver provide that, if a receivership is created, it may be carried to the extent of winding up the company's affairs and that a decree of dissolution may be entered.

A receiver may not be appointed merely to give a corporation an opportunity to tide over a period of financial stress. Cronan v. District Court, 15 Ida. 184, 96 Pac. 768; Duncan v. George C. Treadwell Co., 82 Hun 376, 31 N. Y. Supp. 340; Continental Trust Co. v. Brown (Tex. Civ. App.), 179 S. W. 939.

A section of a statute providing for a discontinuance of the receivership and a restoration of the property to the corporation on a showing that the debts were provided for and sufficient capital to resume business raised is not complied with by an arrangement under which a party has been found who is willing to purchase all of the claims against the company and extend time for payment; such an arrangement is merely substituting one debt for another, not "providing" for the debts; a proposition to discontinue the receivership in accordance with the section should be sub-

at least in a winding up of its affairs so as to leave nothing but a shell of an organization.[1] We have seen also

mitted to the court by the corporation itself; though the corporate functions were suspended by the receivership, the court would, on a proper application, give the directors or the stockholders an opportunity to take such steps as might be necessary to bring the matter properly before it. Bull v. International Power Co., 87 N. J. Eq. 1, 99 Atl. 111.

An order appointing a receiver of an insolvent corporation to wind up its affairs should be accompanied by an order enjoining its officers from further transacting its business. Morgan v. New York, etc., R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244.

Even under a statute providing that the receiver shall pay all debts, or, in case of a deficiency, distribute the assets ratably among the creditors, and shall distribute any surplus among the stockholders, the court may in its discretion, on proper application, authorize a surplus to be turned back to the corporation so that it may resume business. Anthony v. Anthony & Cowell Co., 40 R. I. 1, 99 Atl. 641. See dissenting opinion as to the unqualified right of stockholders to be heard on such a proposition.

Though a receiver pendente lite should be appointed on a sufficient showing, he should be discharged, if on the full hearing, the allegations of fact on which the appointment was based are not fully and clearly proved. Rainey v. Freeport, etc., Co., 58 W. Va. 424, 52 S. E. 528.

[1] See § 296, et seq. supra.

As to whether the corporation may be dissolved by a court of equity the court of Missouri holds that it can not be done. The question had been before that court on several occasions and is regarded as stare decisis. In one of the recent cases (Ashton v. Penfield, 233 Mo. 391, 135 S. W. 938), Judge Lamm in announcing the opinion of the court, said: "That question has two sides. It has been held in respectable cases that where the situation is so crying as to show the purposes or business of the corporation have been abandoned, or where performance of the corporate purpose is clearly impracticable, or where the trouble is so radical, deep seated, and dominating as to point to inevitable corporate disease, a crippled and non-paying corporate life, equity will wind up its affairs and dissolve it, absent statutory authority. Arents v. Blackwell's Durham Tobacco Co., 101 Fed. 338, and cases and authorities cited; O'Connor v. Knoxville Hotel Co., 93 Tenn. 708, 28 S. W. 308; Miner v. Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; Gluck and Becker on Rec. (2 ed.) pp. 54, 55.

"But the doctrine of this court runs counter to that and onr doctrine accords with the overwhelming weight of authority elsewhere. The rule in this jurisdiction is that a court of equity is without jurisdiction in any extreme case put to dissolve a corporation and make distribution of its assets. [State ex rel. v. Foster, 225 Mo. 171, 125 S. W. 184.] I did not agree to

that this same result may follow the foreclosure of a corporation mortgage covering practically all of the company's property.[2] Apart from these instances of what might be called the indirect dissolution, or practical dissolution, of a corporation, it is a universally recognized rule that the only authority which has the power to say whether or not a corporate existence shall terminate short of the period for which it was created is the same authority that was responsible for its coming into being. Accordingly, the question of the technical dissolution of a corporation earlier than the time at which its charter would naturally expire is a matter of purely statutory arrangement and controlled by the statutes of the legislature under whose enactments the corporation was organized.[3] Many and varied statutes bearing on the subject

that ruling when made, but was of mind then that the reason of the rule no longer existed in full vigor because of changed business conditions. But there was no call then or now to give voice to contrary views. The matter is settled, stare decisis. On the authority of the Foster case we hold the decree erroneous in the above particular."

It might be observed that the court in the exercise of its equity powers made an order in the case "that the receiver should be kept in charge until such time in the future as the court may find full equity done and that it should then lift its hand and retire."

A strong dissenting opinion was filed by Judge Graves in which he took the view that the majority of the court were attempting to do indirectly what they could not directly do, namely, dissolve the corporation by "starving it to death." He also criticised what he termed the "reaching out the arms of equity" for the purpose of administering business affairs and thought that this tendency would end "in a government by the courts."

2 See § 309, note 9.

3 Inasmuch as a corporation is a creature of the statute, its existence and manner of dissolution is also fixed by statute. In re French Bank Case, 53 Cal. 495, 550; Fees v. Mechanics' State Bank, 84 Kan. 828, L. R. A. 1915A, 606, 115 Pac. 563; Pride v. Pride Lumber Co., 109 Me. 452, 84 Atl. 989; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Elizabethtown Gaslight Co. v. Green, 46 N J. Eq. 118, 18 Atl. 844; Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Denike v. New York, etc., Cement Co., 80 N. Y 599, 605; Lowe v. R. P. K. Pressed Metal Co., 91 Conn. 91, 99 Atl. 1; Union Sav., etc., Co. v. District Court, 44 Utah 397, Ann. Cas. 1917A, 821, 140 Pac. 221.

have been passed. They are found in practically every jurisdiction. Voluntary and involuntary dissolution is provided for. A voluntary dissolution of a corporation is, of course, placed entirely under the control of its stockholders. Involuntary dissolution is provided for in various ways. As we have seen in the sections immediately preceding this, statutes have been enacted providing for the appointment of receivers to aid creditors and stockholders in much the same way as some courts of equity, without the aid of statutes, have given them the same remedy. Some of these statutes have made the dissolution of the corporation an imperative result of these receivership proceedings, while others have left the question as to how far they should be carried to the discretion of the court.[4] Some statutes provide for direct dissolution proceedings, at the instance of creditors or stockholders, making a receivership a necessary or a discretionary aid to the dissolution. Then there are statutes in the enforcement of which the state alone is primarily interested. Statutes of this character are such as provide for dissolution, or forfeiture of charter, as a penalty for disobedience of some regulatory statute, failure to pay license taxes, disobedience of anti-trust laws, or of laws relating to the manner of conducting business by banks, insurance companies, building and loan associations, and the like, in which the general public are interested and for whose protection the regulatory acts are passed. Upon dissolution some machinery must be provided for liquidating the company's affairs and distributing its assets to those to whom they properly belong. This machinery is provided for by statute and some statutes dealing with this matter provide that their purposes shall be accomplished through the medium of a receivership. In regard to all of these statutes it must be said, as was said above of receivership stat-

[4] See § 310, et seq.

utes, that they are so numerous and so varied, not only as to their general provisions and the extent to which they attempt to take care of details, but even as to their phraseology and context, that it is impossible to lay down many principles that can be said to be of general application under them and that decisions concerning the matters with which they deal must be read and applied only in the light of the statutes by which they were controlled.[5]

[5] In an action seeking the dissolution of a corporation a receiver will not be appointed at the instance of a preferred stockholder without a showing of insolvency or mismanagement threatening serious injury to his interests. Texas Consol., etc., Mfg. Assn. v. Storrow, 92 Fed. 5, 34 C. C. A. 182.

Under the statutes of Maine, a liquidating trustee of a dissolved corporation, having title to its assets, may bring suit in a foreign jurisdiction in his own name. Strout v. United Shoe, etc., Co., 195 Fed. 313.

Such a trustee has power to sue notwithstanding the statute continuing the corporation for certain purposes for a period of three years after dissolution. Strout v. United Shoe, etc., Co., supra.

The fact that a corporation has lost its charter through failure to pay corporation license tax does not necessitate the appointment of a receiver to keep alive actions commenced before the charter was forfeited. Stark Electric R. Co. v. McGinty Contracting Co., 238 Fed. 657, 151 C. C. A. 507.

In an action looking to the dissolution of a corporation all stockholders are necessary parties in the absence of some equitable reason such as impracticability on account of numbers, etc. Alabama Fidelity, etc., Co. v. Dubberly (Ala.), 73 So. 911.

The venue of an action brought several months after the life of a corporation had terminated under the terms of its charter to have liquidating receivers appointed is the county in which it carried on its business or had its principal place of business as a going concern. Henderson v. Palmer Union Oil Co., 29 Cal. App. 451, 156 Pac. 65.

Supersedeas orders staying proceedings of the receivership pending an appeal from a decree of dissolution do not affect the decree. Crittenden v. Superior Court, 166 Cal. 340, 136 Pac. 287.

Forfeiture of charter for failure to pay corporation license tax has same effect as a judicial decree of dissolution. Brandon v. Umpqua Lumber, etc., Co., 166 Cal. 322, 136 Pac. 62.

A corporate deed, made after dissolution conveying property outside of the jurisdiction to the liquidating receiver is either valid because the corporation still had title or immaterial because the title was in the receiver without

§ 315. Effect of Statutes Providing for Dissolution Proceedings.

The general effect of the appointment of a receiver over a corporation is not to operate as a dissolution of

the deed. Sayre v. Sage, 47 Colo. 559, 108 Pac. 160.

It is within the discretion of a court to dismiss an action looking to the dissolution of a corporation and the appointment of a liquidating receiver brought by one of the three owners of all of the stock, in the absence of a showing of fraud in the management, notwithstanding the fact that the business had been run at a loss for several years, the bearing of this latter fact being weakened by an improvement in the showing for the last year. Ray v. Robert Price Coal Co., 80 Conn. 558, 69 Atl. 355.

A corporation that has lost its charter for failure to pay corporation license tax is a dissolved corporation over which a receiver may be appointed; and the statute providing that a corporation shall function as such for liquidating purposes for a period of three years after its dissolution does not affect the proposition that a stockholder or creditor may ask for a liquidating receiver after the expiration of the three years and that the corporation should be made a party to the action, in which its officers may appear and answer for it. Harned v. Beacon Hill, etc., Co., 9 Del. Ch. 232, 80 Atl. 805; (affirmed 9 Del. Ch. 411, 84 Atl. 229); Slaughter v. Moore, 9 Del. Ch. 350, 82 Atl. 963.

A corporation may not voluntarily offer to surrender its charter and have a receiver appointed on an ex parte application. White v. Davis, 134 Ga. 274, 67 S. E. 716.

A liquidating receiver may not be appointed in proceedings brought for the surrender of the charter until the surrender has been accepted and a petition for such receiver by stockholders and directors is not aided by the fact that the corporation is joined as a petitioner; creditors have a right to contest such a petition. Bank of Soperton v. Empire Realty Trust Co., 142 Ga. 34, 82 S. E. 464.

The appointment of a liquidating receiver should be made only after a decree of dissolution and a hearing on behalf of all interested parties. Ward v. Farwell, 97 Ill. 593.

After decree of dissolution, and conveyance of property to the liquidating receiver by a special commissioner, the receiver is the proper person to have the title registered. Teninga v. Glos, 266 Ill. 121, 107 N. E. 126.

Pending proceedings by the state to have a charter forfeited, corporate property may be placed in control of a receiver to prevent its being used for an unlawful purpose. Columbian Athletic Club v. State, 143 Ind. 98, 52 A. L. R. 407, 28 L. R. A. 727, 40 N. E. 914.

When a liquidating receiver had been appointed pending successful proceedings to set aside a default judgment against a corporation, the action could not be continued without notice to the receiver. Hollister v. Vermont Bldg. Co., 141 Iowa 160, 119 N. W. 626.

After decree of dissolution and

its corporate entity. Such an appointment merely suspends its corporate functions during the pendency of the appointment of a liquidating receiver, the corporation has no standing to prosecute an appeal from only the part of the decree that appoints the receiver. State v. Fidelity Loan & T. Co., 113 Iowa 439, 85 N. W. 638.

Corporation liquidators appointed in voluntary dissolution proceedings begun after the state had commenced an action to have the charter forfeited will not displace a state liquidator, the state's rights dating from the filing of its bill. State v. People's Fire Ins. Co., 126 La. 548, 52 So. 763.

Any person interested may ask for a receiver of property of a defunct corporation in the court of the district in which the property is situated. Board of School Directors, etc. v. Meridith, 140 La. 269, 72 So. 960.

After voluntary dissolution proceedings have reached the stage to which the liquidating receiver's title will relate back, execution sale of property on which attachment had been levied before the dissolution proceedings had been commenced is invalid; the attachment lien is not dissolved, but further steps should be taken in the liquidation proceedings. Cobb v. Camden Savings Bank, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667.

After the appointment of a liquidating receiver the corporation has not standing to make any motion concerning an action against the corporation that was pending at the time dissolution proceedings were begun; the receivership court should direct the receiver what to do. Carter, etc., Co. v. Stewart Drug Co., 115 Me. 289, 98 Atl. 809.

Notwithstanding the fact that a liquidating receiver has not diligently prosecuted the proceedings in which he was appointed the time within which claims against a corporation will outlaw after its dissolution will run against a creditor. Montgomery v. Merrill, 18 Mich. 338.

A corporation ceases to exist upon its dissolution and the liquidating receiver is vested with all the corporate interests except the power to conduct business otherwise than as may be necessary for the purposes of liquidation. Cady v. Centreville, etc., Mfg. Co., 48 Mich. 133, 11 N. W. 839.

In a dissolution proceeding a temporary receiver can not be given authority other than to preserve the corporate property until final decree of dissolution. Woodmansee v. Ann Arbor, etc., Co., 164 Mich. 688, 130 N. W. 311.

The appointment of a liquidating trustee in an action brought to enjoin a corporation from continuing business is improper, such an appointment being provided for in an action brought to have the charter forfeited and then only after decree of forfeiture. Jackson Loan & T. Co. v. State, 101 Miss. 440, 56 So. 293.

One who is a stockholder in his own name and a director of a corporation as well as the administrator of an estate that owns a large block of stock is entitled to institute certiorari proceedings to

receivership and places the exercise of those functions necessary for the maintenance and preservation of its

have reviewed proceedings leading up to a decree of dissolution and the appointment of a liquidating receiver. Hettel v. First Judicial District Court, 30 Nev. 382, 133 Am. St. Rep. 731, 96 Pac. 1062.

A decree of dissolution and for the appointment of a liquidating receiver can not be made on an ex parte application. Hettel v. First Judicial District Court, supra.

The right of a corporation to sue for injuries to its property pending dissolution proceedings is not affected by the appointment of a temporary receiver in those proceedings, since no title to corporate assets vests in such receiver. Mutual Brewing Co. v. New York, etc., Co., 16 App. Div. 149, 45 N. Y. Supp. 101.

Since a liquidating receiver appointed in voluntary dissolution proceedings acts as trustee for creditors, time does not run to bar the claims of creditors while such receivership proceedings are progressing. Ludington v. Thompson, 153 N. Y. 499, 47 N. E. 903.

A liquidating receiver can not be appointed before decree of forfeiture of charter in proceedings brought to determine that there is ground for such forfeiture. People v. Washington Ice Co., 18 Abb. Prac. (N. Y.) 382, 383.

A liquidating receiver may sell corporate property subject to all prior liens. Mayor v. Burr, 133 App. Div. 604, 118 N. Y. Supp. 203; In re French, 181 App. Div. 719, 168 N. Y. Supp. 988.

Dissolution statutes are to be strictly construed. In re French, supra.

An action begun against a corporation either before or pending voluntary dissolution proceedings abates upon the making of a decree of dissolution and can not be revived without making the liquidating receiver a party. In re French, supra.

In voluntary dissolution proceedings a temporary receiver should not be appointed on an ex parte application. In re Manoca Temple Assn., 128 App. Div. 796, 113 N. Y. Supp. 172.

Corporate title vests in a liquidating receiver appointed on voluntary dissolution. Michel v. Betz, 108 App. Div. 241, 95 N. Y. Supp. 844.

Notwithstanding a by-law to the effect that title to stock does not pass until a transfer is made on the books, one who buys stock on a probate sale can participate, without such transfer, in receivership proceedings as a stockholder, such by-law being for the protection of the company only. Mitchell, et al. v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358.

A stockholder bringing suit for dissolution and a liquidating receiver must show that he can not get relief within the corporation and that he is equitably entitled to institute the litigation instead of the corporation. Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358; Moore v. Lewisburg, etc., Ry. Co., 80 W. Va. 653, 93 S. E. 762.

When a corporation has prac-

assets and business in the court acting through its agent, the receiver.[1] A court of equity has no inherent power to dissolve corporations as a mere dissolution process on account of corporations being creatures of the legislature and endowed with only the life and conditions with which the legislative enactment endows them.[2] In some cases the

tically ceased to operate as such, certain former directors are in possession of and claiming title to a piece of realty which is the only asset of the corporation and a vendor's lien on which is the only corporate liability, the court may, at the instance of the remaining stockholders, appoint a receiver to sell the property, pay the lien, and distribute the balance among the stockholders as their interests may appear. Canadian Country Club v. Johnson (Tex. Civ. App.), 176 S. W. 835.

On decree forfeiting charter the court may of its own motion appoint a liquidating receiver. Waters-Pierce Oil Co. v. State, 47 Tex. Civ. 299, 48 Tex. Civ. 147, 105 S. W. 851; San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S. W. 289.

In a stockholder's proceedings for dissolution as such a receiver can not be appointed and such proceedings can not be used as a cloak for obtaining a receivership to delay creditors. Kokernot v. Roos (Tex. Civ. App.), 189 S. W. 505.

The power of a court to appoint a liquidating receiver in involuntary dissolution proceedings is not limited to those instituted by the state's prosecuting attorney. Conlan v. Oudin, 49 Wash. 240, 94 Pac. 1074.

Unless saved by statute actions pending against a corporation are abated by decree of dissolution and can not be reviewed without making the title holding liquidator a party. Hawley v. Bonanza, etc., Co., 61 Wash. 90, 111 Pac. 1073.

1 Moss Steamship Co., Ltd. v. Whinney, [1912] A. C. 263.

2 Fluker v. Emporia City Ry. Co., 48 Kan. 577, 580, 30 Pac. 18; Blum Bros. v. Girard Nat. Bank, 248 Pa. St. 148, Ann. Cas. 1916D, 609, 93 Atl. 940.

In Wheeler v. Pullman Iron, etc., Co., 143 Ill. 197, 207, 17 L. R. A. 818, 32 N. E. 420, the court said: "In the absence of statutory authority, courts of chancery had no jurisdiction to decree a dissolution of a corporation, by declaring a forfeiture of its franchise, either at the suit of an individual or of the state. Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84; Doyle v. Peerless Petroleum Co., 44 Barb. (N. Y.) 239; Folger v. Columbian Ins. Co., 99 Mass. 267, 274, 96 Am. Dec. 747; State v. Merchants' Ins., etc., Co., 8 Humph. (Tenn.) 235; Attorney General v. Bank of Niagara, 1 Hopk. Ch. (N. Y.) 354; Denike v. New York & R. Lime, etc., Co., 80 N. Y. 599, 605. The mode of enforcing a forfeiture of the charter at common law was by scire facias or quo warranto in courts of law only, and at the suit only of the sovereign. The judgment in

statutes not only prescribe the ordinary method for the dissolution of a corporation, but also provide for the appointment of a receiver in special circumstances either in the dissolution proceedings or in the winding up of its

such cases, at law, relates solely to the right to exercise the corporate franchise, and operates to extinguish corporate existence. In respect of trade corporations, independently of statutory provision, and notwithstanding the dissolution of the corporation, its assets belong to those who contributed to its capital, and for whom it stood as representative in the business in which it was engaged, and are treated in equity as a trust fund to be administered for the benefit of the bona fide holders of stock, subject to the just claims of creditors of the corporation."

A proceeding for the dissolution of corporation because it has ceased to act under its franchise must be brought by state, and not by a private individual. Richards v. Cavalry Club of Rhode Island (R. I.), 101 Atl. 222.

The power of a court of equity to dissolve a corporation and distribute its assets was denied in a recent California case as in accord with the well established rule in that state. Boyle v. Superior Court, 176 Cal. 671, L. R. A. 1918D, 226, 170 Pac. 1140.

In Ashton v. Penfield, 233 Mo. 391, 135 S. W. 938, the Supreme Court held that a court of equity was without jurisdiction to dissolve a corporation.

In Baillie v. Columbia Gold Min. Co., 86 Ore. 1, 166 Pac. 965, 167 Pac. 1167, the court said: "We are cited to a line of authority to the effect that equity has no jurisdiction to dissolve a corporation unless such jurisdiction is conferred by statute and that a receivership which would be equivalent to a dissolution will not be granted. The receivership suggested in our previous opinion would not dissolve the Columbia Company. It is within the general powers of a court of equity to grant a receivership over a corporation where through such receivership the relief of a minority stockholder can be best worked out. Smith on Receiverships, § 225c, p. 359; 2 Machen on Modern Law of Corporations, § 1161, p. 958; Miner v. Belle Isle Ice Co., 93 Mich. 97, 112, 17 L. R. A. 412, 53 N. W. 218; State v. Second Judicial District Court, 15 Mont. 324, 333-339, 48 Am. St. Rep. 682, 27 L. R. A. 392, 39 Pac. 316. The right is to be exercised sparingly and with great caution, to the end that the innocent be not made to suffer with or for the guilty. Columbia Nat. Sand Dredging Co. v. Washed Bar, etc., Co., 136 Fed. 710, 712; Bauer v. Haggerty, 42 Wash. 313, 84 Pac. 871; Ponca Mill Co. v. Mikesell, 55 Neb. 98, 101, 75 N. W. 46. But where there are no innocent stockholders or creditors liable to injury from the appointment and where the rights of a minority stockholder victimized by the frauds of the majority can best be secured to him through a receivership, the relief will be granted. Hampton v. Buchanan, 51 Wash. 155, 163, 98

affairs after a dissolution of the charter has taken place.[3] After a corporation has become dissolved by any method

Pac. 374; Fougeray v. Cord, 50 N. J. Eq. 185, 201, 24 Atl. 499. Section 1108, L. O. L., does not divest this jurisdiction inherent in courts of equity; the office of the statute is not to abridge, but to enlarge this jurisdiction."

In some cases the statutes provide for liquidation by a vote of the stockholders and in certain conditions by application to the court for liquidation through a receivership. Hart Land & Improvement Co. v. Odd Fellows Hall Assn., 142 La. 487, 77 So. 125.

3 The ordinary proceedings for the dissolution of a corporation in California are covered by section 400 of the Civil Code, but the court is given authority by section 565, Code of Civil Procedure, to appoint other persons in the place of the persons who were directors at the time of the dissolution for the purpose of preserving its assets, winding up its affairs and distributing the surplus to the stockholders. State Investment, etc., Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

See, also, Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561.

In California the statute (Code of Civil Proc., § 564, subds. 5 and 6) allows a receiver to be appointed as follows: "5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

Another provision of the California Statute (§ 565 Code of Civ. Proc.) provides as follows: "Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members."

The above section of the code must, however, be read in connection with section 400 of the Civil Code of that state, which provides: "Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation."

In this connection, see, French Bank Case, 53 Cal. 495; White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062; First Nat. Bank v. Superior Court, 12 Cal. App. 335, 107 Pac. 322.

Where a corporation dies a natural death a fund in its bank account at the time of its dissolu-

under the statutes, its property naturally becomes a trust subject to be administered by a court of equity if there is any necessity for such control by such a court, and the statutory provisions are insufficient to cover the situation.[4]

tion becomes a part of its assets to be administered as a trust fund notwithstanding an attempt to transfer it. All of its assets under the statute immediately become a fund for the benefit of its stockholders and creditors. Porter v. Anglo & London, etc., Bank, 36 Cal. App. 191, 171 Pac. 845.

In Crossman v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335, the court, in defining the status of dissolved corporations, said: "It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text-writers agree, and their statement is supported by an overwhelming weight of authority. See 5 Thompson on Corporations, §§ 6721, 6722, 6723; Clark & Marshall on Private Corporations, §§ 322, 329; Angell & Ames on Corporations, § 195; 2 Morawetz on Corporations, § 1031; 10 Cyc. p. 1316; 7 Am. & Eng. Ency. of Law, p. 854; Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 574, 12 Sup. Ct. 743; First Nat. Bank v. Colby, 21 Wall. (U. S.) 609, 22 L. Ed. 687; Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945; Sturges v. Vanderbilt, 73 N. Y. 384; Rodgers v. Adriatic, etc., Ins. Co., 148 N. Y. 34, 38, 42 N. E. 515."

[4] Where the corporation has determined to dissolve and appointed an agent to collect and distribute its assets, a receiver will not be appointed at the instance of a stockholder on the ground that the agent is wasting the assets, until he has exhausted his remedies in the matter before the directors and stockholders or shown why it could not be done. Blades v. Billings Mercantile Co., 154 Mo. App. 350, 360, 134 S. W. 579, 582.

The dissolution of a corporation does not affect its property rights which rest in its governing body for the benefit of all interested. Iowa Telephone Co. v. Keokuk, 226 Fed. 82.

In Greenwood v. Union Freight R. R. Co., 105 U. S. 13, 26 L. Ed. 961, Mr. Justice Miller said: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal (after dissolution by legislative action), and the courts may, if the legislature does not provide

Even where there are statutory provisions upon the subject of the procedure to dissolve a corporation and in jurisdictions which emphatically hold that a court of

some special remedy, enforce such rights by the means in their power. The rights of the shareholders of such a corporation to their interests in its property are not annihilated by such a repeal and there must remain in the courts the power to protect those rights."

Where a corporation has become dissolved its property vests in those who were its directors at the time of its dissolution. They take it as trustees for stockholders and creditors, and they must be made parties to any proceeding seeking to appoint a receiver over the property. People v. O'Brien, 111 N. Y. 1, 7 Am St. Rep. 684, 2 L. R. A. 255, 18 N. E. 692.

Under the New York statute the directors at the time of dissolution became trustees for the stockholders and corporation's creditors with power "to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses." But where there were no creditors at the time of its dissolution by expiration of its charter, the stockholders become equitable owners of the corporate assets and the court may, under the General Corporation Law, in an action by a stockholder against a trustee charging bad faith and suing for an accounting, appoint a trustee, the court saying: "A receiver for the benefit of creditors is not a necessary party to the action, because there are no creditors. As a matter of orderly administration, in such an action as this, the court would, either pendente lite or in the interlocutory judgment, appoint a receiver and require him to advertise for creditors, and ascertain the personnel of the stockholders and the extent of their holdings. The complaint asks such relief." De Martini v. McCaldin, 184 App. Div. 222, 171 N. Y. Supp. 528.

Where under the statute the directors are made trustees for the purpose of winding up its affairs, if they unduly delay in doing so, the court may appoint a receiver. Re Pontius, 26 Hun (N. Y.) 232.

In Carter, etc., Co. v. Stewart Drug Co., 115 Me. 289, 98 Atl. 809, it is held that, upon the dissolution of a corporation and the appointment of receivers to distribute its funds, the provisions of R. S. c. 47, § 77 (R. S. 1916, c. 51, § 81), extending the existence of a corporation for three years after the termination of its charter are inapplicable, and that the corporation is thereafter incapacitated to sue or be sued in a court of law, otherwise than to promote the object confided to the receiver.

The general rule is that a receiver may be appointed in lieu of trustees, when trustees are negligent and guilty of a breach of duty as such. Boyd v. Murray, 3 Johns. Ch. (N. Y.) 48; Re Pontius, 26 Hun (N. Y.) 232; Etowah Min. Co. v. Wills Valley Min. & Mfg.

equity has no power to dissolve a corporation, it is held[5] that such statutes will not interfere with "the ancient and settled jurisdiction of equity," and accordingly the court will, where equitable facts warranting the appointment of a receiver are shown, appoint a receiver to be kept in charge "until such time in the future as the court may find full equity done" and that it will then "lift its hand and retire." It is to be presumed that the courts

Co., 106 Ala. 492, 17 So. 522; Newman v. Newman, 2 Bro. Ch. 92 (Belt's ed.) note 7; Davis v. Browne, 2 Del. Ch. 188.

Where the corporation has been dissolved at the instance of the state, a stockholder may obtain a receiver to wind up its affairs. Olmstead v. Distilling, etc., Co., 73 Fed. 44.

A receiver may be appointed, after the dissolution of a corporation under the statute, for the purpose of winding up its affairs. State v. Farmers', etc., Co., 90 Neb. 664, Ann. Cas. 1913B, 643, 134 N. W. 284.

Where the funds of a dissolved corporation are being diverted, a receiver may be appointed. Cogswell v. Second Nat. Bank, 76 Conn. 252, 56 Atl. 574.

[5] In Ashton v. Penfield, 233 Mo. 391, 135 S. W. 938, the evidence showed deep rooted dissensions and gross mismanagement on the part of two directors and a third director, the three constituting all of the stockholders. The secretary of the corporation acted in conjunction with the majority stockholders. The receiver was appointed at the instance of the minority stockholder who held merely less than one-half of the stock. The corporation, though solvent, was headed toward disaster. The court regarded the bill as not solely one for dissolution of the corporation but to preserve the corporate property and to right the property wrongs committed by the majority in control. The court, speaking through Judge Lamm, said: "It is urged that such relief is at law, not in equity, and we are referred by counsel to certain sections of the statutes for the cure of corporate ills. But those statutes are preclusive and do not oust the ancient and settled jurisdiction of equity, absent express provision to that effect. . . . Before existing heads and subjects of equity jurisdiction are lopped off, the lawmaker must evince such beheading purpose so unmistakably that there can be no fair two ways about it. . . . We conclude, then, that in the face of injuries, suffered and threatened, the minority stockholder was entitled to a receivership and to the aid of equity in rehabilitating the corporation by such orders, proceedings, suits and management as would attain that result and meanwhile protect the corpus of the estate. Under the facts here the complaining stockholder could get no relief from corporate action."

which, through *stare decisis* or other reasons, find themselves unable to allow a court of equity to wind up the affairs of a corporation in the course of their equitable administration of its affairs in a suit brought before them upon a showing of equitable facts will, as soon as it is apparent that a winding up of the affairs will result in a mere corporate shell remaining, "lift their hands," remove the receiver and leave the corporation to be dissolved according to the procedure laid down by the statutes. If the court of equity will retain jurisdiction of such a receivership until it is apparent that a dissolution of the corporation is the only future course on behalf of the corporation, we see no reason why a dissolution proceeding may not be initiated with its consent and the receivership thereupon terminated, as was the evident intention of the court in the Missouri case just referred to, where Judge Lamm seemed to take that position.

It might be remarked that the fact that the assets of a corporation are preserved by a receiver and its affairs administered with a view to closing up its affairs need not amount to a dissolution of the corporate entity inasmuch as long as its assets have not been distributed to its stockholders it may resume business.[6]

We do not apprehend that a receivership will prevent a corporation from maintaining its corporate entity and making arrangements as such corporate entity to resume business where it has not been restrained from doing so by the court,[7] and undoubtedly reorganization efforts by its stockholders with a view to rehabilitating itself and

6 A sale of all of the property of a corporation does not necessarily terminate its corporate existence. Geddes v. Anaconda Copper Mining Co., 245 Fed. 225, 157 C. C. A. 417.

7 A receivership will not prevent the corporation from issuing new stock and bonds where it has not been enjoined from acting. United States, etc., Trust Co. v. Delaware, etc., Const. Co. (Tex. Civ.), 112 S. W. 447.

It may incur expenses for reorganization purposes. Linn v. Joseph Dixon, etc., Co., 59 N. J. L. 28, 35 Atl. 2.

resuming business as a going concern should be encouraged by the court, subject, however, to the supervision of the court so that the reorganization is fair to all parties concerned.

§ 316. When Liquidating Trustees Are Favored Rather Than Liquidating Receivers.

The aversion of courts of equity to taking the control of property out of the hands of the real owners and placing it in the hands of an officer of the court applies to the business of winding up the affairs of a dissolved corporation as fully as to any other situation. In many states it is provided that upon dissolution, the corporation shall continue to function as such, for a limited time, for the purpose of winding up its affairs. In others the directors in office at the time of the dissolution have the statutory duty of caring for the liquidation. In practically every state some statutory authority, not nominated by a court and composed of persons directly interested in the property, is furnished for this purpose. It is the general rule that courts will not displace these statutory liquidators by receivers, unless some statute imperatively so requires, or it be shown that such trustees are guilty of gross frauds or abuse of their trust in their liquidation actions. This statement is true even with reference to dissolution brought about, at the instance of the state, as a punishment for violation of a regulatory statute. The state may be interested in the matter as to whether or not a corporation shall continue in business; in fact the state may be the only party entitled to raise the question. But after dissolution has occurred, the state, generally, has no interest in what happens to the assets of the concern.

In order to have a receiver appointed in preference to the statutory liquidators in case of the dissolution of a corporation, no matter what may be the cause of the dis-

solution, there must be a showing that such liquidators are violating their trust and that the property of the corporation will not be preserved without the appointment of a receiver.[1]

§ 317. Court's Method of Making a Choice Between Liquidating Trustees and Liquidating Receivers.

Some statutes provide that the court may make a choice between a receiver and liquidating trustees at the very outset of the liquidation proceedings. This choice will be exercised in favor of the trustee process. To lead to a different decision there must be a showing, of some equitable character, not simply that the management of a receiver is likely to be better than that of the statutory trustee, but that, with the trustee in control the creditors

1 Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

For a different result and somewhat different reasoning, but under different statutes, see San Antonio Gas Co. v. State, 22 Tex. Civ. 118, 54 S. W. 289. See, also, In re Standard Cordage Co., 184 Fed. 156; Anderson v. Buckley, 126 Ala. 623, 28 So. 729; Conlan v. Oudin, 49 Wash. 240, 94 Pac. 1074.

Since, under the Washington statutes, corporate property, upon dissolution, vests in certain statutory trustees, a Minnesota court, in which there was pending at the time of its dissolution, an action in which a Washington corporation was plaintiff, could not appoint a receiver to continue the action in the name of the company. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992.

While a corporation is in the hands of statutory liquidating trustees a court can not appoint a receiver in an action brought to compel the issuance of a duplicate stock certificate. Baltimore Trust Co. v. George's Creek, etc., Co., 119 Md. 21, 85 Atl. 949.

When corporate property has vested in statutory liquidating trustees the state can not provide for the continuance of the liquidating proceedings by a receiver to be appointed in an action to which the trustees are not parties and in which the court has no judicial function except the appointment of a receiver. People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 1 L. R. A. 255, 18 N. E. 692.

Upon dissolution, the stockholders can not appoint a liquidating trustee to displace statutory trustees. Lakeside Irr. Co. v. Buffington (Tex. Civ. App.), 168 S. W. 21.

or the stockholders would be liable to suffer loss or injury that would not threaten them under a receivership.[1]

§ 318. Displacement of Liquidating Trustees by Receivers.

Notwithstanding what has been said in the preceding two sections, courts of equity, with or without statutory authority, have the power to depose statutory liquidating trustees and appoint receivers in their stead. The assets of a dissolved corporation constitute a trust fund for the benefit of the creditors and the stockholders. The management of this trust, as is that of any other trust, is under the visitorial power of a court of equity. Since the corporation itself is out of the way and is not even a party to the proceedings, there is not the same objection to appointing a receiver that has, in the minds of some courts, militated against the appointment of a receiver over a going concern.[1] Proceedings looking toward such a receivership may be instituted by a shareholder or a creditor. Fraud is usually the basis of the jurisdiction; though indifference, incompetency, and the like conditions, sufficiently serious to threaten loss, or irreparable damage, may be sufficient.[2]

1 Hegeman v. Atlantic Rubber-Shoe Co., 73 N. J. Eq. 295, 75 Atl. 819; Floore v. Morgan (Tex. Civ. App.), 175 S. W. 737; Moore v. Lewisburg, etc., Ry. Co., 80 W. Va. 653, 93 S. E. 762. See, also, Merchants' & Insurers' Reporting Co., et al. v. Jones, et al., 220 Fed. 791, 136 C. C. A. 397; Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 232, 80 Atl. 805; State v. Syndicate Land Co., 142 Iowa 22, 120 N. W. 327; American Spirits Mfg. Co. v. Eldridge, 209 Mass. 590, 95 N. E. 942.

The court's choice of a receiver rather than the directors as liquidators may be based upon wrongful acts of the directors committed before the proceedings were begun. American Surety Co. v. Great White Spirit Co., 58 N. J. Eq. 526, 43 Atl. 579.

1 See § 309, note 9, supra.

2 Henderson v. Palmer Union Oil Co., 29 Cal. App. 451, 156 Pac. 65, 68; Midland Co. v. Anderson, 63 Ill. App. 51; Wank v. Peet (Mo. App.), 190 S. W. 88; Charles H. Horne & Co. v. Frederick Harrington, Inc., 87 N. J. Eq. 227, 100 Atl. 335; Talling v. Elbs, 120 N. Y. Supp. 693; Seering v. Black, 140 Wis. 413, 122 N. W. 1055.

When the affairs of a corporation are being liquidated by the

8. *Status of Statutory Receivers Appointed on Account of Insolvency.*

§ 319. General Rule in Respect to the Subject.

Many statutes provide for the appointment of a receiver upon the insolvency of a corporation. Such a receivership is undoubtedly based upon the necessity of

statutory trustees of its domiciliary state, a claim that a local receiver could dispose of its property in another state to better advantage than the trustees will not warrant the appointment of a receiver in that state. Black v. Sullivan Timber Co., 147 Ala. 327, 40 So. 667. See, also, Weatherly v. Capital City Water Co., 115 Ala. 156, 22 So. 140.

In an action seeking to displace statutory trustees by a receiver the trustees are necessary parties. Weatherly v. Capital City Water Co., supra.

On a motion to vacate a receivership created to displace liquidators chosen by the stockholders, stockholders who voted for the liquidators may intervene in support of the motion when the liquidators are consenting to the receivership. In re Eckhardt Mfg. Co., 114 La. 119, 38 So. 78.

A receiver should not be appointed to displace statutory trustees except on a showing of threatened injury to the applicant through wrongful conduct of the trustees. Ferrell v. Evans, 25 Mont. 444, 65 Pac. 714.

One who was a stockholder at the time of dissolution continues to be a stockholder so as to be entitled to participate in proceedings looking to the substitution of a receiver for the statutory liquidators; one who had resigned as director before such proceedings were begun was not a proper party defendant; adverse claims to stock can not be litigated in such a proceeding. Tompkins v. Transit Finance Co. (N. J. Eq.), 78 Atl. 398.

Statutory trustees may reduce the par value of preferred stock to the amount actually paid for it instead of calling upon the holders to pay in the amount of the par value remaining unpaid; such action does not wrongfully affect the preference to which the holders are entitled on distribution so as to entitle them to a receiver. Hellman v. Pennsylvania Electric, etc., Co., 73 N. J. Eq. 269, 67 Atl. 834.

A stockholder who attempts to displace by a receiver a liquidating agent appointed by the stockholders, must show that he could not obtain relief within the corporation itself. Blades v. Billings, etc., Co., 154 Mo. App. 350, 134 S. W. 579.

Allegations of fraud, mismanagement, etc., to be used as reasons for supplanting statutory trustees, must be specific and positive, not general and in the nature of conclusions. Moore v. Lewisburg, etc., Ry. Co., 80 W. Va. 653, 93 S. E. 762.

preserving and conserving the assets of the corporation, but such a disaster to a corporation, unless the insolvency is one of a temporary character and likely to be removed by good management under a period of freedom from pressing creditors, is naturally a final step in the life of the corporation and a preliminary to dissolution.

Some confusion has arisen among the authorities because of the fact that insolvency or temporary financial embarrassment amounting in effect to insolvency is a most frequent cause among a group of causes in which fraud or improper actions on the part of corporate officers is the controlling receivership fact. In such circumstances the receivership is generally granted under the general equity powers of the court, but there are many instances where under the statute insolvency of the corporation is made a specific ground for the appointment of a receiver. The powers of receivers under these different circumstances is variant.[1] The

1 Alabama, T. & N. Ry. v. Tolman (Ala.), 76 So. 381.

In a general receivership created upon the ground of insolvency the court may grant the receiver temporary authority to conduct the business as a going concern. Blum Bros. v. Girard Nat. Bank, 248 Pa. St. 148, 156, Ann. Cas. 1916D, 609, 93 Atl. 940.

In Pennsylvania the courts of equity have long exercised the jurisdiction to appoint receivers over corporations which are financially embarrassed. Since 1836 this course has had also statutory authority. Blum Bros. v. Girard Nat. Bank, 248 Pa. St. 148, 156, Ann. Cas. 1916D, 609, 93 Atl. 940. See, also, Power v. Grogan, 232 Pa. 387, 81 Atl. 416.

Under many statutes a receiver may be appointed over an insolvent corporation at the instance of a simple creditor. Oil City Ironworks v. Pelican Oil, etc., Co., 115 La. 265, 38 So. 987; Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609; San Antonio, etc., R. Co. v. Davis (Tex. Civ.), 30 S. W. 693.

Where it is not shown that a corporation is dissolved or is seeking dissolution, nor that it is insolvent, nor the existence of fraud or mismanagement on the part of its officers and it is merely shown that its liabilities exceed its assets and that it has ceased to conduct the business for which it was incorporated, the court is without jurisdiction to appoint a receiver. Murray v. Superior Court, 129 Cal. 628, 62 Pac. 191.

The courts in New York have no power either by statute or

status of a receiver of an insolvent corporation, appointed under statutory authorization, is generally fixed by the statute itself as far as title to the corporate property is concerned, which is the general basis of confusion arising from the power to sue or be sued in respect to the property or liens affecting it.[2] A receiver appointed

under their inherent jurisdiction as courts of chancery, to appoint a receiver of a corporation upon a petition showing sufficient assets to meet all liabilities eventually, but that some of the creditors whose claims have matured threaten suit, and that the institution of such suits would be prejudicial to the interests of creditors whose claims are not due. Re Atlas Iron Const. Co., 72 N. Y. St. Rep. 801, 38 N. Y. Supp. 172.

But courts have also refused to appoint receivers at the instance of stockholders alleging insolvency and the rendition of judgments against it. See Steele Lumber Co. v. Laurens, etc., Co., 98 Ga. 329, 24 S. E. 755; Bell v. Wood, 181 Pa. St. 175, 37 Atl. 201.

In order to make the appointment upon the ground of insolvency a strong case must be shown. Miller v. Southern Land, etc., Co., 53 S. C. 364, 31 S. E. 281.

Where insolvency is alleged as a ground for the appointment of a receiver, it must be shown by the facts which go to prove such insolvency. Atlantic Trust Co. v. Consolidated, etc., Co., 49 N. J. Eq. 402, 23 Atl. 934.

Under the New Jersey statute allowing a receiver to be appointed over an insolvent corporation, the proceeding appears to be one in rem. Albert v. Clarendon Land, etc., Co., 53 N. J. Eq. 623, 23 Atl. 8.

Sometimes under the statute a receiver may be appointed over a corporation at the instance of a stockholder where the corporation is in such a financial condition that threatened litigation and judicial sales of its property will waste its assets. Waggy v. Jane Lew Lumber Co., 69 W. Va. 666, 72 S. E. 778.

See, also, notes under section 314, supra.

2 Under the provisions of Revisal 1905, §§ 1207, 1224, receiver of insolvent corporation has such a title that a creditor attacking unregistered contract of conditional sale must by some judicial process or method fasten his claim upon the property. Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526.

Under the Arkansas statute a receiver of an insolvent corporation is vested with the title to the property of the corporation and hence is the real party in interest in any litigation concerning it. Buchanan v. Hicks, 98 Ark. 370, 34 L. R. A. (N. S.) 1200, 136 S. W. 177.

"While receivers do not acquire the legal title to the assets of an insolvent corporation, yet they are clothed with a kind of equitable title to be worked out under the order and direction of the appointing court. The effect of their ap-

over an insolvent corporation by virtue of a statute is sometimes invested with such a character of title to the property and assets of the corporation which give him a standing in the courts of another state which a chancery receiver has not, since the latter receiver is a mere officer of the court which appointed him and, of course, his powers are limited by that of the court of which he is a mere officer.[3]

pointment is to remove those in charge of the management of the corporation and to place the receivers in possession and control of its business and assets as custodians for the benefit of creditors and others ultimately entitled." Blum Bros. v. Girard Nat. Bank, 248 Pa. 148, 156, Ann. Cas. 1916D, 609, 93 Atl. 940.

Receiver of insolvent corporation may enforce stockholder's liability for unpaid stock issued as full paid only in right of creditors. McDermott v. Woodhouse, 87 N. J. Eq. 615, 101 Atl. 375.

3 Where, under the statute under which a receiver is appointed, he is vested with the title to the property over which he is appointed receiver as assignee in statutory successor, he may prosecute an action for its recovery in another state than that of his appointment. Sterrett v. Second Nat. Bank, 248 U. S. 73, 63 L. Ed. 52, 39 Sup. Ct. 27. See, also, Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337; Hawkins v. Glenn, 131 U. S. 319, 33 L. Ed. 184, 9 Sup. Ct. 739; Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163, 27 Sup. Ct. 755; Converse v. Hamilton, 224 U. S. 243, Ann. Cas. 1913D, 1292, 56 L. Ed. 749, 32 Sup. Ct. 415; Keatley v. Furey, 226 U. S. 399, 57 L. Ed. 273, 33 Sup. Ct. 121.

Under some statutes it is expressly provided that all of the real and personal property of an insolvent corporation together with its franchises, rights and privileges forthwith vest in the receiver upon his appointment. Under such a statute the proceeding and appointment is considered in the nature of judicial process by which the rights of general creditors are fastened upon the property. Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526.

The appointment of a receiver of an insolvent corporation under a statute which invests him with the title of its assets, is legal notice to all persons having contractual relations with it. Buchanan v. Hicks, 98 Ark. 370, 34 L. R. A. (N. S.) 1200, 136 S. W. 177. See, also, Breed v. Glasgow Inv. Co., 92 Fed. 760.

The federal courts will appoint receivers over insolvent receivers under the statutory provisions of the state in which the jurisdiction is invoked. Land Title, etc., Co. v. Asphalt Co., 127 Fed. 1, 62 C. C. A. 23; McGraw v. Matt, 179 Fed. 646, 103 C. C. A. 204.

But in this connection see, Morrow Shoe Mfg. Co. v. New England Shoe Co., 60 Fed. 341, 8 C. C. A. 652, 24 L. A. R. 417; Jacobs v. Mexican Sugar Co., 130 Fed. 589.

In Sterrett v. Second National Bank, 248 U. S. 73, 63 L. Ed. 52, 39 Sup. Ct. 27, the court, speaking through Mr. Justice Day, said: "Since the decision of this court in Booth v. Clark, 17 How. (U. S.) 322, 15 L. Ed. 164, it is the settled doctrine in federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed.

"The reasons for this rule were fully discussed in Booth v. Clark, and have been reiterated in later decisions of this court. Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. 244; Great Western Min., etc., Co. v. Harris, 198 U. S. 561, 575, 577, 49 L. Ed. 1163, 25 Sup. Ct. 770; Keatley v. Furey, 226 U. S. 399, 403, 57 L. Ed. 273, 33 Sup. Ct. 121. This practice has become general in the courts of the United States, and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered, and, if necessary, administered. The system established in Booth v. Clark has become the settled law of the federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action. Great Western Mining, etc., Co. v. Harris, supra, p. 577."

In the leading case of Booth v. Clark, 17 How. (U. S.) 322, 15 L. Ed. 164, upon the right of a receiver to sue in a state other than that of his appointment, the receiver was appointed under a creditors bill. He sought to subject certain property of the debtor in a foreign state to his judgment. The court said: "Whether appointed, as this receiver was, under the statute of New York, or under the rules and practices of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extra territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property none can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

9. *Receiverships on Account of Corporation Maintaining a Monopoly or Engaged in Illegal Transactions.*

§ 320. Circumstances When Receiver Appointed in Proceedings for Maintaining a Monopoly Under the Sherman Anti-Trust Law.

The general extent and purposes of the Sherman Anti-Trust Law are well established by numerous decisions of the United States Supreme Court. In a general way it may be said the Anti-Trust Act broadly condemns all corporations and companies which restrain the free and natural flow of trade in the channels of interstate commerce, although it is not intended that the act shall interfere with normal and usual contracts incident to lawful purposes and intended to further legitimate trade.[1] Although in several of the larger cases in which the court found that the corporations involved were maintaining a monopoly in violation of the Sherman Anti-Trust Law, the appointment of a receiver was threatened in case the court found that such a necessity would be shown in order to accomplish the purpose of the prosecution, still no

1 See Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632; United States v. Terminal R. Asso., 224 U. S. 383, 56 L. Ed. 810, 32 Sup. Ct. 507; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. Ed. 107, 33 Sup. Ct. Rep. 9; United States v. Union P. R. Co., 226 U. S. 61, 57 L. Ed. 124, 33 Sup. Ct. 53; United States v. Reading Co., 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. 90; United States v. Patten, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, 33 Sup. Ct. 141; Nash v. United States, 229 U. S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 780; Straus v. American Pub. Asso., 231 U. S. 222, Ann. Cas. 1915A, 369, L. R. A. 1915A, 1099, 58 L. Ed. 192, 34 Sup. Ct. 84.

The domination and control, and the power to suppress competition may be acquired by means of a holding company or by means of a direct controlling interest in the stock of one corporation by another. The mischief at which the Anti-Trust Statute is aimed, is equally effective whichever form is adopted. United States v. Union Pac. R. Co., 226 U. S. 61, 57 L. Ed. 124, 33 Sup. Ct. 53.

appointment was made. The legislative policy under the Anti-Trust Law has been stated to be a resort to restraint rather than a dissolution of the corporate entity engaged in the monopoly. A receivership is a proper remedy where it is shown to be necessary to effect the dissolution of the unlawful combination, but the court will only resort to a receivership as a last resort.[2] In the American Tobacco Company case[3] the Supreme Court held that the defendants were operating a combination in restraint of trade and a monopoly of the trade, and granted a wider relief than the court below. The court stated in its opinion the difficulties of applying a remedy. The court adverted to the fact that one of the remedies which it could apply was the appointment of a receiver to take charge of the assets and property of the combination in all of its ramifications for the purpose of preventing a continued violation of the law, and thus work out by a sale of the property or otherwise a condition

2 See, also, United States v. Union Pacific R. Co., 226 U. S. 470, 57 L. Ed. 306, 33 Sup. Ct. 162; United States v. Terminal R. R. Assn. of St. Louis, 224 U. S. 383, 56 L. Ed. 810, 32 Sup. Ct. 507.

The fact that the cause of action involved arises under the Sherman Anti-Trust Law will not prevent a court of equity from entertaining jurisdiction of the suit. United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261, 61 L. Ed. 1119, 37 Sup. Ct. 509; In United States v. Reading Co., 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. 90, the suit was to enforce the Anti-Trust Law respecting an alleged combination of railroad and coal mining companies formed to restrain competition in the production, sale and transportation in interstate commerce of anthracite coal. It did not involve a receivership.

Although the court did not appoint a receiver in the case of United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632, which was a suit under the Sherman Anti-Trust Act brought to dissolve an unlawful combination, which act did not by its terms provide for the appointment of a receiver, the court observed: "We might at once resort to one or the other of two general remedies—(a) the allowance of an injunction . . . or (b) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination."

3 United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632.

which would not be repugnant to the act. But it thought that on account of the extensive power which would at once result from resorting to a receivership, such a receivership might not only do grievous injury to the public, but cause widespread and perhaps irreparable loss to many innocent people. The court then made certain orders for the dissolution of the combination, but with a condition that if the dissolution was not accomplished within a six months' period it would apply one of the two remedies, one of which was a receivership, to the situation.

One of the elements which obtains a large consideration by the court in applying the remedy and in determining whether a receivership should be resorted to in the case of large business enterprises is the effect which would result from a cessation of the interstate business in which the company is engaged.[4] And where the appointment of a receiver would as a practical effect aid in the continuance of the unlawful combination, the appointment of a receiver will naturally be refused.[5]

In a case[6] in the United States Circuit Court, in which one corporation, through stock ownership in other corporations and ownership of vessels operating on the Great Lakes, was held to have created a monopoly under the Anti-Trust Law, the court laid down the general prin-

[4] In Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, Ann. Cas. 1912D, 734, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. 502, the court adverted to the serious injury to the public which would result from a cessation of interstate commerce, in the necessary products of the defendant and expressed a desire not to deprive the stockholders or the corporations of the right to make, after the dissolution of the combination, "normal and lawful contracts or agreements." It did not desire to deprive "the stockholders or corporations of the right to live under the law of the land but as compelling obedience to that law."

[5] A receiver will not be appointed where if to do so it would aid a combination or trust in restraint of trade. American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721.

[6] United States v. Great Lakes Towing Co., 217 Fed. 656.

ciples which would govern the court in determining the advisability of appointing a receiver. It said:

"While the receivership is clearly proper when necessary to effectuate dissolution (Union Pacific Case, supra; St. Louis Terminal Case, supra),[7] it is not always necessary, even in such a case, and should not be resorted to except where necessary. In none of the anti-trust cases to which we have referred does there appear to have been actual receivership. The nearest approach to it is in the Union Pacific Case, where a trustee was appointed to hold and transfer the stocks required to be disposed of.

"The controlling inquiry thus is: What remedy promises the most effective measure of relief against the evils which we have found to exist? In the instant case, the evil to be remedied is not the ownership by the towing company of the corporate stocks of the Dunham and the Union companies, the Thompson Towing and Wrecking Association, the Hand and Johnson Tug Line, and the Great Lakes Towing Company, Limited. These companies were not substantial competitors. No good would result in distributing to the stockholders of the towing company the stocks of the five companies above enumerated; and the government does not so request. Nor does the evil reside in the mere ownership of the corporate stocks, or physical properties, or both, bought from the other corporations or individuals. It is concededly impossible to restore to the sellers the property so bought. The combination represented by the towing company violates the Sherman Act because it is a monopoly created by abnormal and unfair means, the most important of which are (a) the system of exclusive contracts by which vessel owners who employ throughout the entire season

[7] United States v. Union Pacific R. Co., 226 U. S. 470, 57 L. Ed. 306, 33 Sup. Ct. 162; United States v. Terminal R. R. Assn. of St. Louis, 224 U. S. 383, 56 L. Ed. 810, 32 Sup. Ct. 507.

the towing company's tug and wrecking service, at all the ports covered by its tariffs (so far as the vessel owner had occasion for such service), receive a large discount from tariff rates, which is denied to all others; (b) the giving of special concessions, rebates, and discriminations to customers; (c) the restraint of competition by means of operating contracts, by unnecessary conditions imposed upon sellers of towing properties to buyers of tugs from the towing company; and (d) unfair rate wars, all adopted or engaged in for the purpose of obtaining and effectuating monopolistic control. Unless for such means, purposes, and practices, the size alone of the combination, or the mere unification of the towing interests thereby brought about, would surely not justify putting the towing company entirely out of business.

"Merely enjoining further operation by the towing company would injure, rather than benefit, the public by depriving it of the present service pending the reorganization of a new and sufficient service. A receivership, and operation thereunder, until competitive conditions should be restored, without utilizing the towing company's property, would amount to a partial and unnecessary confiscation. We are thus left practically to a choice of two remedies: First, selling the towing company's properties to purchasers dissociated from the officers, directors and stockholders of the towing company, with the expectation that operations will be carried on under a number of separate and independent ownerships, each confined to a given port or group of ports, and by receivership insuring a continuance of service pending sale and the ability to deliver the towing company's properties upon sale; or, second, to permit continued operation by the towing company only upon complete elimination of the offensive practices under which its monopoly has been created and maintained, and the imposition of such injunctive restrictions as will keep

the way open for full and free competition. The towing company is before the court and subject to its injunctive processes, including punishment for disobedience thereto; and if we can impose upon that company prohibitions, susceptible of enforcement, which shall eliminate past abuses and remove obstacles to free competition, such course would provide the most effective relief available, and so would manifestly be for the public interest.

"We do not overlook the government's contention that a corporation which has, by improper practices, created a monopoly, will, if left in control, find means through indirect and secret methods to evade any injunctive restrictions which may be imposed. We also appreciate that the towing company's present occupancy of the field places all prospective competitors at such disadvantage as in considerable measure to deter them from entering into competition. Nor do we fail to appreciate the insistence that this court can not effectively superintend the conduct of the defendant's business. Indeed, in our former opinion we said that, for reasons there stated, it then seemed to us unlikely that a decree merely enjoining administrative practices would give complete relief, in the absence of radical change in the fundamental principles upon which the towing company was organized and operated, one of which reasons was the fact that a decree commanding cessation of purely administrative practices would not be self-executing.

"In spite, however, of these difficulties, we are convinced, after mature consideration, that continued operation by the towing company under proper and stringent injunctive regulations will, if obedience to such regulations can be adequately enforced through punishment for contempt, give better assurance of free competition and better public service than is promised by a division of the towing company's properties among several new ownerships. In reaching this conclusion, we take into account

the unsatisfactory history of the towing business previous to the organization of the Great Lakes Towing Company, the fair possibility of a recurrence of those conditions if the parties interested in the towing company's business are wholly excluded from the field and the new organizations released from all restraint by means of our decree, and the possibility of a renewal of the present monopoly through the reacquisition of the interests in the new organizations by those now interested in the towing company (which again would be released from the restraint of our decree), and the fact that under the plan we propose to adopt we shall have, if such plan can be enforced, the effect of fourteen separate organizations, so far as concerns opportunities for competition and the avoidance of discriminations, and under the continued control of this court.

"The plan we have adopted, not only includes the limitation contained in the plan presented by the towing company, but in the extent and stringency of its provisions goes far beyond that plan. For example: The so-called 'exclusive contracts' are forbidden, not only as affecting more than one port, but as applied to even one port; and such restrictions, as well as the towing company's tariffs, are made to apply to all classes of service given by that company. Stringent provisions against unfair rate cutting are also contained, and the provision against discriminations is practically unlimited. Again, we have sought to impose the general prohibitions contained in the Sherman Act, so far as applicable, as well as to apply the rules of the Interstate Commerce Act (Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1913, § 8563 et seq.]) as far as seems possible unless Congress shall include within the terms of that act corporations of the class of the towing company.

"We see no reason to doubt that under the decree as drafted obedience to the injunctive process can be en-

forced, and disobedience thereto punished, without serious difficulty, for operation is expressly forbidden, except in strict compliance with the terms of the decree. Receivership and sale will, however, be resorted to in the event that the towing company shall not consent to be bound by the plan embodied in our decree."

In most of the cases involving dissolution of the monopoly it has not been found necessary to dissolve the corporation itself and the court has always been open for the suggestion of a plan by either the government or the offending corporation whereby the monopoly may be dissolved without causing the confiscation or other destruction of the private interests in the property and business. Various remedies have been applied. In most of the cases injunctive relief in one form or other has been applied,[8] but generally, in connection with cancellation of objectionable contracts,[9] distributions of stock holdings of constituent or subsidiary companies to the stockholders of the holding company,[10] the enforcement of the giving of withheld privileges to other companies,[11] or the sale of the stock holdings which caused the obnoxious

8 United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 343, 41 L. Ed. 1007, 1028, 17 Sup. Ct. 540, 560; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. Ed. 107, 33 Sup. Ct. 9.

9 United States v. Reading Co., 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. 90 (in this case certain contracts with coal mining companies were ordered to be canceled).

10 Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, Ann. Cas. 1912D, 734, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. 502; United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632 (in this case in addition to stock distribution the business was divided into four controlling companies which were so divided that the business control was in the hands of a number of separate companies. (Northern Securities Co. v. United States, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436 (in this case the holding company was required to reduce its stock and in lieu of the stock so retired to distribute to its stockholders a proportionate amount of the competitive stocks held by it).

11 United States v. Terminal R. R. Assn. of St. Louis, 224 U. S. 383, 56 L. Ed. 810, 32 Sup. Ct. 507.

monopoly.[12] In most of the cases the courts, however, reserved the idea of a receivership as a remedy of the last resort, in the event that the plan adopted did not prove effective through the fault of the offending corporation. Thus it will be seen that each case must stand upon its own particular facts, and the methods adopted in one case are not necessarily a precedent in another case, except where the same situation is presented for remedy.[13]

We do not apprehend that a receiver would be appointed in a proceeding under the Sherman Anti-Trust Law, except as a temporary measure pending the enforcement of some definite remedy which might take some time to put into effect or pending a dissolution and sale of the corporation and its property. In one of the cases, [14] to which we have already referred, it was said:

"The Anti-Trust Act contains in terms no provision for equitable relief to the public on account of violations of the act, except by way of injunction or prohibition. Section 4, which alone relates to the equitable remedy, invests the appropriate courts with 'jurisdiction to prevent and restrain violations of this act.' It is made the duty of the district attorneys, under the direction of the Attorney General, to 'institute proceedings in equity to prevent and restrain such violations.' The prescribed prayer of the petition is that 'such violations shall be enjoined or otherwise prohibited,' and provision is made for 'such temporary restraining order or prohibition as shall be deemed just in the premises.' While the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy, as disclosed by the terms of

[12] United States v. Union Pacific R. Co., 226 U. S. 470, 57 L. Ed. 306, 33 Sup. Ct. 162 (in this case the dissolution of the monopoly was effected by a sale of the Southern Pacific Railway stock held by it).

[13] United States v. Union Pacfic R. Co., 226 U. S. 470, 57 L. Ed. 306, 33 Sup. Ct. 162.

[14] United States v. Great Lakes Towing Co., 217 Fed. 656.

the act, is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate."

§ 321. Right of Receiver of Corporation Injured by Violations of Anti-Trust Law to Recover Treble Damages.

Where a corporation of which a receiver is appointed has been damaged by unlawful acts or agreements in violation of the Sherman Anti-Trust Law, the receiver thereof may sue to recover the statutory treble damages, but in order to recover such damages he must show that the corporation was damaged in the transaction. It is, of course, necessary in a case of that sort to show that the cause of action really and substantially involves a dispute or controversy arising under the Anti-Trust Act.[1] In the prosecution of such actions, the general principles of the law of torts are applied. If the plaintiff has been a participant with the defendant in the creation and maintenance of the unlawful monopoly, the question then arises as to whether such participation or acquiescence operates as an estoppel to the maintenance of the action for damages.[2] This question, of course, does not arise where the damages are imposed upon the plaintiff by acts in the nature of oppressive competition of such a character as to violate the provisions of the Anti-Trust Law.

1 Noyes v. Parsons, 245 Fed. 689, 158 C. C. A. 91.

2 The case of Bluefields S. S. Co. v. United Fruit Co., 243 Fed. 1, 155 C. C. A. 531, was an instance of the creation of a monopoly in the production and wholesale marketing of bananas in which the agreements creating the unlawful condition were suggested by the plaintiff corporation. In that case the court said:

"When in this class of torts unlawful combinations or unlawful agreements necessarily operate to restrain unduly trade and inflict injury, questions of willful purpose or conscious design to violate the law and inflict injury have no place." Addyston Pipe Case, 175 U. S. 211, 214, 234, 44 L. Ed. 136, 20 Sup. Ct. 96; Northern Securities Co. v. United States, 193 U. S. 197, 331, 48 L. Ed. 679, 24 Sup. Ct. 436. The courts have held that so far as intent is involved (that is, intent either to violate the law or thereby to inflict injury) per-

In actions for damages brought under this act, the statute of limitations of the place where the action is

sons so combining or contracting are presumed to have intended the necessary, natural, and probable consequences of their acts and agreements, and if their effect is to restrain unduly interstate trade with consequent injury, then the combination is illegal and the participants are chargeable with the consequences and are liable for the damages resulting. Continental Wall Paper Co. v. Voight, 212 U. S. 227, 53 L. Ed. 486, 29 Sup. Ct. 280; Loewe v. Lawlor, 208 U. S. 274, 52 L. Ed. 488, 13 Ann. Cas. 815, 28 Sup. Ct. 301; O'Halloran v. American Sea Green Slate Co. (D. C.), 207 Fed. 187, 189. There is no question about this law when the damages inflicted by an unlawful combination fall upon one not involved in the combination and not participating in violating the law. But here there was evidence that the plaintiff, acting through all its stockholders, had combined with the defendant to restrain trade and commerce and to build up a monopoly between them. In prescribing the zone for banana cultivation and in limiting the purchase price and regulating the importation of bananas into the United States, the parties unquestionably effected thereby a combination which in some degree restrained trade and measurably created a monopoly. If that combination unlawfully restrained trade and created an unlawful monopoly, as averred by the plaintiff, then certainly when the plaintiff complains of injury done by the defendant, the question arises ex necessitate rei whether the injury complained of was the natural and probable consequence of the combination or was in consequence of conduct pursued beyond its scope with intent to inflict injury not within the agreement of the parties.

The plaintiff's claim was in effect that it did not reap all the profits which the combination should have yielded because of the manner in which the defendant exercised its control and conducted the plaintiff's business. The plaintiff's business was intended to be conducted by the defendant along lines of restraint of trade and monopoly, in the course of which injury might follow as a natural effect, or might be occasioned by intentional and malevolent acts of the defendant. In this state of the case, the origin and purpose of the injury became questions for the jury. . . .

If the Sherman Act was violated by the combination in which the Bluefields Company participated, and injury to that company was a natural consequence, then the case comes within the well settled principle that where a criminal combination is made or a criminal enterprise is undertaken by two parties and either party violates the agreement with injury to the other, the law will afford the injured party no redress but will leave him as it finds him. In pari delicto potior est conditio defendantis. Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187; McMullen

brought are applicable.[3] A receiver may intervene in such an action or be substituted as plaintiff in a suit already commenced by the corporation of which he is receiver.[4]

§ 322. Whether the Cause of Action for Treble Damages May Be Asserted by Receiver After Dissolution of Corporation.

The question whether after the dissolution of a corporation, which had a cause of action for treble damages for violation of the Anti-Trust Law, its receiver

v. Hoffman, 174 U. S. 639, 43 L. Ed. 1117, 19 Sup. Ct. 839; Pittsburgh Dredging & Construction Co. v. Monongahela & Western Dredging Co. (C. C.), 139 Fed. 780; Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & T. Ry. Co., 61 Fed. 993, 9 C. C. A. 659; Bishop v. American Preserves Co. (C. C.), 105 Fed. 845; Continental Wall Paper Co. v. Voight, 212 U. S. 227, 262, 53 L. Ed. 486, 29 Sup. Ct. 280.

So also were correct the court's rulings and instructions as to the plaintiff's acquiescence in the defendant's exercise of its control. If, upon evidence which we think abundantly sufficient, the jury found that all the stockholders of the Bluefields Company joined in forming the alleged unlawful combination and in placing their company in it; acquiesced for a long term of years in the part their company played in that combination and in the manner it played it or was caused to play it; and accepted and enjoyed the profits which sprang from it, we are of opinion that the corporation itself was bound by their acts and was precluded from asserting a right of action based upon them. Morawetz on Corporations, § 262; Wells v. Northern Trust Co., 195 Ill. 288, 63 N. E. 136; Omaha Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917.

The rights of its two new and innocent stockholders are not superior to the rights of the corporation. It is urged, however, that even if the corporation is precluded from maintaining an action for the benefit of its stockholders, the corporation might later repudiate their acts and recover for the benefit of its creditors. But there is in this case no question of creditors other than such as may always technically be present in cases in which corporate action is involved. The litigation had its rise on a stockholder's bill, and though now prosecuted by a receiver in an action at law, the rights involved are obviously those which exist between the corporation and its stockholders.

[3] Bluefields S. S. Co. v. United Fruit Co., 243 Fed. 1, 155 C. C. A. 531.

[4] Bluefields S. S. Co. v. United Fruit Co., supra; Imperial Film Exch. v. General Film Co., 244 Fed. 985.

appointed in the dissolution proceedings may sue is one not free from difficulty. The general test of survivorship of a cause of action lies in whether it was assignable, and besides certain forms of tort actions cease with the death of the party in whose favor they run. There has been some discussion as to the nature of the cause of action for treble damages as to whether it is one in which the damages recoverable are only such as affect property interests. The act itself has not prescribed whether the cause of action is assignable, and under such circumstances the question must be determined by the general principles regulating that point in choses in action in general. In a well-considered case[1] in the Fed-

1 Imperial Film Exchange v. General Film Co., 244 Fed. 985. In the above case Judge Hough said:

"Such an action as this under the Sherman Law can only be brought when a person is 'injured in his business or property.' Section 7. The action is to recover 'threefold the damages by him sustained'; i. e., sustained by and in the said 'business' or 'property.'

"Such an action as this might well be called sui generis, but surely the nearest approach to one of the old legal categories that can be made is to assign this new statutory cause of action to that of actions for a tort occasioning injury to property, of which perhaps the most ancient and familiar illustrations are trespass q. c. f. and trespass d. b. a. By a long list of decisions the general test of survivability of actions is their assignability. In fact, many, if not most, of the cases seem to reason in a circle; i. e., if the question is of assignability, a case of survival is thought to rule it, and e converso. See such decisions catalogued in 4 Cyc. 23. In short, assignability and the right of survival are attributes of causes of action discoverable by the same tests; as a general rule they are 'convertible terms.' Selden v. Illinois Trust, etc., Bank, 239 Ill. 67, 130 Am. St. Rep. 180, 87 N. E. 860; Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. Supp. 1053; Morenus v. Crawford, 51 Hun 89, 5 N. Y. Supp. 453; Grocers' National Bank v. Clark, 48 Barb. (N. Y.) 26.

Admitting that most actions for wrong to the person, or indeed to a person, are still subject to the common-law rule, it is several centuries since an exception was established (in language of Story) that:

"'Vested rights ad rem and in re, possibilities coupled with an interest, and claims growing out of and adhering to property may pass by assignment.' Comegys v. Vasse, 1 Pet. at 213, 7 L. Ed. 108.

"Sometimes this rule is covered up or disguised by an assignment

eral Court for the Southern District of New York it was held by Judge Hough that a trustee, whom he regarded as a receiver, of a corporation in the dissolution proceedings was the equivalent of an assignee and could be substituted as plaintiff in an action previously instituted by the corporation to recover treble damages under the Anti-Trust Law. But it has also been held

of the property injured, as in Tome v. Dubois, 6 Wall. 548, 18 L. Ed. 943, where the defendant had wrongfully deprived the plaintiff's assignor of a quantity of sawlogs. The assignor sold the sawlogs to the plaintiff, though he had no possession of them, and the plaintiff maintained an action for conversion. In New York, not merely such property might have been assigned, together with the cause of action growing out of it, but the cause of action itself might have been directly assigned. Richtmeyer v. Remsen, 38 N. Y. 206.

"Assuming that the cause of action set forth in this complaint, being statutory, is sui generis, the Congress has not prescribed whether said cause of action may be assigned or not. In the absence of such permission or prohibition, the question of assignability of rights conferred by statutes is to be governed by the general principles regulating that quality in choses in action in general. The general rule was laid down in Meech v. Stoner, 19 N. Y. 26, when Comstock, J., said, in speaking of the right to assign a claim under the statute for money lost at gambling:

" 'The assignability of things in action is now the rule, nonassignability the exception; and this exception is confined to wrong done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage.' 19 N. Y. 29.

"Therefore, if this be regarded merely as a statutory claim, it is of such a nature as to be assignable. The chose in action alleged to exist in the complaint is undoubtedly property in the largest sense of that word, the test whereof is that it could by appropriate process be reached by the creditors of the Imperial Film Exchange. I do not think it open to doubt that a judgment creditor of this plaintiff could by proceedings supplementary to execution procure the appropriation of this cause of action to himself in satisfaction of his judgment. This is enough to prove that it is property.

"The Supreme Court of the state by its order has, in obedience to the statute, preserved and handed on to Mr. Truesdale as trustee all the property of this plaintiff; that is, it has taken possession of everything that the plaintiff could have assigned and everything that the creditors of the plaintiff could hope to reach, either at law or in equity. This lawful action of the court having supervision of this corporation is the equivalent (at least) of an assignment.

in other districts that the cause of action is one sounding purely in tort and not assignable.[2] But such a cause of action, although assignable, may by assignment under some circumstances become champertous.[3]

§ 323. Right to Sell Plant to Sole Competitor in Business.

A concern which has been conducting its business at a loss may sell its property and plant to its sole competitor instead of scrapping it as junk or selling it piecemeal without violating the Sherman Anti-Trust Law, since the buyer will be required to deal fairly with the public under the law.[1]

"Because, therefore, the permanent receiver, Mr. Truesdale, is the equivalent of an assignee, because the cause of action is capable of assignment, and Mr. Truesdale has become the owner of it, I regard the legal death of the corporation as an immaterial element in this application."

For an exhaustive consideration of the authorities on the assignability of such causes of action, and especially in connection with champerty, see the opinion of Circuit Judge Rogers in Sampliner v. Motion Picture Patents Co., 255 Fed. 242.

See also United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 146 C. C. A. 532.

In Caillouet v. American Sugar Refining Co., 250 Fed. 639, it was stated that inasmuch as the Sherman Anti-Trust Law is silent as to the survival of the right of action for damages, and there is no other statute of the United States in point whether the action survives or not, must be determined by the principles of the common law, regardless of the law of Louisiana. It was there held that the cause of action sounded in tort.

2 In Bonvillain v. American Sugar Refining Co., 250 Fed. 641, it was held that the action to recover threefold damages for violation of the anti-trust law is one sounding in tort and not assignable.

3 While such a claim may be assignable, its assignability may amount to champerty. Sampliner v. Motion Picture Patents Co., 243 Fed. 277; also on appeal in 255 Fed. 242, 277; see, also, General Film Co. v. Sampliner, 252 Fed. 443, 164 C. C. A. 367, to same effect.

1 American Press Assn. v. United States, 245 Fed. 91, 157 C. C. A. 387.

Minority shareholders of company owning copper mining property can not attack a sale of its property to defendant on the ground that the defendant is attempting to acquire a monopoly of copper mining business in violation of Sherman Anti-Trust Act. Geddes v. Anaconda Copper Mining Co., 245 Fed. 225, 157 C. C. A. 417.

§ 324. Circumstances When Receiver Appointed Under State Anti-Trust Laws.

The same general principles appear to be applied by state courts in proceedings under state statutes prohibiting monopolies. The power of the court to appoint a receiver for the purposes of enforcing the decree of the court is recognized. In a leading case on the subject from New Jersey,[1] the court, speaking through Chancellor McGill, said:

"I have not for a moment doubted the power of this court, where necessary to prevent the property of a defendant from use in the contrivance of devices to mislead and deceive the court, and thereby defeat its injunction, to take control of that property, through the instrumentality of a receiver. Indeed, the power of the court to appoint such a receiver, when the appointment is necessary to effectuate its decree, has not been disputed. Such power is so essential at times to the efficient exercise of the court's jurisdiction that it has become too well established either to be seriously questioned or to need citation of authority to support it. Out of consideration for property rights it is sparingly and cautiously exercised; but when execution of a decree depends upon its exercise the court will most certainly use it to the full extent that the exigencies of the case demand. I perceive no necessity for the appointment of a receiver in this case as it now stands upon the assurance of counsel; but, in order that the court may be completely and particularly informed touching the obedience to its injunction, I will refer it to a master, to inquire whether the injunction is now being

1 Stockton v. Central R. Co. of New Jersey, 50 N. J. Eq. 489, 25 Atl. 942.

The above case was a proceeding by the attorney-general to break the anthracite coal combine between the Pennsylvania Railroad Company and the Reading Railroad Company. An injunction was granted and the question was referred to a master to ascertain whether the order was being obeyed. It was declared that the court had power to appoint a receiver for the purpose of preventing a violation of the order.

obeyed in letter and in spirit. He will be empowered to send for and examine the officers, agents, books and papers of the defendants. Further order in the premises will be reserved until the coming in of his report."

Where the corporation is being dissolved and its property distributed on account of its maintenance of a monopoly, the appointment of a receiver has been held to be proper.[2] This generally occurs in proceedings by the state for a forfeiture of the charter under statutes declaring a forfeiture in cases where a corporation is guilty of conducting an unlawful monopoly or combination in restraint of trade.[3] But where it is attempted to appoint

2 Cameron v. Havemeyer, 25 Abb. N. C. 438 (451), 12 N. Y. Supp. 126. This was one of the early sugar trusts. In this case the court had declared the trust agreement void as creating a vast monopoly, and so against public policy. The court says: "I can not, therefore, but think such a course is not only demanded by law but it is to the best interest of all concerned—for the public, because it will free the corporations composing the trust from their illegal relations with it . . . ; for the certificate holders, because it will preserve the property and facilitate the speedy settlement of the matter, either by a reorganization, if practicable, or a division of the property."

A receiver was appointed in Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. 530, in a case involving a combination in violation of the anti-trust laws.

In Gray v. De Castro, 23 App. N. C. 314, 8 N. Y. Supp. 237, a receiver was appointed of property which the trial court declared to be a combination known as the "sugar trust," and decreed that the charter of the defendant corporation be forfeited. The receiver, pending an appeal from that decree, sought to have an injunction restraining the trustees of the trust from selling or disposing of the property, but the defendants unequivocally denied any intentions of so disposing of the property and the court, in view of their financial responsibility and the fact that the appeal would be very shortly decided, refused to grant the injunction but with leave to renew the motion after decision of the appeal, or upon a new showing of any intention of disposing of the property.

3 The case of Waters-Pierce Oil Co. v. State (Tex.), 106 S. W. 326, was one in which a receiver was appointed at the instance of the state in a proceeding to forfeit the permit of a foreign corporation to do business on account of violation of the anti-trust laws of the state. An appeal was taken from the order appointing the receiver and, pending the hearing

a receiver in a proceeding by the state to forfeit the charter of a corporation for such unlawful conduct, it has been held that the appointment will not be made if the facts and circumstances do not bring the case within statutory provisions for such appointment.[4]

§ 325. Receiverships Where Corporation Is Engaged in an Illegal Business, Such as Racing, Gambling or Prize-Fighting.

Where a corporation is engaged in conducting horse races and racing stables, if a receiver is appointed, he may continue the business if it can be done without violating the law. If, however, it can not be conducted without violating the law, it will be the duty of the receiver to wind up the affairs of the corporation. But a stockholder who seeks the appointment of a receiver on the

of the appeal, a receiver was sought in the federal courts, but it was held that the latter court had no jurisdiction. See Palmer v. Texas, 212 U. S. 118, 53 L. Ed. 435, 29 Sup. Ct. 230.

4 In Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, a judgment of dissolution in quo warranto proceedings against a corporation had been entered because of an alleged monopoly in respect to the manufacture of sugar, and the trial court appointed a receiver over its property under a statute which authorized the appointment of receivers over corporate property in certain circumstances, but the Supreme Court held no authority to make such an appointment existed under the statutory provision relied on, which provided that a receiver may be appointed by the court in which an action is pending in various cases, and among others, "In the cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights," but there being other provisions specifically applying to forfeiture proceedings for such causes and which in fact was the basis for the quo warranto proceedings. The case was decided strictly upon the provisions of several different statutory provisions relative to allowing ordinarily the directors to act as trustees upon dissolution of a corporation, and of the specific statute which allowed quo warranto proceedings to be instituted. The court held in effect that provisions under which the receivership was sought to be maintained had reference to another proceeding separate and distinct from the judgment of dissolution in the quo warranto proceedings.

ground that the racing business conducted by the corporation is in violation of law will be denied relief if he knew of the character of the business when he became a stockholder.[1] A receiver will not be allowed to recover money lost by the corporation of which he is a receiver in wagering contracts in the absence of a statute allowing such a recovery, and this is especially true where the directors of the corporation were aware of the fact that their general manager was conducting such illegal operations upon the exchange.[2] In an Indiana case[3] a corporation was engaged in conducting prize-fights and maintained premises for that sole purpose, to which it induced the public to attend. The state sought to have the corporation dissolved as having forfeited its franchise and to have a receiver appointed to take charge of its property until the further order of the court. A receiver was appointed, which was assigned as error. The receivership was sustained on the ground that under the statute a receiver may be appointed when the corporation "has forfeited its corporate rights," or when, "in the discretion of the court or the judge thereof, in vacation, it may be necessary to secure ample justice to the parties." The court had issued a restraining order and the receivership was also said to be necessary to secure the full effect of the injunction. The court had issued an injunction restraining the future conducting of prize-fights in the premises. The court stated: "The receivership in this case is not necessarily for the segregation and sale of the property, but only to take charge of the same until further order of the court in aid of the injunction."

[1] Gordon v. Business Men's Racing Ass'n, 140 La. 674, 73 So. 768.

[2] F. M. Davies & Co. v. Porter, 248 Fed. 397, 160 C. C. A. 407.

[3] Columbian Athletic Club v. State, 143 Ind. 98, 52 Am. St. Rep. 407, 28 L. R. A. 727, 40 N. E. 914.

10. Receivers Over Foreign Corporations.

§ 326. Receivers Over Foreign Corporations for Special Purposes.

At the outset of this chapter,[1] it was shown that certain of the receiverships discussed in preceding chapters were created to take charge of and preserve property without regard to the character of the owner of the property. The property involved in these cases is special property and it is protected by the court *pendente lite* for a special purpose. Thus a receiver may be appointed in a mortgage foreclosure action, or in a judgment creditor's suit to set aside a fraudulent conveyance, or to reach equitable assets of a debtor without regard to the question as to whether or not the debtor is an individual or a corporation. Likewise it is immaterial in these cases that the debtor is a foreign corporation, if the court has jurisdiction otherwise of the property and the debtor.

In this connection it is of interest to note that a court may sometimes effect an indirect control over the property of a foreign corporation through action with reference to its capital stock. If the owner of the stock is subject to the jurisdiction of the court in any suit and it will serve the purposes of justice to do so the court may appoint a receiver to sell the stock and make an assignment thereof.[2]

Another instance that may be mentioned of the power of a court to deal with the property of a foreign corporation is in connection with the rights of the state to define the conditions upon which a foreign corporation may do business and own assets within its borders. When it has been decreed, in an action brought on behalf of the state, that a foreign corporation should be ousted

1 See § 293 supra.

2 Title Ins. & T. Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542. See, also, Tennessee Fertilizer Co. et al. v. Hand, 147 Ga. 588, 95 S. E. 81, dissenting opinion.

from the right to continue in business within the state, the court may, although the state has no beneficial interest in the property, appoint a receiver, in aid of the decree, to hold and manage the corporation's property until the purposes of the decree have been accomplished.[3]

It is to be observed that, though a court of equity may find an existing statute to support its appointment of a receiver over property of a foreign corporation in any of the circumstances above referred to, it is universally held that such a court may take such action solely by virtue of its inherent powers.

§ 327. Ancillary Corporation Receivers of Foreign Corporations.

In the case of a corporation owning property and doing business in a number of jurisdictions, one of which is its domiciliary, or creating, jurisdiction, when a situation arises which makes it proper or necessary to have a corporation receivership created to take charge of all of its property and affairs for the benefit of all of its creditors and stockholders, either temporarily, until some wrongful and harmful condition has been remedied, or permanently, to wind up its affairs by selling all of its assets and distributing the proceeds among its creditors and stockholders, the usual practice is to have a so-called primary receiver appointed in an action instituted in the domiciliary jurisdiction, and so-called ancillary receivers appointed in actions instituted in other jurisdictions.[1]

3 McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226. A foreclosure suit having been instituted against a foreign corporation that has lost its right to do business within the state, the court may appoint a receiver, or trustee, to defend for the company. Rowe v. Stevens, 25 Idaho 237, 137 Pac. 159.

1 The commencement of ancillary suits and appointment of a receiver therein in different jurisdictions is proper where the defendant is a corporation engaged in business and owning property in different districts and in different states; and, while the courts in which such ancillary suits are brought are entirely indepedent in fact of the court of primary juris-

The separate actions are strictly independent actions. Each court acts on its own jurisdiction. It is a jurisdiction that rests on the inherent power of the court.[2] The general purpose and effect of this procedure is stated, in a federal court opinion,[3] as follows:

"When the administration extends over assets located in several jurisdictions, it is often convenient to apply, in advance, for the assistance of the different courts; hence the practice has become common of applying for auxiliary or ancillary appointments. When such an application is made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state in the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver. Ordinarily, in comity to the proceeding of another court of coördinate jurisdiction, it will appoint an ancillary receiver, and assume administration in aid of the primary receiver. Trust Co. v. Miller, 33 N. J. Eq. 155. When it appoints a receiver, the officer becomes its officer, and is completely

diction, they will treat their jurisdiction as ancillary in the interests of uniformity of action and economical adminstration. Lewis v. American Naval Stores Co., 119 Fed. 391. Non-resident creditors of an insolvent foreign corporation on account of their interest therein, may maintain a suit for the appointment of an ancillary receiver of the assets of the corporation located within the state and for the sequestration of its assets for the benefit of all creditors. Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233.

2 Evans v. Pease, 21 R. I. 187, 42 Atl. 506.

3 Sands v. E. S. Greeley & Co., 88 Fed. 130, 132, 31 C. C. A. 424.

amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. 'Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state.' Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464. It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver. U. S. v. Coxe, 18 How. 105, 15 L. Ed. 299. It is eminently proper that claimants residing within its jurisdiction should be relieved from the expense and inconvenience of proving their claims in other jurisdictions, and that provision should be made for securing to them equality of distribution in respect to the whole assets of the corporation; but there is no hard and fast rule to control the discretion of the court in making such distribution of the assets as shall be just to all creditors, and ultimately effect a ratable distribution of all the property of the corporation. Buswell v. Supreme Sitting, 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; Baldwin v. Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739."

The principles above set forth are well established by the decisions and the practice is quite uniform.[4]

[4] Haydock v. Fisheries Co., 156 Fed. 988.

When a corporation has, in the primary proceedings, waived the defense that the applicant was only a general and not a judgment creditor, and the application was on behalf of all creditors, the corporation can not raise this defense against a similar applicant in an-

§ 328. Independent Corporation Receivers of Foreign Corporations.

"In the absence of statute a corporation can not be dissolved by judicial decree except in an action commenced in the name of the state which created it."[1] This quotation states a universally accepted rule, as far as the control of courts over foreign corporations is concerned. Sometimes it is stated to the effect that a court can not wind up the affairs of a foreign corporation nor interfere in its internal affairs. "Its corporate existence, derived from another sovereignty, may not be dissolved nor the internal workings of its purely corporate machinery controlled or regulated."[2] However courts of

cillary proceedings. Walker v. United States Light & Heating Co., 220 Fed. 393.

An ex parte ancillary appointment, without a complaint filed in the ancillary jurisdiction and on application of one who was not a party to the primary action is erroneous. There should be an independent bill. Greene v. Star Cash, etc., Co., 99 Fed. 656.

The primary appointment may be by a state court and the ancillary one by a federal court. Scaife v. Scammon Inv., etc., Assn., 71 Kan. 402, 80 Pac. 957; Shinney v. North American Savings, etc., Co., 97 Fed. 9.

An attorney of a foreign corporation, as a creditor, may apply for an ancillary receivership, though the corporation has not complied with a statutory requirement that it should appoint the commissioner of corporations as its attorney upon whom process might be served. Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 N. E 355.

Where a receiver in a proceeding for dissolution has been appointed in the court of the domicile of a foreign corporation, the court may appoint an ancillary receiver to distribute its assets located in the foreign jurisdiction. MacNabb v. Porter Air, etc., Co., 44 App. Div. 102, 60 N. Y. Supp. 694.

Where it is shown that the affairs of a corporation have been grossly mismanaged and that applications for a receiver have been made in two other states and also a federal court, the court will appoint a receiver to protect its assets in the state. Williams v United Wireless Telegraph Co., 131 N. Y. Supp. 41.

1 Low v. R. P. K. Pressed Metal Co., 91 Conn. 91, 99 Atl. 1.

2 McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226. See, also, Sidway v. Missouri L. & L. Stock Co., 101 Fed. 481; Federal Union Surety Co. v. Flemister, 95 Ark. 389, 130 S. W. 574; Dickey v. Southwestern Surety Ins. Co., 119 Ark. 12, Ann. Cas. 1917B, 634, 173 S. W. 398; Heitkamp v. American

equity do appoint "receivers of the assets" of foreign corporations located within their jurisdiction. Sometimes the right to do so is based upon statutory authorization—either a statute expressly relating to foreign corporations, or one relating to corporations, the term corporations being unmodified and construed to include foreign as well as domestic corporations.[3] It is generally

Pigment & Chemical Co., 158 Ill. App. 587; Edwards v. Schillinger, 245 Ill. 231, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895, 91 N. E. 1048 (affirming 148 Ill. App. 227); Stockley v. Thomas, 89 Md. 663, 43 Atl. 766; Hallenberg v. Greene, 66 App. Div. 590, 73 N. Y. Supp. 403.

Equity will not decree what it can not enforce and therefore will not appoint a receiver to examine the books of a foreign corporation when it can not empower its receiver to do so. State ex rel. Minnesota Mutual, etc., Co. v. Denton, 229 Mo. 187, 138 Am. St. Rep. 417, 129 S. W. 709.

Where there is no showing of insolvency and no receiver has been appointed over the corporation in the state of its domicile, a receiver should not be appointed over it at the instance of minority stockholders. Parks v. United States, etc., Corporation, 140 Fed. 160.

[3] In Holshouser Co. v. Gold Hill Copper Co., 138 N. C. 248, 70 L. R. A. 183, 50 S. E. 650, under the statutes of North Carolina a suit was commenced by creditors against a foreign corporation, owning property in the state and doing business therein, to have a receiver take charge of its assets and apply them under the orders of the court to the payment of its debts. It was alleged that the corporation had suspended its ordinary business for want of funds to carry it on and that numerous judgments and attachments had been docketed and levied on its property. The court regarded the assets as a trust fund for the payment of the debts of the corporation and allowed nonresident creditors to file their claims against the corporation.

Under the statute the courts of the state are authorized to appoint receivers to take charge of the property of foreign corporations located in the state, "at the instance of any stockholder, or creditor, when the directors or other officers of the corporation are jeopardizing the rights of stockholders or creditors by grossly mismanaging the business, or by committing acts ultra vires, or by wasting, misusing or misapplying the property or funds of the corporation." Van Vleet v. Evangeline Oil Co., 129 La. 406, 56 So. 343.

The following are also instances of appointing receivers over foreign corporations under the express provisions of statutes. Rittle v. J. L. Owens Mfg. Co., 136 Minn. 93, 161 N. W. 401; MacNabb v. Porter Air-Lighter Co., 44 App. Div. 102, 60 N. Y. Supp. 694; Swing v. Bentley & Gerwig Furniture Co., 45 W. Va. 283, 31 S. E. 925.

recognized, however, that courts of equity have inherent power to take such action. This view of the matter is expressed in a case decided by the Supreme Court of Errors of Connecticut.[4] At the instance of certain stockholders a receiver was appointed by a Connecticut court, to take charge of the local assets of a New York corporation. Proceedings went to the point of a sale of practically all of the assets. In the meantime a domestic receiver had been appointed by a New York court. This receiver intervened in the Connecticut court; asked to have all of the proceedings theretofore taken annulled, as being void for want of jurisdiction, and himself appointed as ancillary receiver. Affirming an order sustaining a demurrer to this petition the Supreme Court, speaking through Mr. Justice Beach, said:

"Courts of equity have, in the absence of statutory authority, been unwilling to appoint receivers of corporations in liquidation proceedings at the instance of private suitors, lest they should by indirection accomplish all the practical consequences of a technical dissolution of the corporation. Penna. Steel Co. v. N. Y. City R. R. Co.,

A resident stockholder of a foreign corporation, who claims that a transfer of corporate assets has been fraudulent, may maintain an action for a receiver and other equitable relief. Whitman v. Holmes Pub. Co., 33 Misc. Rep. 47, 68 N. Y. Supp. 167.

Where there is a sufficient petition for the purpose, a court may appoint a receiver of property within the District of Columbia belonging to a foreign corporation, although the corporation may not be doing business therein at the time, and to that extent proceed upon the substituted notice provided by statute in analogous cases. Mitchell Mining Co. v. Emig, 35 App. D. C. 527.

The court is allowed to exercise its discretion as to the manner of protecting local creditors in their rights, according to the circumstances of each individual case. It may retain the funds until the proportionate shares of the local creditors have been ascertained and these shares decreed and paid out of the local assets before transferring the funds to the domiciliary administration or their rights protected in some other manner best suited to the circumstances of the individual case. Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233.

4 Low v. R. P. K. Pressed Metal Co., 91 Conn. 91, 99 Atl. 1.

198 Fed. 721, 117 C. C. A. 503. As a result of this judicial caution expressions may be found in some text-books and decisions questioning whether equity has any jurisdiction at all to appoint receivers over corporations for the purpose of administering the corporate assets, in actions commenced by private suitors, unless specially authorized by statute to wind up the business of the corporation and terminate its corporate existence. See Penna. Steel Co. v. N. Y. City R. R. Co., supra, where the development of the jurisdiction of equity to appoint receivers of corporations is outlined. These authorities do not lay down the broad generalization that equity has no inherent jurisdiction over the subject-matter. On the contrary, courts of equity frequently appoint receivers in liquidation over corporations without statutory authority. As pointed out by Judge Noyes in Penna. Steel Co. v. N. Y. City R. R. Co. supra, exceptions to the so-called rule have been evolved which are in some aspects as broad as the rule itself. The particular exception to which he refers in that opinion is in the case of creditors' bills. Another exception is in the case of foreclosures of corporate mortgages.[5] Still another, which arises out of the necessities of the case, is in the appointment of receivers of the property of foreign corporations carrying on business within the forum. In the latter class of cases the local court is necessarily without authority, statutory or otherwise, to dissolve the corporation; and since the statutes of the forum in regard to corporate receiverships generally relate to domestic corporations only, courts of equity, in dealing with receiverships over foreign corporations, have in point of fact exercised their inherent powers as courts of chancery.

"The plaintiff relies upon authorities holding that because the courts of one state can not decree the dissolu-

[5] See § 309, note 9, supra, for a quotation from Judge Noyes opinion on this subject.

tion of corporations created by another state, they will not entertain an original action in the nature of a stockholders' suit to wind up the business of a foreign corporation. Republic Mountain Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; Sidway v. Missouri Land & Live Stock Co. (C. C.), 101 Fed. 481; Maguire v. Mtg. Co. of America et al., 203 Fed. 858, 122 C. C. A. 83. Here again may be found expressions tending to support the plaintiff's claim that the courts of one state are absolutely without original jurisdiction to wind up the local business of a foreign corporation at the instance of stockholders; but the common practice of appointing so-called ancillary receivers in such cases demonstrates that courts do have jurisdiction over the subject-matter of winding up the local business of foreign corporations in receivership proceedings, whether in a stockholders' suit or upon a creditors' bill. It would be an intolerable proposition to assert that any local business was beyond the original equity jurisdiction of our courts merely because it was conducted by a foreign corporation. The principle that courts will not interfere in what are vaguely called the internal affairs of a foreign corporation must yield to the larger and more important principle that all who choose to engage in business within the state, whether under a corporate franchise or not, necessarily subject such business to the jurisdiction of the courts as fully as if it were conducted by our own citizens or corporations. It is, however, unnecessary to argue the point further, for the plaintiff himself, by applying to be appointed as ancillary receiver, admits that the Superior Court for Fairfield county has power to appoint an ancillary receiver, of the local business of this New York corporation for the purpose of winding up the local business; and his contention that it has power to appoint an ancillary receiver, but not an original receiver for that purpose, or in other words, that it had no jurisdiction to appoint any receiver at all for that purpose

until the courts of New York had first appointed a general receiver in winding up proceedings at the domicile of the corporation, is manifestly inconsistent with the independent sovereignty of the state of Connecticut. It may be the better practice, as it is the usual practice, for the domiciliary receiver to be first appointed; but it is self-evident that the jurisdiction of a Connecticut court to wind up a Connecticut business in receivership proceedings must be derived wholly and exclusively from the state of Connecticut."

§ 329. General Circumstances and Conditions for Appointment.

Although corporate property taken over by a corporation receiver must be held for the benefit of all parties interested therein, the power of the court to take control of the local assets of a foreign corporation is usually invoked for the special benefit of local creditors.[1] A receiver of a foreign corporation will be appointed at the instance of a creditor or a stockholder and on much the same grounds, or under the same circumstances, as a receiver of a domestic corporation. There must be a showing of insolvency, mismanagement, official neglect, and the like, sufficiently serious to have caused injury or to threaten injury to those on whose behalf the receivership is requested.[2]

1 Scattergood v. American Pipe, etc., Co., 247 Fed. 712; Irwin v. Granite State, etc., Assn., 56 N. J. Eq. 244, 38 Atl. 680; Hallenberg v. Greene, 66 App. Div. 590, 73 N. Y. Supp. 403. Although a receiver of a foreign corporation is appointed at the instance of a nonresident stockholder, the property will be held until the claims of domestic creditors are satisfied. Walter v. F. E. McAlister Co., 21 Misc. Rep. 747, 48 N. Y. Supp. 26.

2 Shinney v. North American Savings, Loan & Building Co., 97 Fed. 9; Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432, 19 Sup. Ct. 165; Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, Ann. Cas. 1912A, 897, 70 S. E. 820; Reusens v. Manufacturing & Selling Co. of America, 99 App. Div. 214, 90 N. Y. Supp. 1010; Walter v. F. E. McAlister, 21 Misc. Rep. 747, 27 Civ. Proc. R. 33, 48 N. Y. Supp. 26; Pacific Coast Coal Co. v. Esary, 85 Wash. 448, 148 Pac. 579; Scat-

As in other cases, such a receivership will not be created when there is a legal or less drastic equitable

tergood v. American Pipe, etc., Co., 247 Fed. 712.

Where a foreign corporation has its principal place of business within the state, it is not immune from the supervising control of the courts of equity of that state. State ex rel. Wurdeman v. Reynolds, 275 Mo. 113, 204 S. W. 1093.

Under a proper showing courts of equity of the District of Columbia may appoint receivers of property within the district belonging to foreign corporations, notwithstanding acts of Congress forbidding them to appoint receivers of foreign corporations. Barley v. Gittings, 15 App. D. C. 427.

On a proper showing a receiver of a foreign corporation may be appointed when it appears that its domiciliary affairs have been wound up and the domiciliary receiver discharged. Culver Lumber & Mfg. Co. v. Culver, 81 Ark. 102, 118 Am. St. Rep. 17, 99 S. W. 391; Holbrook v. Ford, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091.

The appointment of a receiver of a foreign corporation at the instance of a creditor and with the consent of the corporation, can not be collaterally attacked. Horton v. Thomas McNally Co., 155 App. Div. 322, 140 N. Y. Supp. 357.

An action looking to the appointment of a receiver of a foreign corporation can not be maintained on the basis of a cause of action that arose against the corporation out of the state. Fenkart v. Bodemann, 64 Misc. Rep. 143, 118 N. Y. Supp. 1.

Certain statutes giving to the Attorney General or stockholders the right to have receivers of foreign corporations appointed are not exclusive so as to deny to a creditor the right to have a receiver appointed over the local assets of a foreign corporation. Popper v. Supreme Council, etc., 61 App. Div. 405, 70 N. Y. Supp. 637.

Where a corporation is organized under one state but its officers, who are in control of its assets, are residents of another state, and the corporation is in process of dissolution in the state of its creation, but the officers, who are insolvent, have property belonging to it in the state in which they reside, the court of the latter state will at the instance of stockholders in its own jurisdiction appoint a receiver to preserve the property since the stockholders are remediless in the state of the corporation's legal residence and the property is within the jurisdiction of the court. Redmond v. Hoge, 3 Hun (N. Y.) 171.

And under statutes so permitting the court may appoint a receiver over the property belonging to a foreign corporation at the instance of its judgment creditors for the purpose of preserving it for the benefit of stockholders and other creditors. Murray v. Vanderbilt, 39 Barb. (N. Y.) 140; De Bemer v. Drew, 57 Barb. (N. Y.) 438.

But the court will not appoint a receiver for a foreign corporation where it has no property in the state where the appointment is

remedy available to the applicant nor on an insufficient showing of facts. Wrongs that may be corrected through the corporation will not be remedies through a receivership. Facts, not conclusions, must be pleaded, and the pleading must be positive and explicit.[3] A receivership will not be conducted for the mere purpose of finding whether a receiver can conduct it more profitably than has the corporation itself,[4] nor as a real estate promotion.[5] A receiver will not be appointed over the local assets of a foreign corporation that has been dissolved and against which an action can not be maintained.[6]

sought. Such a receiver does not take title to debts due from nonresidents even though they may be payable within the state. Holbrook v. Ford, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091. A receiver of a foreign corporation will not be appointed where his appointment would serve no useful purpose and would in fact be against the interests of citizens of the forum. Thornley v. Walsh Co., 200 Mass. 179, 86 N. E. 355; Borton v. Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597.

If, however, a judgment creditor has obtained his judgment in the state in which the corporation was created and also obtained a receiver in that jurisdiction in aid of his judgment but the corporation has transferred its property to a corporation in another state without any consideration other than shares of stock in the latter corporation, the courts of the state of the latter corporation will appoint a receiver in aid of the judgment. Barclay v. Quicksilver Min. Co., 9 Abb. Prac. N. S. (N. Y.) 283.

The provisions of R. L. 1905, § 3173, authorizing the appointment of a receiver of "the stock, property, things in action and effects" of a company applies to property in the state belonging to a foreign corporation. Rittle v. J. L. Owens Mfg. Co., 136 Minn. 93 161 N. W. 401.

3 Parks v. United States Bankers' Corp., 140 Fed. 160; North American Land & Timber Co. v. Watkins, 109 Fed. 101, 48 C. C. A. 254; Forsell v. Pittsburg & Montana Copper Co., 42 Mont. 412, 113 Pac. 479; Phillip v. Sonora Copper Co., 90 App. Div. 140, 86 N. Y. Supp. 200.

4 Leary v. Columbia River & P. S. Nav. Co., 82 Fed. 775.

5 American Tribune New Colony Co. v. Schuler, 34 Tex. Civ. App. 560, 79 S. W. 370; North American Land, etc., Co. v. Watkins, 109 Fed. 101, 48 C. C. A. 254.

6 Fenton v. Lumberman's Bank, 1 Clarke Ch. (N. Y.) 286; Droppelman v. Illinois Surety Co., 95 Wash. 476, L. R. A. 1917D, 1032, 164 Pac. 70.

Where a stockholder joins in a petition at the domicile of a corporation for its dissolution and its dissolution is decreed and its directors become trustees to wind up its affairs, he can not afterwards

§ 330. When Receivership in Ancillary Jurisdiction May Be Considered a Primary One.

Where a corporation has had its principal place of business and most of its property in a jurisdiction other than that in which it was created a receivership created in the former jurisdiction, with the consent of the corporation, may be treated as the primary receivership, for the purpose of winding up its affairs, and all others may be regarded as ancillary. In such a case it may be considered that the fact that the proceeding was not begun in the domiciliary jurisdiction was a defense that the corporation could and did waive.[1] The assumption by a court of jurisdictional authority over all of the assets, tangible and intangible, of a foreign corporation within the jurisdiction of the court, coupled with an actual possession, through its receiver of all the tangible assets within such jurisdiction, and so far as appears, all such assets existing anywhere, carries with it the right to control an intangible right of action of the company for a diversion of a trust fund, and excludes the right of a receiver subsequently appointed in the state of incorporation to maintain a suit in the same cause of action.[2]

Where a foreign corporation carries on its principal business in another state where a large number of subsidiary corporations which it owned and controlled were chartered and their plants located, and becomes financially embarrassed, a receiver may be appointed by the Federal Court for it in the state where it so conducts its principal business upon the petition of a stockholder and an answer of the corporation itself admitting the receiv-

have a receiver appointed in another state even though the property of the corporation is in the latter state. Black v. Sullivan Timber Co., 147 Ala. 327, 40 So. 667.

1 Lewis v. American Naval Stores Co., 119 Fed. 391; Walker v. United States Light & Heating Co., 220 Fed. 393.

2 Lively v. Picton, 218 Fed. 401, citing Porter v. Sabin, 149 U. S. at page 480, 13 Sup. Ct. 1008, 37 L. Ed. 815; Palmer v. Texas, 212 U. S. at page 129, 29 Sup. Ct. 230, 53 L. Ed. 435.

ership facts set forth in the petition. Although insolvency was not alleged, temporary embarrassments through inability to borrow money or sell its securities under the existing financial market conditions was set forth together with the fact that the corporation was interested in numerous public utility corporations which should be maintained as going concerns.[3]

3 Scattergood v. Am. Pipe & Const. Co., 249 Fed. 23.

In the above case the court said: "Under facts like the foregoing, does a District Court in Pennsylvania have power to appoint a receiver for a foreign corporation? In our opinion the answer should be yes; the reason being that the law of the state as interpreted by its highest tribunal has given that power to the local courts, and therefore according to the established rule a similar power may be exercised by the Federal courts within the state. Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; and citations in 3 Rose's Notes (Rev. Ed.) 399. Among the Pennsylvania cases may be mentioned Bank v. Construction Co., 242 Pa. 269, 89 Atl. 76, where the state courts exercised jurisdiction over a New Jersey corporation 'with a principal office in Philadelphia, engaged largely in building railroads and in public contracts,' settled its affairs, and wound up its business; and Blum Bros. v. Girard Bank, 248 Pa. 148, 93 Atl. 940, Ann. Cas. 1916D, 609, where the common pleas court appointed receivers for a New Jersey corporation doing a mercantile business in Philadelphia, although the bill averred that the corporation was solvent, being in possession of assets far in excess of its liabilities, but was temporarily embarrassed by reason of a stringent money market and other circumstances. In the latter case the Supreme Court maintains the right to appoint receivers in the case of embarrassed corporations (making no distinction between domestic and foreign), . . .

"We think these references are enough to show that a Pennsylvania court (and therefore a Federal court sitting within the state) may entertain a bill to appoint receivers for a corporation financially embarrassed; and, if this be true, the District Court had jurisdiction of the subject-matter of the present bill as well as of the defendant's person. Having thus complete jurisdiction over the cause, it had authority to decide all questions arising therein, and its rulings can be questioned only by those properly parties to the dispute. Among such parties we do not think the appellant is to be reckoned. The sole ground for his effort to interfere is that he is a stockholder; but, as the company has voluntarily submitted its person and the subject-matter of the suit to a tribunal having jurisdiction in both respects, we do not see by what right a single stockholder relying merely on that character can attack such valid and voluntary action, and can success-

§ 331. Necessity for the Existence of Property in the Ancillary Jurisdiction.

One of the general rules of receiverships is that the receivership must be effective for some purpose. In order for it to be useful there must be property of some character upon which it can act. Hence, where a foreign corporation has no property within the state the court will not in proceedings supplementary to execution appoint a receiver and require the corporation to convey its property to him.[1] It is not necessary that the foreign corporation be doing business in the state provided that it has property therein.[2] Where a corporation is a subsidiary of a foreign corporation and has a claim against it

fully undertake to conduct the proceedings as if he and not the company were the real defendant. For example, much of his argument objects to the bill as if it had been before the court on demurrer.

"We do not think our conclusion is in real conflict with Maguire v. Mortgage Co., 203 Fed. 858, 122 C. C. A. 83, where the Court of Appeals for the Second Circuit recognizes that if state statutes 'provide for the liquidation of the affairs of corporations through receivers . . . the courts within the appropriate jurisdictions may enforce them.' But no such statute was there presented, and this we think sufficiently distinguishes the case now before us."

The voluntary appearance and answer of a company waives the question of jurisdiction of the person. Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. Ed. 98, 14 Sup. Ct. 286. See also Lewis v. American Naval Stores Co., 119 Fed. 391.

1 Bennett v. Valley Min. Co., 142 Iowa 53, 120 N. W. 654.

Where there is no property in the state a federal court will not appoint a receiver over a foreign corporation at the instance of two directors who also are creditors, and notwithstanding that the other directors consent to the making of the appointment. Kirwin v. Boston, etc., Min. Co., 171 Fed. 900. See, also, Bluefields S. S. Co. v. Steele, 184 Fed. 584, 106 C. C. A. 564.

Where there are no debts owing by a corporation organized under the laws of Maine, a federal court of New York will not appoint a receiver at the instance of stockholders seeking its dissolution. Parks v. United States, etc., Corp., 140 Fed. 160.

2 A receiver in supplementary proceedings may be appointed in New York over property in the state although the corporation has no agent in the state and is not engaged in doing business therein. Logan v. McCall Pub. Co., 140 N. Y. 447, 35 N. E. 655.

which it will not enforce for the benefit of resident creditors, the court may appoint a receiver to do so.[3]

§ 332. Federal Courts Not Affected by Diversity Citizenship Rule.

The appointment of an ancillary receiver by a federal court in a case in which it already has a primary receivership is in aid of the primary receivership and is not dependent upon the existence of the same jurisdictional facts as the original proceeding. Hence, the right of a federal court to appoint an ancillary receiver to a receivership in another district is not dependent upon the diversity of citizenship of the parties in the ancillary suit.[1]

§ 333. General Status and Rights of the Primary Receiver in Another Jurisdiction.

An ordinary chancery receiver is a mere custodian for the court and has no estate in the property and for that reason comity does not authorize such a receiver to sue in a foreign jurisdiction.[1] But although such a receiver

3 Where a corporation which is a subsidiary of another corporation in a foreign jurisdiction, has a claim against the primary corporation but refuses to enforce it, the court will at the instance of a minority stockholder in the subsidiary company, appoint a receiver over it for the purpose of commencing suit and the receiver may thereupon have an ancillary receiver appointed to sue the foreign corporation in its domicile. Bluefields S. S. Co. v. Steele, 192 Fed. 23, 112 C. C. A. 411.

1 Bluefields S. S. Co. v. Steele, 184 Fed. 584, 106 C. C. A. 564.

1 Great Western Min., etc., Co. v. Harris, 198 U. S. 561, 49 L. Ed. 1163, 25 Sup. Ct. 770.

See, also, the leading case of Booth v. Clark, 17 How. (U. S.) 322, 15 L. Ed. 164.

An auxiliary receiver of a foreign corporation is a mere custodian of the property to preserve the same, and has only the power conferred by the order appointing. Buckley v. Harrison, 10 Misc. Rep. 683, 31 N. Y. Supp. 999.

"Comity is not a rule of law, but one of practice, convenience and expediency. It persuades, but it does not command." Bluefields S. S. Co. v. Steele, 184 Fed. 584, 106 C. C. A. 564, citing Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 44 L. Ed. 856, 20 Sup. Ct. 708.

has no absolute right to sue outside of his own jurisdiction he frequently is permitted to do so.[2]

A receiver who is in effect an assignee of a foreign insolvent corporation in the state wherein the corporation has its domicile has a standing to intervene in a foreign jurisdiction and be heard on a proceeding for the appointment of a receiver of the property of the corporation in such state.[3] Where the primary receiver is a quasi assignee he stands in the position of the corporation itself in respect to its property and will be permitted to sue in other jurisdictions and his right to do so is protected by the full faith and credit clause of the federal constitution.[4] Of course, if the owner of the property has transferred the title to the property to the receiver, he has the same rights as the owner to sue in a foreign jurisdiction.[5]

2 Barley v. Gittings, 15 App. D. C. 427; Metzner v. Bauer, 98 Ind. 425; McAlpin v. Jones, 10 La. Ann. 552; Howarth v. Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; Comstock v. Frederickson, 51 Minn. 350, 53 N. W. 713; Falk v. James, 49 N. J. Eq. 484, 23 Atl. 813; Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; Bagby v. Atlantic M. & O. R. Co., 86 Pa. St. 291; Hazlett v. Woodhead, 28 R. I. 452, 67 Atl. 736, 737; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; Gilman v. Ketcham, 84 Wis. 60, 36 Am. St. Rep. 899, 23 L. R. A. 52, 54 N. W. 395; Kirtley v. Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738.

In Bluefields S. S. Co. v. Steele, 184 Fed. 584, 106 C. C. A. 564, the court said: "Where a court, having jurisdiction of the person of a defendant corporation, has determined by its decree to take possession of that corporation's property for the purpose of winding up its affairs, and has appointed a receiver to act as its officer in that behalf, such receiver has often been permitted, in cases not conflicting with local policy or the rights of local creditors, to prosecute suits in other jurisdictions for the recovery of debts or assets. Kirtley v. Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; Hurd v. Elizabeth, 41 N. J. L. 1; Mabon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805; Lewis v. Clark, 129 Fed. 570, 64 C. C. A. 138; Converse v. Mears (C. C.), 162 Fed. 767."

3 Buswell v. Supreme Sitting of Order of the Iron Hall, 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065.

4 Converse v. Hamilton, 224 U. S. 243, Ann. Cas. 1913D, 1292, 56 L. Ed. 749, 32 Sup. Ct. 415.

5 Iglehart v. Bierce, 36 Ill. 133; Graydon v. Church, 7 Mich. 36.

The exemption from being sued out of the district of its domicile provided by the statute, is a personal privilege which may be waived and which is waived by pleading to the merits. And this is true regardless of the fact that neither the plaintiff nor the defendant resides in the judicial district in which the suit is brought.[6]

An ancillary receiver will not be appointed where the foreign receiver is under the statutes of his own jurisdiction vested with the title to all of the property of the corporation.[7]

§ 334. General Powers and Purposes of the Ancillary Receivership.

The courts of a state proceed upon the theory that they will do justice to its own citizens so far as it can be done by administering upon property within its own jurisdiction and will yield to the doctrine of comity only to the extent that it can be done without impairing the remedies or lessening the securities which its own laws give to its own citizens.[1]

An ancillary receiver should not transmit the assets in his jurisdiction to the primary receiver until provisions have been made regarding the claims of creditors in the ancillary proceeding.[2]

6 Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. Ed. 98, 14 Sup. Ct. 286.

Where the defendant company in a suit in which the appointment of a receiver is sought in a district which is not the residence of either the plaintiff or defendant, appears and moves to vacate the appointment upon the ground of the wrong district and also upon grounds going to the substance and merits of the bill, it waives the point that the court had no jurisdiction of its person. Bluefields S. S. Co. v. Steele, 184 Fed. 584, 106 C. C. A. 564.

7 Chicago Title, etc., Co. v. German Ins. Co., 119 App. Div. 347, 104 N. Y. Supp. 253.

1 Willitts v. Waite, 25 N. Y. 577, 587.

2 Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 N. E. 355.

The ancillary court may protect its local creditors in respect to the final distribution by requiring the representation of the domiciliary administration to secure them by a bond before allowing the local

Where an application in an ancillary receivership for a distribution of the fund in court might affect the ultimate orderly administration and just distribution of the fund, the court should refer the matter to the court of primary jurisdiction. In other words, to secure an orderly and just distribution, claims and assets are both referred to the primary court for the purpose of distribution. But from this it does not follow that the ancillary court should not entertain a petition by a creditor within its jurisdiction seeking merely the allowance and adjudication of his claims. Where the jurisdiction is exercised in the ancillary proceedings to aid in preserving the assets in order that the ultimate purpose disclosed by the bill may be accomplished, those claiming to be creditors and who are thus deprived of the right to proceed in the usual way ought to have some benefit of the proceedings, and the right to appear in the district of their residence and establish their status as creditors should be accorded them unless likely to cause confusion or to embarrass the orderly and harmonious administration or distribution of the estate. The determination of the single question whether the foreign corporation is indebted to

assets to be withdrawn from the state. People v. Granite State Provident Assn., 161 N. Y. 492, 55 N. E. 1053.

Courts of the local or ancillary jurisdiction should before allowing a domiciliary receiver or other representative of such corporation to withdraw the funds sequestrated there protect the resident domestic creditors out of such funds or otherwise to the extent of their distributive shares in the whole estate of the insolvent corporation. Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233.

In Way v. J. H. Way & Sons Co., 216 Fed. 719, it was stated that as a general rule ancillary receivership proceedings should be compared to conserving the property of the corporation within the jurisdiction of the court and transmitting the moneys into which it may be converted for distribution in the original or primary proceeding. And where the corporation is a purely private one and has no public duties to perform and no public functions to serve, the interference of a court with its affairs should be confined, as far as possible, to the strictly legal purposes of receiverships, leaving its business affairs to those most concerned.

a claimant involves no considerations affecting the present administration of the property and especially so where no claim for lien or preference is made.[3]

In Massachusetts the rule is laid down that in an ancillary receivership preference will not be given to domestic creditors unless it appears that there is a danger of discrimination against them in the forum of the principal receivership, and then only so far as is necessary to counteract such discrimination. And the court in order to secure equality of distribution among all creditors, may allow foreign creditors to prove their claims in the same way as creditors residing in Massachusetts were allowed to prove their claims in the principal proceedings.[4]

It must be noted, however, that the court appointing an ancillary receivership in accordance with the general rule assumes full and exclusive jurisdiction over all the property of the receivership within the limits of its jurisdiction.[5]

The right of an ancillary receiver to take possession of the property of the corporation which is the subject of the receivership is derived from the court which appoints him and is not a result of mere comity. He acts in respect to such property in accordance with the directions of the court.[6]

And the courts of a foreign state are not permitted to remove from another state property belonging to a

3 Pfahler v. McCrum-Howell Co., 197 Fed. 684.

4 Thornley v. J. C. Walsh Co., 207 Mass. 62, 92 N. E. 1007.

5 Reynolds v. Stockton, 140 U. S. 254, 35 L. Ed. 464, 11 Sup. Ct. 773.

6 Sands v. E. S. Greeley & Co., 88 Fed. 130, 31 C. C. A. 424.

The jurisdiction of a state court of the property of a foreign corporation attaches as soon as a receiver of the property has been appointed and has duly qualified, even though he has not taken actual possession of the property, and in such circumstances a federal court can not interfere. Palmer v. Texas, 212 U. S. 118, 53 L. Ed. 435, 29 Sup. Ct. 230. See also Farmers' Loan & T. Co. v. Lake Street Electric Ry. Co., 177 U. S. 51, 44 L. Ed. 667, 20 Sup. Ct. 564.

debtor without the approval, directly or indirectly, of the courts of such state.[7]

§ 335. Exclusive Character of Jurisdiction of Primary Receivership Created in Place Outside of Domiciliary.

As has been stated before,[1] the courts of a state or jurisdiction wherein a foreign corporation is doing business or owns property may, under certain circumstances, place a receiver over its property. Such a receivership may be frequently appointed under statutes which provide that where a foreign corporation doing business within the state becomes unable to pay its obligations in due course of business or for other reasons is in such a condition that its assets should be preserved for the benefit of its creditors, the court may appoint a receiver for such purpose.[2] In such circumstances it sometimes happens that several bills will be filed for receiverships, one in a state court and another in a federal court, and the question arises which court has acquired jurisdiction in the matter. The rule governing cases of this character was stated by Mr. Justice Day in an important case,[3] as follows:

"If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well-settled principles, often recognized and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The federal and state courts exercise jurisdiction within the same terri-

7 Great Western Min., etc., Co. v. Harris, 198 U. S. 561, 49 L. Ed. 1163, 25 Sup. Ct. 770; Fowler v. Osgood, 141 Fed. 20, 72 C. C. A. 270, 4 L. R. A. (N. S.) 824; Morrill v. American, etc., Bond Co., 151 Fed. 305.

1 See § 327, supra.

2 See the case of Holshouser Co. v. Gold Hill Copper Co., 138 N. C. 248, 70 L. R. A. 183, 50 S. E. 650. Also see section 328 for other cases under statutory authorization.

3 Palmer v. Texas, 212 U. S. 118, 53 L. Ed. 435, 29 Sup. Ct. 230.

tory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty. . . . If the courts of Texas had required jurisdiction over this property and the subsequent procedure amounted to simply suspending the order appointing the receiver, then we are of opinion that the federal court had no right to intervene. If it is established that the state court had acquired jurisdiction over this property before the application in the federal court was made, the court of the state had the right to determine for itself, while continuing to lawfully exercise its prior jurisdiction, how far it would permit any other court to interfere with such possession and jurisdiction."

§ 336. What Showing Is Necessary to Obtain Appointment of an Ancillary Receiver.

The decree of the court of primary jurisdiction making the appointment of the receiver is evidence in other jurisdiction of the receivership facts contained therein but the local jurisdiction has the right to determine whether these facts require the appointment of a receiver and the receiver appointed by it, if one be appointed, is its officer and subject to its orders.[1]

While the judgments and decrees of other courts are entitled to full faith and credit, it is essential in order to bring the question of whether such full faith and credit

[1] Sands v. E. S. Greeley & Co., 88 Fed. 130, 31 C. C. A. 424; Rust v. United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16.

has been accredited, to show in the pleadings before the court what the nature of the judgment and decree of such court was by way of proper averments showing the justification of the appointment of an ancillary receiver.[2]

In a leading case in the federal court,[3] in speaking of the filing of a bill for the appointment of an ancillary receiver, and the mode of procedure, Judge Lanning said: "Where the receiver has no such character, or where because of local policy or the rights of local creditors the rule permitting a receiver to sue in a jurisdiction other than the one in which he was appointed is not deemed applicable, a bill may be filed for the appointment of an ancillary receiver, and, on a proper showing, such a receiver will be appointed. In any such case the jurisdiction is analogous to that of a court to appoint a receiver on a proper bill in a suit ancillary to another suit or action pending in the same court. In a suit strictly ancillary to another suit pending in the same court, no subpœna *ad respondendum* is necessary. The parties are already in court. The service of a rule or of notice is all that is required to enable the court to proceed with the ancillary suit. So, where a defendant has been regularly brought into court in an original suit, and a receiver of his property has been appointed in that suit, another court, whose jurisdiction is invoked in aid of the original receivership, may proceed on the service of a rule or notice merely. Such service may be made on the defendant wherever he is found, or it may be published, as is the practice in the United States Circuit Court for the District of Maine. See preliminary statement in Conklin v. U. S. Shipbuilding Co. (C. C.), 123 Fed. 913, and Haydock v. Fisheries Co. (C. C.), 156 Fed. 988. Having been once brought into a court which has regularly acquired jurisdiction of

2 Bluefields S. S. Co. v. Steele, 184 Fed. 584, 106 C. C. A. 564.

3 Bluefields S. S. Co. v. Steele, 184 Fed. 584, 106 C. C. A. 564.

his person in an original suit, and having there had a decree entered against him appointing a receiver to take possession of all his property wherever situate, the court in which the appointment of an ancillary receiver is sought will take jurisdiction of his person upon the service of a rule or notice, precisely as if the original suit were pending in that court. Otherwise, the prevailing practice in the federal courts of appointing ancillary receivers in railroad and other cases of insolvent corporations whose property extends through or exists in different judicial districts and states is wrong. While an ancillary proceeding of the kind here considered will be controlled by the court before which it is prosecuted, and in that sense is an independent proceeding, its ultimate object is to aid the purpose of the original suit, and in that sense it is ancillary. Jurisdiction in such an ancillary suit therefore no more depends on diversity of citizenship than it does in a suit ancillary to an original suit pending in the same court. It depends alone on the existence of an original suit in one court which may properly be aided by proceedings in another court. . . . But the court whose aid is invoked must alone determine whether the case is a proper one for the appointment of an ancillary receiver. It can not act intelligently, and therefore can not tell what, in comity, it ought to do unless reasonable information has been communicated to it concerning the object which it is requested to aid. It follows that a bill seeking the appointment of an ancillary receiver should disclose the nature of the proceeding in which the receiver was appointed in the court of primary jurisdiction."

11. *Administration of the Estate.*

a. *Relation of Receiver and Officers of the Corporation to the Estate.*

§ 337. General Relation of the Receiver to the Estate and Court.

As pointed out in an earlier portion of this chapter,[1] the distinctive characteristic of a receiver appointed over the affairs of a corporation is that he takes possession of all the assets of the corporation to preserve and administer them for the benefit of all persons who may be interested therein. It is manifest that this situation makes many differences, as far as the necessary powers and duties that devolve upon him are concerned, between such a receiver and any of the receivers appointed for special purposes as mentioned in preceding chapters.

One of these differences lies in the fact that the corporation receiver must have in mind many persons in addition to the formal, or nominal, parties to the action. The nominal plaintiff in the action out of which the receivership grows may be a single stockholder or a single creditor; in some statutory proceedings the plaintiff may be a state official, such as the attorney general or a corporation commissioner, having no beneficial interest in the assets of the company at all. Whoever the plaintiff is, so far as beneficial interests in the property are concerned, he acts in a general representative capacity. The action calls before the court all those who are beneficially concerned. It may be that the corporation itself will continue to be interested in the property after the receivership has been closed, although many of the statutory proceedings, such as those looking toward dissolution of the corporation, are instituted with the express purpose of ending not only the practical, but also the technical, existence of the company. The receiver then

1 See § 293, supra.

represents, or acts for the protection of, all of these parties, both nominal and real—the corporation, the stockholders, and the creditors. The corporation, of course, is always a formal party. Stockholders are represented by the corporation and in that way are parties, and bound by the proceedings, even if they do not intervene or are not, in some other way, brought personally before the court. Lien creditors need not appear and are not bound by the proceedings if their interests are not brought within the jurisdiction of the court in some formal way. General creditors are presumed to know of the action, are usually, though in a general way, given notice of those phases of the proceedings in which they are particularly interested, such as the filing and the allowance of claims, and are bound by the proceedings.[2]

Administering the estate of a so-called private, industrial or commercial, corporation[3] through a receivership, usually involves conducting the corporate business. Receiverships created at the instance of stockholders or creditors on the score of dissensions within the corporation, or mismanagement on the part of the directors, or other similar cause, are usually expected to terminate in the restoration of the property and business to corporate control and it is necessary to preserve and hold the property and business together until the situation has been prepared for such an outcome; but even in these cases, an eventual sale of the assets may be necessary. Equity insolvency proceedings usually, and statutory insolvency and dissolution proceedings almost always, look to a sale of the assets and a transfer thereof to another owner. In any event, where a sale is likely or bound to occur, it is realized that the proceeds of a sale will be greater if the sale is that of a going rather than a non-going con-

[2] See Guaranty State Bank, etc., Co. v. Thompson (Tex. Civ. App.), 195 S. W. 960.

[3] For Railroads and Other Public Utility Corporations, see Chapter XIV, infra.

cern. The rules and principles that have been developed with reference to a corporation receivership are such as are equitably designed for an administration whose ultimate purpose is to dispose of the assets as a whole while the business is in full running order. If the receivership stops short of this the rights of all interested parties are equitably determined and protected as they exist at the time the judicial administration closes.

While a corporation receivership has these important peculiarities there are still many respects in regard to which a corporation receiver is similar to any other receiver. One of these points of similarity respects the receiver's relation to the appointing court. This point has been stated as follows: "We think the receiver is not an assignee of the corporation, nor a person claiming under it, in the ordinary sense of the terms, or within the meaning of the statute, and so not within the prohibition. The receiver derives his authority and possessory rights in the property from the court appointing him, and not from any act of the corporation. Murtey v. Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779. His possession of the property is the possession of the court by him as its officer. Thompson v. Phoenix Ins. Co., 136 U. S. 287, 34 L. Ed. 408, 10 Sup. Ct. 1019. The ordinary chancery receiver is not an assignee, but a ministerial officer appointed by the court to take possession of and preserve the fund or property in litigation. Quincy, etc., R. R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787; New York, etc., R. R. Co. v. New York, etc., R. R. Co. (C. C.) 58 Fed. 268. If the defendant had been called upon in the first instance to answer to this claim in a suit in which the corporation was named as the plaintiff, it would not have been a suit brought by the corporation, but a suit brought in the name of the corporation by one whose rights therein were independent of the legal title. When a suit is brought in the name of the one having the

legal title to meet the technical requirement of our law, the plaintiff is but a nominal party, without power to control the suit. When the receiver of a corporation sues in its name, the corporation does not have even the standing of a nominal party in an ordinary suit, for no question can be made against the receiver regarding costs. So the question of amendment is not involved in the statutory provision affecting the right to maintain an action. It may be said, further, that this suit is primarily, and perhaps wholly, for the benefit of the creditors, who are in no way within the condemnation of the statute."[4]

The statute referred to in the foregoing quotation was one requiring certain formalities in the way of paying a tax and securing a certain certificate from the secretary of state on the part of a foreign corporation proposing to do business in the state; the prohibition referred to was one provided in the statute to the effect that in default of a compliance with the requirements of the statute no action within the state upon contracts made within the state could be maintained by the corporation, or by an assignee of the corporation, or by any person claiming under such assignee or corporation. The receiver had commenced an action in his own name and the amendment referred to was one substituting the corporation as the nominal plaintiff. The point of the quotation is that the receiver is an officer of the court.

The quotation shows one application of the proposition, or principle, that the receiver is an officer of the court, but it is to be remembered that that principle is always present and determines the relation of the receiver generally to the estate and to those interested therein.

Because he is an officer of the court, the receiver is

[4] Underhill v. Rutland R. Co., 90 Vt. 462, 98 Atl. 1017.
See: Hamilton v. David C. Beggs Co., 171 Fed. 157; In re Frederica Water, etc., Co., 10 Del. Ch. 362, 93 Atl. 376.

not the agent, nor representative, of any of the interested parties. He is, in a sense, the trustee for all of them. As among the members of any particular class of interested parties his attitude is that of an impartial custodian, generally; and this is his general attitude among the various classes of interested parties, though in some instances, as we shall see later,[5] he is called upon to act in the interest of creditors in such a way as to be placed in apparent hostility to stockholders.[6]

Because he is an officer of the court, the receiver is always under its control, and, in fact, has no authority except such as the court may bestow upon him. To justify any of his acts the receiver must be able to point to some order of the court bestowing either expressly or impliedly the right to do the act.[7] Those who deal with the receiver as such are bound to know this rule.[8]

5 See §§ 340 and 341, this chapter.

6 Patrick v. Eells, 30 Kan. 680, 2 Pac. 116; First National Bank of Detroit v. E. T. Barnum Wire, etc., Works, 58 Mich. 124, 315, 24 N. W. 543, 25 N. W. 202; Holbrook, etc., v. American Fire Ins. Co., 6 Paige (N. Y.) 220; Re Van Allen, 37 Barb. (N. Y.) 225, 230; Ardmore Nat. Bank v. Briggs Machinery, etc., Co., 20 Okla. 427, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, 94 Pac. 533.

Where the receiver's company owns the controlling interest in the stock of another corporation and the receiver votes this stock at an election of directors, it is proper for him to vote the stock so as to give the minority of rival factions representation on the board. Bull v. International P. Co., 86 N. J. Eq. 275, 98 Atl. 382. See Marion Trust Co. v. Blish, 170 Ind. 686, 84 N. E. 814, 85 N. E. 344.

7 St. Joseph Gas Co. v. Barker, 243 Fed. 206. (Receiver can not without an order of court make a binding agreement concerning an existing corporate contract.)

Gay v. Hudson River, etc., Power Co. (184 Fed. 631 modified), 186 Fed. 1022, 108 C. C. A. 663; Fields v. United States, 27 App. Cas. (D. C.) 433; certiorari denied, 205 U. S. 292, 51 L. Ed. 807, 27 Sup. Ct. 543. (Can not pay out money without order of court.)

The control of the court over the receiver is co-extensive with the duties imposed upon him. Denver City Waterworks Co. v. American Waterworks Co. (N J. Eq.), 88 Atl. 1052. (Order to discontinue suit already commenced by receiver.)

8 "Every one who deals with a receiver knows that he has the

The receiver may apply to the court for instructions as to how to act in regard to any detail of the administration,[9] and in regard to important matters it is his duty to do so.[10] It is the duty of the receiver to use the utmost care not to contract bills which he may be unable to pay from the property in his hands; and even though he acts under general orders, giving him large discretion, and even though he acts with the consent of creditors, he may place himself in such a position that equity would require him to lose his compensation rather than that creditors should suffer loss.[11] The principle that the receiver is an officer of the court really means that when the receiver acts it is the court acting through the receiver; when we speak of the powers and duties of the receiver we really mean the jurisdiction of the court to do this thing or that thing in the way of conserving the assets of the corporation or conducting its business. In both of these aspects it may be generally said that the court has power to do anything and everything that the corporation could do or would do under a prudent management, except in so far as the court is bound not to disturb the vested rights of lien claimants without their consent. Many matters of detail are being constantly called to a court's attention for action, in the administration of a large estate, that it is impractical to set forth here. It is our purpose to consider here only those mat-

power to charge his estate only as the court may authorize him and, if a prospective creditor fails to inquire how far the assets may be already incumbered he takes the risk." Bell v. Improved Property, etc., Co., 247 Fed. 645, 159 C. C. A. 547.

Persons dealing with a receiver must take notice that his powers are limited and he is constantly subject to the orders of the court. Brunner, Mond & Co. v. Central Glass Co., 18 Ind. App. 174, 63 Am. St. Rep. 339, 47 N. E. 686.

9 Bull v. International P. Co., 86 N. J. Eq. 275, 98 Atl. 382; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 59 Fed. 514.

10 Guaranty Trust Co. v. International Steam P. Co., 231 Fed. 594, 145 C. C. A. 480. (Paying interest on mortgage in order to forestall foreclosure.)

11 Atkinson & Co. v. Aldrich C. Co., 248 Fed. 134.

ters of wider importance and of such general occurrence and frequent recurrence as to make it possible to consider them in the light of principles of general application.[12]

Having assumed jurisdiction of the action and appointed a receiver, the court has, thenceforth, full and exclusive control of the administration of the estate. The possession of the receiver terminates the control of the directors over the property of the corporation.[13] If the court otherwise has jurisdiction of the subject matter and of the persons interested, any matter ancillary to the

12 The court may authorize the receiver to buy a mortgage senior to one owned by the receivership estate and to hold the purchased mortgage as special security for money borrowed to make the purchase. Beaton v. Seaboard Portland Cement Co., 211 Fed. 84, 127 C. C. A. 508.

The court may direct the receiver to compromise a claim against an officer of the corporation. Brown v. Allebach, 166 Fed. 488.

See Spencer v. Alki Point Transp. Co., 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

The court may authorize the receiver to borrow money to compromise a claim; and the order of compromise having been carried out will not revoke the order when it is impossible to restore the other party to the position that he was in before the compromise was effected. Missouri Valley Bridge, etc., Co. v. Blake, 231 Fed. 417, 145 C. C. A. 411.

The court may refuse to authorize the receiver to appeal from an adverse judgment or to pursue litigation unless the creditors, desirous of having such action taken, agree to pay the costs and expenses. Gay v. Hudson River, etc., Power Co., 186 Fed. 1022, 108 C. C. A. 663; Miller v. Kansas City Brick, etc., Co., 195 Mo. App. 357, 191 S. W. 1092.

The court may order the receiver to pay taxes on property belonging to the estate. Hopkins v. Taylor, 87 Ill. 436.

The court may authorize the receiver to redeem property of the corporation that had formerly been sold at judicial sale. Casserly v. Witherbee, 119 N. Y. 522, 23 N. E. 1000; Chamberlain v. Greenleaf, 4 Abb. N. C. (N. Y.) 178.

See Re Oak Pits Colliery Co., L. R. 21 Ch. Div. 322; Commonwealth v. Franklin Ins. Co., 115 Mass. 278.

The receiver having possession of the books of the corporation, may be authorized to enter an assignment of stock. People v. California, etc., Trust Co., 18 Cal. App. 732, 124 Pac. 558.

13 State v. District Court, 50 Mont. 259, 146 Pac. 539; Planten v. National Nassau Bank of New York, 93 Misc. Rep. 344, 157 N. Y. Supp. 31.

administration of the estate may be heard in the receivership court, either in the receivership proceedings themselves, or in a separate suit; and the authority of the court in this behalf will overrule any objection to its jurisdiction that there might otherwise be on the score of the citizenship of the parties.[14] The court has full power to protect its officer, the receiver, in his possession and administration of the estate. Actions against him may not be commenced without the consent of the court. One purpose usually sought in creating corporation receiverships is to prevent sacrifice of the assets by numerous small suits and judicial sales of minor portions of the corporate property and this purpose could not be effected if claimants could pursue their own objects by litigation without the consent of the court. This right of the court may be protected and enforced through either its injunctive powers or its power to punish for contempt.[15] Litigation necessary to protect or recover assets of the estate is in the first instance under the control of the receiver and neither the stockholders nor the creditors may undertake or interfere with such litigation without the consent of the receivership court.[16] The principle here referred to has been stated as follows: "While it

14 Vallery v. Denver, etc., R. Co., 236 Fed. 176, 177, 149 C. C. A. 366; Owen v. Clifton, 232 Fed. 136, 146 C. C. A. 328.

15 In re French, 181 App. Div. 719, 168 N. Y. Supp. 988; Pelletier v. Greenville L. Co., 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855.

16 Du Pont v. Standard Arms Co., 9 Del. Ch. 324, 82 Atl. 692; Big Creek Stone Co. v. Seward, 144 Ind. 205, 42 N. E. 464, 43 N. E. 5; Wenar v. Leon L. Schwartz, 120 La. 1, 44 So. 902; Jacobs v. E. Bement's Sons, 161 Mich. 415, 126 N. W. 1043; Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310; Merchants' Nat. Bank v. Northwestern Mfg., etc., Co., 48 Minn. 361, 51 N. W. 119.

When a receiver is in possession, a mortgagee, whose mortgage gives him the right to take possession on default, can not, on an ex parte hearing and without opportunity for other creditors or the stockholders to be heard, be given permission to take possession on a showing that a default has occurred. City Bank and Trust Co. v. Leonard, 168 Ala. 404, 53 So. 71.

is true that it is a contempt of the appointing court to make its receiver a party defendant to a suit without leave first obtained for that purpose, it does not necessarily follow that the court in which suit is brought is without jurisdiction. The appointing court may protect its officer either by punishing the party bringing the suit for contempt, or by enjoining him from bringing suit. But the failure to obtain leave is no bar to the jurisdiction of the court in which the suit is brought. This is certainly true in all cases where there is no attempt to interfere with the actual possession of the property held by the receiver.'"[17]

Since the court can neither make nor destroy title the corporate assets pass into the receivership subject to all valid existing liens created against it by the corporation.[18] A person in possession of property and claim-

[17] Mulcahey v. Strauss, 151 Ill. 70, 37 N. E. 702.

An action to foreclose a chattel mortgage having been commenced against a corporation under receivership without leave of the receivership court, and the latter court having denied the receiver's application for an injunction against the prosecution of the action, it was held that the court's denial of the injunction was tantamount to an order consenting that the action might proceed; and that whatever infirmity might have been present at the outset because of the want of the receivership court's permission was cured. Schwabacher Bros. & Co. v. Schade, etc., Co., 99 Wash. 271, 169 Pac. 783.

Stockholders having commenced a representative action against directors for losses caused the corporation by their misfeasance before a receiver was appointed and the receiver, after his appointment, having been joined as a party defendant with the consent of the receivership court, it was held that the action did not abate and might be continued, providing another action commenced by the receiver against the same directors and for the same purpose was not also prosecuted. Seagrist v. Reid, 171 App. Div. 755, 157 N. Y. Supp. 979 (see dissenting opinion).

Even if stockholders or creditors, with the consent of the receivership court, intervene in litigation over which the receiver has control they are bound by a stipulation made by the receiver and sanctioned by the court. Spencer v. Alki Point, etc., Co., 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509. See Robinson v. Mutual, etc., Ins. Co., 182 Fed. 850.

[18] Schmidtman v. Atlantic Phosphate & Oil Corp., 230 Fed. 769,

ing either title or the right of possession as against the corporation can not be dispossessed without a proper judicial determination of his rights.[19] Valid executed

145 C. C. A. 79; Ford v. Judsonia M. Co., 52 Ark. 426, 20 Am. St. Rep. 192, 6 L. R. A. 714, 12 S. W. 876; Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12; Shopert v. Indiana Nat. Bank, 47 Ind. App. 474, 83 N. E. 515; In re Frederica Water, Light & Power Co., 10 Del. Ch. 362, 93 Atl. 376; James Bradford Co. v. United Leather Co. (Del. Ch.), 95 Atl. 308; Young v. Stevenson, 81 Ill. App. 40; Williams v. Old Colony Trust Co., 222 Mass. 378, 110 N. E. 1029; Ardmore Nat. Bank v. Briggs Machinery & Supply Co., 20 Okla. 427, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, 94 Pac. 533; Philadelphia Trust Co. v. Northumberland County Traction Co., 258 Pa. St. 152, 101 Atl. 970; Potts v. New Jersey Arms, etc., Co., 17 N. J. Eq. 516.

[19] A valid equitable assignment by the corporation of a judgment to be obtained against stockholders is not destroyed by the appointment of a receiver. Clark v. Sigua Iron Co., 81 Fed. 310, 26 C. C. A. 423.

A corporation which has allowed its equity under a trust deed given to secure preferred stockholders to be sold at judicial sale and has failed to make redemption within the period allowed by law and has thus lost its equity before the appointment of a receiver conveys nothing to the receiver by a transfer executed in his favor. Fitch v. Wetherbee, 110 Ill. 475.

One who obtains title to corporate property by purchase at a tax sale is not within the terms of an order of the court enjoining creditors from interfering with the receiver's possession. Yurann v. Hamilton, 82 Kan. 528, 108 Pac. 822.

Where a mortgagee, pursuant to a state statute, has foreclosed the mortgage by process against the receiver and had the property sold by the coroner, the receivership court has not authority to order the proceeds paid over to the receiver for the purpose of satisfying liens evidenced by receiver's certificates. Interstate Trust, etc., Co. v. Powell Bros., etc., Co., 128 La. 1004, 55 So. 654.

Since a receiver represents the creditors of a corporation he takes its property, on their behalf, free of a trust deed, executed by the corporation, which is void as to them under a statute. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

Where stockholders claim to be the owners of secret formulae usable in the corporate business an order can not be made directing them to turn the formulae over to the receiver without a proper determination of the issue as to title. Brewster v. F. G. Brewster Co., 145 App. Div. 812, 130 N. Y. Supp. 654.

The possession of an assignee for creditors can not be disturbed by a temporary receiver without a proper determination of the validity of the assignment and the rights of the assignee. Rump v.

contracts of the corporation, where nothing remains but the passing over of the consideration from the company, are binding upon the receiver.[20] The receiver is bound by the charter of the corporation.[21] An injunction against the corporation, issued before the appointment, is likewise binding upon the receiver.[22]

Under the general equity rule, the time when the title, or the right of possession and control of the receiver attaches so as to fix the time, as of which equities are to be determined upon distribution, is the date of the appointment, without regard to the time when the receiver qualifies and actually takes possession.[23] "It is generally held that after the appointment of the receiver in a proceeding which contemplates the administration and sale of the property for the benefit of those interested therein no one will be permitted to acquire a lien thereon by attachment, judgment, or otherwise."[24] Up to that

Van Rensselaer, etc., Co., 138 App. Div. 289, 122 N. Y. Supp. 912.

20 Butler v. Beach, 82 Conn. 417, 74 Atl. 748; Watson v. President, etc., of Phoenix Bank, 8 Met. (Mass.) 217, 41 Am. Dec. 500.

A statutory right of set-off is not affected by the appointment of a receiver. Greif v. James H. Wright Co., 10 Del. Ch. 308, 91 Atl. 205.

As to executory contracts see § 359, infra.

For the purposes of set-off a claim against a corporation may be acquired any time before the title, or the right of possession and control, of the receiver vests. United States Brick Co. v. Middletown Shale Brick Co., 228 Pa. St. 81, 77 Atl. 395.

21 People v. Troy Steel, etc., Co., 82 Hun 303, 31 N. Y. Supp. 337; Safford v. People, 85 Ill. 558.

22 Steel v. Gordon, 14 Wash. 521, 45 Pac. 151; Safford v. People, 85 Ill. 558.

23 This time is, however, variously fixed by state statutes as of the date of the commencement of proceedings [Merrill v. Commonwealth, etc., Co., 166 Mass. 238, 44 N. E. 144; Williams v. United W. Tel. Co., 131 N. Y. Supp. 41], or of the filing of security [Travis v. McBride, 166 Mich. 126, 131 N. W. 520], or of an adjudication of insolvency or the appointment of a receiver [Squire v. Princeton L. Co., 72 N. J. Eq. 883, 15 L. R. A. (N. S.) 657, 68 Atl. 176], or of the filing of the bill, or of issuance or serving of process [Cobb v. Camden S. Band, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667].

24 Guaranty State Bank, etc., Co., v. Thompson (Tex. Civ. App.), 195 S. W. 960; Mutual Inv. Co. v.

time the assets of a corporation "do not become a trust fund to be administered"[25] for the benefit of those interested therein; but at that time they do become such a trust fund and thereafter new liens, or priorities, can not be created.[26] Liens established before this time are valid, even though created during the pendency of the proceedings.[27] After that time the corporation itself can not create new liens nor ratify nor make valid previous transfers or liens that for any reason were invalid or imperfect.[28] Nor can a creditor by any *in invitum* process acquire or perfect a lien. "The title of the receiver is of the date at which it is ordered that a receiver be appointed. Then the title of the parties to

Walton Mach. Co., 91 Wash. 298, 157 Pac. 682.

25 See Wheeler v. Matthews, 70 Fla. 317, 70 So. 416.

26 McManus-Kelly Co. v. Pope Mfg. Co. (N. J.), 70 Atl. 297. (Notes of the corporation not yet due can not be set-off against a claim of the corporation already accrued.); In re Lenox Corp., 57 App. Div. 515, 68 N. Y. Supp. 103, 167 N. Y. 623, 60 N. E. 1115; Ardmore Nat. Bank v. Briggs M. & S. Co., 20 Okla. 427, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, 94 Pac. 533; Riesner v. Gulf C., etc., Ry. Co., 89 Tex. 656, 59 Am. St. Rep. 84, 33 L. R. A. 171, 36 S. W. 53; Ellis v. Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858; Cowan v. Pennsylvania P., etc., Co., 184 Pa. 1, 38 Atl. 1075; Fidelity Ins., etc., Co v. Roanoke Iron Co., 81 Fed. 439, 448; Temple v. Glasgow, 80 Fed. 441, 447, 25 C. C. A. 540; Clyde v. Richmond, etc., R. Co., 56 Fed. 539; Attorney General v. Atlantic M., etc., Ins. Co., 100 N. Y. 279, 3 N. E. 193; Watkins v. Minnesota T., etc., Co., 41 Minn. 150, 42 N. W. 862; Texas Trunk Ry. Co. v. Lewis, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647 (attachment filed same day receiver was appointed did not give a lien); see Central Coal, etc., Co. v. Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383; Waggy v. Jane Lew Lumber Co., 69 W. Va. 666, 72 S. E. 778.

The lien of a bank upon a note deposited for collection as against a receiver is limited to indebtedness then existing, and not that which may become due. Smith v. Eighth Ward Bank, 31 App. Div. 6, 7, 52 N. Y. Supp. 290.

27 Travis v. McBride, 166 Mich. 126, 131 N. W. 520; Squier v. Princeton L. Co. (N. J.), 64 Atl. 474 reversed; Squier v. Princeton Lighting Co., 72 N. J. Eq. 883, 15 L. R. A. (N. S.) 657, 68 Atl. 176.

28 Barker v. Southern Building & Loan Assn., 181 Fed. 636; Linville v. Hadden, 88 Md. 594, 43 L. R. A. 222, 41 Atl. 1097; Mutual Inv. Co. v. Walton Mach. Co., 91 Wash. 298, 157 Pac. 682.

control dies and then the title of the court and its agent and officer immediately succeeds. . . . The order of the court either impliedly or expressly takes the title from the parties and vests it in the receiver from that moment. It is enough, however, if it took it from the parties; after that no execution against them could be levied upon it."[29] The principle that the receiver has control of the assets of a corporation from the time of his appointment applies to debtors as well as to creditors of the corporation. The receiver is the only one authorized to collect a debt that remains unpaid at the time his right to control attaches. Persons dealing with the corporation are bound to know of the appointment and, unless special equities intervene, can not escape liability to the receiver by settling with the corporation.[30]

The receiver's control of the administration of the estate gives him the right to the custody of the books of the corporation,[31] free even from the generally recognized right of creditors and stockholders to inspect and make extracts from them when the corporation itself is in charge of its affairs, except with the permission of the court.[32]

[29] Steele v. Sturges, 5 Abb. Prac. (N. Y.) 442.

It is to be understood that this quotation, as likewise our text, is speaking of the time as fixed by the general equity rule, where there is no controlling statute. If the statute fixes a different time, then what is said in the quotation and the text applies as of that time. See note 21, supra.

[30] Buchanan v. Hicks, 98 Ark. 370, 34 L. R. A. (N. S.) 1200, 136 S. W. 177; Laberee v. Stewart, 4 Alaska 69.

[31] Wheeler v. Matthews, 70 Fla. 317, 70 So. 416; Manning v. Mercantile Securities Co., 242 Ill. 584, 30 L. R. A. 725, 90 N. E. 238.

If books and records of a corporation are removed from the state in disobedience to an injunction issued while an action for the appointment of a receiver is pending, a mandatory injunction directing their return will issue, even before a receiver is appointed, in order that they may be open for inspection by those who have a statutory right thereto. Baillie v. Columbia G. M. Co., 86 Ore. 1, 166 Pac. 965, 167 Pac. 1167.

[32] Matter of Tiebout, 19 N. Y. Weekly Dig. 570; People v. Cata-

An order appointing a receiver has, in many respects, the characteristics of a final judgment of a court of record and the principles that apply to a collateral attack upon a final judgment apply to such an order.[33]

§ 338. Difference in Relation to Estate on Part of Equity and Statutory Receivers.

It was pointed out in earlier sections of this chapter that corporation receivers are at times appointed by courts of equity relying upon their inherent powers and without the aid of any statutory authority to make such appointments,[1] while at times the appointment is made directly and expressly pursuant to statutory provision.[2] It is common usage therefore to speak of the former class of receivers as equity or chancery receivers and of the latter as statutory receivers.

It was pointed out also that statutes permitting or authorizing the appointment of corporation receivers went more or less into detail concerning the administration of the corporate estate.[3] It may be said generally that the statutes do not effect any difference between the

ract Bank, 5 Misc. Rep. 14, 25 N. Y. Supp. 129.

33 Lively v. Picton, 218 Fed. 401, 134 C. C. A. 189; Vallery v. Denver & R. G. R. Co., 236 Fed. 176, 177, 149 C. C. A. 366; John H. McGowan Co. v. Ingalls, 60 Fla. 116, 53 So. 932; Paine v. Mueller, 150 Iowa 340, 130 N. W. 133; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962; Berryman v. Billings Mut. Heating Co., 44 Mont. 517, 121 Pac. 280; Guaranty State Bank, etc., Co. v. Thompson (Tex. Civ. App.), 195, S. W. 960.

A plaintiff who commences an action against a corporation over which a receiver has been appointed while not informed of that fact and, upon being so informed, concedes that the receiver should have been made a party and has a postponement of the trial for the purpose of bringing in the receiver, is not barred from subsequently raising the point that the order was void because the appointing judge was disqualified to make it, if he was not aware of the facts constituting the disqualification at the time of the postponement. Davis Colliery Co. v. Charlevoix, etc., Co., 155 Mich. 228, 118 N. W. 929.

1 See §§ 298 to 304, supra.

2 See § 310, supra.

3 See § 310 et seq., supra.

two classes respecting their general relation to the court and estate as set forth in the preceding section. Practically the only difference of importance between the two depends upon the question as to whether or not the statutory receiver takes the legal title to the corporate assets. It is customary to speak of the title of a receiver, but with reference to an equity receiver the expression is not strictly accurate and denotes simply the receiver's right to have possession of the property involved in the receivership and in the case of a corporation receiver to manage and operate it pending the receivership. In the case of an equity receiver appointed on behalf of a judgment creditor seeking to satisfy his judgment out of the equitable or concealed assets of the debtor it is held that the legal title to such assets vests in the receiver upon his appointment or it is the regular practice for the court to compel the debtor to assign the title to the receiver.[4] This, however, is an exception to the rule, for an equity receiver is regarded as a mere custodian of the property entrusted to his care and does not take the legal title; nor is it the practice to have the legal title bestowed upon him.[5] If a state statute, authorizing the appointment of a receiver, does not expressly provide that the legal title shall pass to the receiver, then, in this regard, he is held to be in the same position as an equity receiver. On the other hand many of the state statutes expressly provide that the legal title to the corporate property shall pass to a corporation receiver upon his appointment and the expression statutory receiver, when used, very often denotes a corporation receiver in whom the legal title has been vested by virtue of the statute under which he was appointed.[6]

[4] See § 286 et seq., supra.

[5] Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680.

[6] See Attorney General v. Atlantic M., etc., Co., 100 N. Y. 279, 3 N. E. 193.

The ownership of the title works to the convenience of the receiver in many of the details of his administration,[7] and especially in respect to his administration of the property outside of his jurisdiction. But, again, as far as the domiciliary administration of the estate by a domiciliary receiver is concerned, the practical importance of this distinction between the two classes of receivers revolves around a single point, namely, the question as to whether suits concerning matters originating under the company's management shall be instituted and prosecuted by or against the company or the receiver.[8] The question also arises in respect to the collection of certain statutory assessments against stockholders as will be seen later on.

§ 339. Effect Where Receivership Does Not Involve All of the Corporate Property.

Of course where the receivership is of such a sort that it does not involve all of the assets of a company and leaves assets free to be possessed and managed by the company, the receiver would have no interest in nor any proper connection with litigation concerning the non-receivership property.[1] Even in a foreclosure case a creditor of the mortgagor might seek judgment against it hoping to satisfy the judgment out of an equity remaining in the property; but if he obtained a judgment and asked the court to protect him as to his rights in the equity, the only party that would be interested in that matter would be the mortgagor; the receiver would have no interest in it. Much of the confusion that has arisen over the instant question has been due to failure to have

7 See Teninga v. Glos, 226 Ill. 121, 107 N. E. 126.

8 As to matters arising during the receivership itself, see §§ 337 et seq., infra.

1 Heath v. Missouri, etc., Ry., Co., 83 Mo. 617, 621; St. Louis, etc., Ry. Co. v. Whitaker, 68 Tex. 630, 636, 5 S. W. 448; City Water Co. v. State, 88 Tex. 600, 32 S. W. 1033.

in mind the character of the receivership involved and the question as to whether the receivership court was administering special property for a special purpose or all of the property for all purposes.[2]

§ 340. General Rules Respecting Maintenance of Litigation By or Against Receiver.

In the case of a statutory receiver, taking the legal title, we find no difficulty on the point as to who is the proper nominal party to litigation. Actions begun against the company and not concluded at the time of the appointment abate, to be revived only upon the bringing in of the receiver as defendant; and thereafter actions to establish any claim against or adverse in interest to the estate must be instituted against the receiver.[1] Sometimes the statute provides that the corporation may continue to have the right to defend actions or that the receiver may prosecute actions in his own name or that of the company and in such cases the question presents no difficulty.[2] In the case of an equity receiver, however, where the statute is silent upon the subject, there has probably been a divergence of decision as to whether an action should be instituted against the company or the receiver. In a federal case we find it said: "There may be decisions found, especially among the earlier cases, which would appear to support the

2 See: Shout v. United Shoe Machinery Co., 195 Fed. 313; Henry v. Epstein (Ind. App.), 95 N. E. 275; Leonard v. Hartzler, 90 Kan. 386, 50 L. R. A. (N. S.) 383, 133 Pac. 570; Emory v. Faith, 113 Md. 253, Ann. Cas. 1912A, 586, 77 Atl. 386; State v. Small, 272 Mo. 507, 199 S. W. 127; Kincaid v. Dwinelle, 59 N. Y. 548, 553; Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814.

1 Carter, Carter & Meigs v. Stewart Drug Co., 115 Me. 289, 98 Atl. 809; In re French, 181 App. Div. 719, 168 N. Y. Supp. 988; Kissenger v. Fitzgerald, 152 N. C. 247, 67 S. E. 588; Hollowell v. Norfolk, etc., R. Co., 153 N. C. 19, 68 S. E. 894; Black v. Consolidated Ry. & Power Co., 158 N. C. 468, 74 S. E. 468.

2 See Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430, affirming (1904) 115 Ill. App. 71.

contention of the plaintiff as to the right to maintain the action against the receiver, though it accrued prior to his appointment. But those cases are exceptional and do not belong to the class of the present action. In cases for personal injuries suffered by the alleged negligence or wrongful act of a corporation prior to the appointment of any receiver thereof, the doctrine would seem to be settled that the action can only be maintained against the offending corporation, and not against the receiver subsequently appointed. This doctrine is founded upon the principle, that the receiver is only answerable for the consequences of the acts and negligence of his own servants and employees operating the franchise of the corporation, and not for the acts and negligence of the corporation itself, before he assumed control and management of it. The corporation is doubtless accountable for its acts and negligence before the appointment of a receiver, but it does not follow that such liability devolves upon a receiver on his appointment. He does not represent the corporation in respect to such transactions, nor does he assume liability therefor. The possession of the receiver is not the possession of the corporation, but is adverse and antagonistic thereto; and the corporation does not in any manner control either the receiver or his employees. The negligent acts or wrongs committed by the corporation, before the appointment of the receiver, are independent transaction, for which the corporation is responsible."[3]

[3] McDermott v. Crook, 20 App. Cas. (D. C.) 465; Sundles v. Idaho-Oregon Light & Power Co., 218 Fed. 698; Emory v. Faith, 113 Md. 253, Ann. Cas. 1912A, 586, 77 Atl. 386; Hackett v. Supreme Council A. L. H., 206 Mass. 139, 92 N. E. 133; Andrews v. Steele City Bank, 57 Neb. 173, 77 N. W. 342 (the receiver has the right to intervene); Black v. Consolidated Ry. & Power Co., 158 N. C. 468, 74 S. E. 468 (The receiver may be joined as a party defendant in an action pending at the time of the appointment).

Lynn v. McCue, 94 Kan. 761, 147 Pac. 808. In a pending action in which the issue is as to a conversion of certain of the company's

On the other hand the Missouri Supreme Court, in sustaining the view that an action may be maintained against the receiver of a corporation for a tort committed prior to the appointment of the receiver, speaks as follows: "When a corporation passes into the hands of a receiver, it is taken by him subject to all the debts and liabilities existing against it, at the time of his appointment, whether rising for contract or tort. The court appointing him ascertains and adjusts these debts and liabilities and orders a distribution of the assets in discharge thereof, according to the law and equity governing them. On application of the claimant the court entertains and adjusts his rights. It may exercise the discretion of allowing the adjudication of his demand to be made in an independent suit, and this is usually done when the issues can be more conveniently tried in the place where the facts arise and the venue belongs. Before instituting his suit the claimant obtains leave from the court of which the receiver is an officer to sue him in another tribunal, which was the case here. In respect to the past liabilities of the corporation, it is not pretended that the receiver can be personally held. Nevertheless

assets, if the receiver is not brought in, the trial court, knowing of its appointment, may order that a judgment against the company shall not be binding upon the receiver, at least so far as creditors who are not represented in the action are concerned.

St. Louis, etc., R. Co. v. Ravia Granite, etc., Co. (Okla.), 174 Pac. 252. (In this case the point seems not to have been mentioned.)

In Weigen v. Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862, the court said: "It will be observed that there is no allegation that the corporation had been dissolved, or that the court, in appointing the receiver, enjoined it from exercising any of its corporate powers. No statute of this state limits the powers of a corporation upon the appointment of a receiver, and those of the defendant were restrained only by depriving it of its property. The right to sue, and be sued, conferred by the statute, was retained. No relief was asked against the receiver, and he was not a necessary party, though he might, in the discretion of the court, be permitted, by intervening to interpose any defense to the action."

he is the representative of the corporation, taking its place in respect to the custody and administration of its estate, and toward its claimants and creditors he occupies a relation somewhat analogous to that of an administrator. The functions of the corporation being suspended as to its former managers, the receiver takes their place and holds and conducts everything in his own name. A suit, therefore, to ascertain and adjust a liability of the company is properly brought against the receiver in his capacity as such, somewhat in the same form as a suit against an administrator by a creditor of the estate of the deceased. The judgment goes against the defendant in his capacity as a receiver, and is liable out of the assets of the company in his hands. Such is the judgment in this case. Upon this judgment the court that granted leave to the plaintiff to sue will adjudge to him his equitable share in the assets of the company, and order payment according to the equities and priorities of the different claimants on the assets."[4]

The point is, in the main, purely technical, and the decision of any court concerning it would probably depend largely upon how firmly the court pursued the practice of adhering strictly to the rules of equity procedure.[5] If the point that the proper party was not before the court was seasonably made the ruling ought perhaps to be that the corporation is at least the only necessary party defendant. It might be that because of the statute of limitations some benefit could be gained by delay. Apart from considerations of that sort, the importance of the point is stated as follows: "The fact that the receiver is not a proper party to an action for

[4] Combs v. Smith, 78 Md. 32. See, also, Harrell v. Atkinson, 9 Ga. App. 150, 70 S. E. 954.

[5] In Kissenger v. Fitzgerald, 152 N. C. 247, 67 S. E. 588, where permission to institute the action had been obtained from the receivership court, it was ruled that an action against the receiver was "in effect" an action against the company.

a tort committed by a corporation prior to the appointment of a receiver goes merely to the remedy and does not preclude the injured party recovering against the company and collecting his claim from the receivership assets.'"[6] If the cause of action arose under the company's management the claim evidenced by a judgment against the company would rank as a general creditor's claim. If the cause of action arose under the receiver's administration then the claim would have priority as being a receiver's indebtedness. If the action was brought with the consent of the receivership court, or if it was one commenced prior to the receivership and the receiver was made a party or intervened, the court would know the rank of the claim. If the action was commenced and prosecuted without the knowledge of the receivership court then a judgment against the company would be presumed to rank as a general claim.

In regard to actions on behalf of the corporation, or the estate, the statutes sometimes, even though not bestowing legal title upon the receiver, expressly give him the right to institute proceedings in his own name, or the court itself may grant him authority to do so.[7] The practice on the part of the court of granting this right to receivers is followed especially with reference to cases that may properly be instituted before the appointing court itself, and it is sometimes said that the practice is a development along the line of giving increased power to equity receivers—a practice which equity courts may adopt without the aid of statutes.[8] In the absence of such statutory or court-order provision, the strict equity rule undoubtedly is that, although the receiver conducts and controls the litigation, the corporation is the proper nominal plaintiff. The rule has been stated[9] as follows:

6 In re Seaboard Air Line Ry., 166 Fed. 376.

7 Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962.

8 Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. Ed. 447.

9 Underhill v. Rutland R. Co., 90 Vt. 462, 98 Atl. 1017.

"It is an established principle of the common law and the settled doctrine of this state that an action in a court of law for the enforcement of a right must be in the name of the person having the legal title. No exception exists at common law in favor of a receiver and we have no statute creating one. Actions brought here by receivers appointed in another state are sustained on the ground that the statutes of their states give them the legal title."

The tendency is, however, to make the technical point of little practical value. In the case from which the quotation immediately preceding was taken the receiver commenced the action in his own name. At the conclusion of plaintiff's evidence the point that the proper plaintiff was not before the court was made the basis of a motion for a directed verdict in favor of defendant. In reply plaintiff asked for leave to amend by substituting the corporation as plaintiff. In support of an order granting permission to do so this same court said: "The plaintiff sues as receiver of the Columbian Marble Company. The amended declaration declares upon a promise to the Columbian Marble Company and in consideration thereof a promise to the plaintiff as receiver. The case has been tried as it would have been if properly brought. The receiver would have been the one to prosecute the suit if brought in the name of the company. He was in fact the only one who could enforce the right. He is the one to receive, hold, and account for the damages recovered, in whichever name the suit is prosecuted. As regards the purpose and management of the suit, he is the same as the company."

In a Massachusetts case, in which a similar amendment was permitted, it was said: "The suit is being prose-

See: Philadelphia, etc., Iron Co. v. Butler, 181 Mass. 468, 63 N. E. 949; also Tompkins v. Sperry, etc., Co., 96 Md. 560, 54 Atl. 254; Hayward v. Leeson, 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656; Arnold v. Searing, 78 N. J. Eq. 146, 78 Atl. 762.

cuted for those who by decree of the court appointing the receiver are entitled to the proceeds and for whose benefit it was originally brought. The substitution of the company for the receiver as the party plaintiff was made to comply with the technicalities of our procedure."[10]

As far as the defendant is concerned the practical bearing of the matter is to avoid the possibility of having to satisfy two judgments. From that point of view it is his duty to raise the question as to proper parties by some motion effective to reach the point.[11] As far as the receiver is concerned the bearing of the matter is to have the recovery inure to the benefit of the estate and not diverted to the company at the loss of the estate. It is the receiver's duty to see that the estate receives such benefit as it is entitled to from a favorable outcome of the suit. From this point of view a representative action begun by certain stockholders on behalf of the company, before the receivership, against directors to recover losses caused the company by their misfeasance, in which the judgment would necessarily not be paid to the nominal parties but to the person properly entitled to receive it, is not obnoxious to a provision in the order appointing a receiver restraining the company, its officers, "and all other persons whomsoever . . . from interfering with, attaching, levying upon, or in any manner whatsoever disturbing the claims, choses in action, and causes of action of the said defendant railway company . . . or any of the property and premises of the railway company . . . or from taking possession of, or in any way assuming a control of, or from inter-

10 East Tennessee Land Co. v. Leeson, 178 Mass., 206, 59 N. E. 639. See: Chandler v. Frost, 88 Ill. 559 (amendment pursuant to statute concerning amendments); Wilson v. Welch, 157 Mass. 77, 31 N. E. 712; Campbell, etc., Co. v. Barr, etc., Engine Co., 182 Mass. 304, 65 N. E. 396 (amendment after verdict); Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570 (amendment after verdict).

11 Boston Elevated R. Co. v. Paul Boyton Co., 211 Fed. 812, 128 C. C. A. 338.

fering with, the said claims, choses in action, causes of action, or any other property or premises, or any part thereof."[12]

In subsequent sections where we speak of actions brought by the receiver it is to be understood that the expression is used merely for convenience and that, if the rule requires it, the corporation is to be made the nominal plaintiff.

§ 341. Relation of Directors and Officers of the Corporation to the Estate.

While a corporation is functioning as such and is itself in possession, control, and management of its property and affairs, its directors and officers are, in a sense, trustees for its stockholders and creditors, and they are bound by both equity and statutory principles to exercise the highest good faith in their management toward these other interests and are not permitted to gain any undue advantage or make any unfair gain from their official connection with the company. When, however, a corporation receiver is placed in control and, as a consequence the functions of directors and officers, as such, cease in respect to its property and they may act with reference to the estate just as any other creditor or any stranger and have no greater duty or obligation relative to the estate than any of these others.[1]

Where the officers of the corporation have not been restrained from performing their corporate duties by

12 American Steel Foundries v. Chicago, etc., R. Co., 231 Fed. 1003.

Where a receiver appointed under a statute, represents the corporation and not its creditors, sues directors for misappropriation of corporate assets, the suit should be considered as one by the corporation. Folsom v. Smith, 113 Me. 83, 92 Atl. 1003.

1 The mere fact that some of the stockholders of a corporation are related to the appointing judge does not make an order appointing a receiver void. Ex parte Tinsley, 37 Tex. Cr. 517, 66 Am. St. Rep. 818, 40 S. W. 306.

The court can not, on an ex parte application, make an order directing a former manager, who

an order of court, they may hold corporate meetings and do such things as will not interfere with the possession of the receiver.[2] Even a sale of all of the property of the corporation will not necessarily terminate its corporate existence.[3] The court, however, has the power to control the corporate actions of the officers of a corporation over which it has placed a receiver and usually does do so,[4] and especially where their actions will interfere with the proper and regular disposition of the receivership property.

A director of a company who, under the company management, has acquired, in a manner nowise improper, a claim against the company, either secured or unsecured, is entitled to have it participate in the distribution of the receivership estate just the same as if it were owned by a stranger to the company.[5] But a director of a corporation may not, when the corporation is insolvent, buy up for himself, at a discount, claims against the corporation and present them to the company for settlement at their face value; although, if a stranger to the corporation purchases claims against it, while insolvent, at a discount, before the receivership, and presents them for payment from the estate, the fact that a director of the corporation, thoroughly acquainted with the company's affairs, had acted as his agent in making the purchases will not prevent the claims sharing in the distribution, on the basis of their par value, on an equality

had been discharged before the receiver was appointed, to file an account of his management. Farmers' Union, etc., Stock Co. v. Randall, 126 La. 817, 52 So. 1036.

2 United States, etc., Trust Co. v. Delaware, etc., Const. Co. (Tex. Civ.), 112 S. W. 447. See, also, Linn v. Joseph Dixon, etc., Co., 59 N. J. L. 28, 35 Atl. 2.

3 Geddes v. Anaconda Copper Mining Co., 245 Fed. 225, 157 C. C. A. 417.

4 Guaranty Trust Co. v. Missouri Pac. Ry. Co., 238 Fed. 812; Davidson v. American Blower Co., 243 Fed. 167, 156 C. C. A. 33; Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. 456, 164 C. C. A. 380.

5 Curran v. Oppenheimer, 164 App. Div. 746, 150 N. Y. Supp. 369.

with other claims, if, as a matter of fact, the director himself had no beneficial interest in the transaction.[6] The same thing is true with reference to claims purchased by a director for himself if the purchase is made after he has been, by the appointment of a corporation receiver, released from his fiduciary relation to the corporation and those interested in or dealing with it and the consequent restrictions upon his conduct with reference to its affairs.[7] A director, or an officer, may become the owner of receiver's certificates[8] or purchase corporate assets at a receiver's sale[9] as freely and unreservedly as a stranger to the corporation. However, in testing any issue of fraud raised against the participation, in any detail of the administration, of such an interested person, his former connection with the company leads to an inquiry into the transaction made more thoroughly and with closer scrutiny of all the attending circumstances than would perhaps be necessary in the absence of such a circumstance.[10]

§ 342. Status of the Corporation Pending the Receivership.

The status of the corporation pending the receivership as far as the entity of the corporation is concerned is one of inactivity as far as conducting its business affairs and as far as its activity as a corporate body is concerned, it is dependent upon the nature of the proceeding in which the receiver is appointed, whether it is a dissolution proceeding or other form of litigation, and it is also depen-

6 Horner v. New South Oil Mill (Ark.), 197 S. W. 1163.

7 In re Allen, etc., Co., 227 Mass. 551, 116 N. E. 875.

8 McKittrick v. Arkansas Cent. Ry. Co., 152 U. S. 473, 38 L. Ed. 518, 14 Sup. Ct. 661; Tiffany v. Smith, 124 N. Y. Supp. 85.

9 If, however, the officer purchased at an unfairly low price because of wrongful control over the sale, the sale might be set aside or he might be held to hold them as trustee for all parties interested in the estate. Broussard v. Mason, 187 Mo. App. 281, 173 S. W. 698.

10 Horner v. New South Oil Mill, 130 Ark. 551, 197 S. W. 1163.

dent upon the scope of the order of the court in making the appointment of the receiver.

Unless prohibited by the order of the court, the appointment of a receiver does not prevent the stock of the corporation from being transferred in like manner as before the appointment of the receiver or the holding of corporate meetings which do not interfere with the operation of the receivership.[1] The receivership court may, however, control the holding of corporate meetings and may enjoin them from being held if actions are proposed which are detrimental to the purposes of the receivership.[2] And if the books of the corporation have been turned over to the receiver, he may be required by a stockholder to transfer his stock upon the books.[3] Likewise a receiver may be compelled to allow a stockholder or bondholder to examine property in his hands.[4] Where under the statute the property of an insolvent corporation immediately vests in a receiver appointed over it, upon his appointment, the corporate officers should turn all of its property over to the receiver.[5] Unless the court which has appointed a receiver over a corporation has

1 Butler v. Beach, 82 Conn. 417, 74 Atl. 748. See, also, United States, etc., Trust Co. v. Delaware, etc., Const. Co. (Tex. Civ.), 112 S. W. 447; Linn v. Joseph Dixon, etc., Co., 59 N. J. L. 28, 35 Atl. 2.

Where a receiver was appointed for a foreign corporation in New Jersey, and its powers were limited to the corporation's property located within the state, an injunction which only restrained the use of the corporation's franchises in New Jersey did not prevent a minority stockholder from suing to prevent the fraudulent exercise of the corporation's franchises in other states and to restrain the foreclosure of a chattel mortgage and the execution of a judgment for fraud. Sims v. United Wireless Telegraph Co., 179 Fed. 540.

Where not prohibited from doing so by order of court, a corporation may issue new stock and bonds. United States, etc., Co. v. Delaware, etc., Const. Co. (Tex. Civ.), 112 S. W. 447.

2 Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. 456, 164 C. C. A. 380.

3 People v. California Safe, etc., Co., 18 Cal. App. 732, 124 Pac. 558.

4 Henszey v. Langdon-Henszey, etc., Min. Co., 80 Fed. 178.

5 Generotzky v. Barnay Hotel Co., 85 N. J. Eq. 63, 95 Atl. 865.

prohibited the commencement of suits against the corporation, such suits may be initiated.[6] But it is the usual custom for the court to restrain such suits upon appointing a receiver.

Where by reason of a receiver being appointed over it in its domiciliary jurisdiction it can not maintain a suit there, it will not be permitted to do so in another state.[7]

The appointment of a receiver will not, however, prevent the statute of limitations running in favor of the corporation.[8]

Although a receiver is conducting litigation on behalf of the corporation, the corporation may also appear by counsel at its own expense.[9]

b. Who Will Be Appointed Corporation Receiver.

§ 343. Who Will Be Selected as the Receiver and Qualifications He Should Possess.

The general rule is that a receiver should be a person who stands indifferent as between the parties and is subject to no influence other than to conserve the property entrusted to his management for the benefit of those who shall finally be entitled to it.[1] He should be an impartial

6 Denton v. Baker, 79 Fed. 189, 24 C. C. A. 476; Warner v. Imbeau, 63 Kan. 415, 65 Pac. 648.

Although a receiver has been appointed over a foreign corporation in another state, the corporation may be sued. Venner v. Denver, etc., Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

The appointment of a temporary receiver under the statute of a foreign corporation, pending a suit by a stockholder against the corporation and some of its officers, does not prevent a judgment creditor of the corporation from maintaining supplementary proceedings under Code Civ. Proc. 2441, for examination of a third person. Howell v. German Theatre, 64 Misc. Rep. 110, 117 N. Y. Supp. 1124.

7 E. F. Kirwan Mfg. Co. v. Truxton, 2 Penne. (Del.) 48, 44 Atl. 427.

8 Jackson v. Fidelity, etc., Co., 75 Fed. 359, 21 C. C. A. 394; International, etc., R. Co. v. McCulloch (Tex. Civ.), 24 S. W. 1101.

9 Johnson v. Southern Bldg., etc., Assn., 99 Fed. 646.

1 Kokernot v. Roos (Tex. Civ.), 189 S. W. 505; Graham v. Hundley Dry Goods Co. (Mo.), 177 S. W. 600; Farmers' Loan & Trust Co.

person who does not represent any particular party to the action. He is the agent of the court, or as has frequently been stated, the "arm of the court." The general rules applicable to receiverships in respect to his status toward the receivership and the principles applicable to his selection were discussed in the earlier part of this work.[2]

A corporation, generally a trust company, has been appointed in several instances.[3] The question of whom the court will appoint in any particular case is one resting solely within its discretion, which will not be reviewed except for an abuse of it in accordance with the general rules respecting the exercise of discretionary powers.[4] Although the court generally gives consideration to names suggested by the parties to the litigation, it is under no obligation to appoint the persons suggested.[5]

v. Northern Pac. R. R. Co. (C. C.), 66 Fed. 169; Olmstead v. Distilling & Cattle Feeding Co., 67 Fed. 24.

The duties of a receiver are to take charge of, and safely keep and account for, all of the assets of the estate, and put into effect orders of the court respecting the receivership property. Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co., 92 Wash. 654, 159 Pac. 788.

A receiver represents all interests involved in the litigation, and under direction of court manages property for benefit of all concerned. Bull v. International Power Co., 86 N. J. Eq. 275, 98 Atl. 382.

An ordinary chancery receiver is not an assignee, but a ministerial officer appointed by the court to take possession of and preserve the fund or property in litigation. Underhill v. Rutland R. Co., 90 Vt. 462, 98 Atl. 1017.

[2] See sections 26 and 62 et seq., section 154 and chapter IV generally.

[3] Kimmerle v. Dowagiac Mfg. Co., 105 Mich. 640, 63 N. W. 529; Re Knickerbocker Bank, 19 Barb. (N. Y.) 602; Roby v. Title, etc., Trust Co., 166 Ill. 336, 46 N. E. 1110.

[4] Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358; Fisher v. Southern Loan & Trust Co., 138 N. C. 90, 102, 50 S. E. 592.

[5] The court, of course, need not follow the wishes of the majority of stockholders in selecting a receiver. Garig v. Truth Printing, etc., Co., 123 La. 895, 49 So. 632.

The best person should be appointed without reference to whom has suggested his name. Lespinasse v. Bell, 2 Jac. & W. 436, 37 Eng. Reprint 694.

The defendant has no right to choose as to whom is to be appointed receiver. Grosch v. Cen-

Where a court appoints a person upon the theory that all of the interested parties have consented to his appointment, and it transpires that such was not the fact, the court will revoke the appointment.[6] The fact that a person is a relative of persons who are large stockholders and bondholders in the corporation is no objection to his appointment where almost all of the interested parties unite in praying for his appointment as receiver and he is familiar with the receivership property through being a former officer of the corporation.[7] The general rule in respect to appointing parties to the litigation as receivers has been stated as follows:[8]

"While, in extraordinary cases, it is proper, and may be advisable, to appoint a party to the action receiver, it is not usual to do so; and, when the court is asked to depart from the usual practice, a full, frank, and complete disclosure of all facts relevant to the question should be made to the court."

The practice in England is, upon appointing a party to the litigation as receiver, to expressly direct that he is not to receive compensation.[9]

tral Vannina, Inc., 7 Porto Rico Fed. 39.

Sometimes in accordance with debenture securities, the holders are given the right to select the receiver. Under such circumstances the appointment must be a fair one. Re Maskelyne British Typewriter, Ltd. [1898], Ch. 133.

6 Wood v. Oregon Development Co., 55 Fed. 901.

7 Bowling Green Trust Co. v. Virginia, etc., Co., 133 Fed. 186.

8 Burroughs v. Toxaway Co., 182 Fed. 129.

The court will not usually appoint as receiver a person interested in the property or a party to the controversy, but the question is one of discretion. The court suggested that if any embarrassing conditions arose the court would either associate some one else or appoint another in his stead. Fisher v. Southern Loan & Trust Co., 138 N. C. 90, 102, 50 S. E. 592.

9 Sargant v. Read, Ch. D. 600; Blakeney v. Dufour, 15 Beav. 40, 51 Eng. Reprint 451; Sutton v. Jones, 15 Ves. Jr. 584, 33 Eng. Reprint 875.

In Pawley v. Pawley [1905], 1 Ch. 593, a defendant was appointed receiver, without salary, for the purpose of providing for the payment of his costs out of an income to which plaintiff, a

Where a party to the litigation is appointed receiver, the general rule is that he is not entitled to compensation for his services.[10] Probably in most cases where a party to the litigation is appointed, it is done by consent of all parties and for the purpose of avoiding the expenses connected with compensating a receiver.[11]

But it has been declared that where the appointment of a party as receiver is made without determining at the time that he shall serve without compensation, it becomes a question of discretion with the court whether to make an allowance under all the circumstances of the particular case.[12]

As stated before, the question of the appointment is one lying within the discretion of the receivership court. Under such circumstances if the business of the corporation is one requiring special knowledge or ability to conduct it as a going business, or if its affairs are in such condition as to details of management or requirements that it can be best conducted by some one connected with the corporation, the court will not hesitate to appoint such person as its receiver where he is not charged with

married woman, was entitled as her separate use, subject to certain restraints on anticipation.

10 Meissler v. Meissler, 101 Ill. App. 256; Brien v. Harriman, 1 Tenn. Ct. 467; Todd v. Rich, 2 Tenn. Ch. 107.

Where a party to the litigation is appointed receiver, it is the general rule that he is not entitled to compensation for his services, and especially so in the case of the appointment of a partner as receiver on dissolution of the partnership. Bartelt v. Smith, 145 Wis. 31, Ann. Cas. 1912A, 1195, 129 N. W. 782.

11 Bartelt v. Smith, 145 Wis. 31, Ann. Cas. 1912A, 1195, 129 N. W. 782.

Likewise where a party to the litigation is appointed receiver upon an understanding that he is to serve without compensation, none will be allowed him. Polk v. Johnson, 160 Ind. 292, 98 Am. St. Rep. 274, 66 N. E. 752; Steel v. Holladay, 19 Ore. 517, 25 Pac. 77.

12 Meissler v. Meissler, 101 Ill. App. 256.

In some instances, however, compensation has been allowed to a receiver who is a party to the litigation. Geyser Min. Co. v. Salt Lake Bank, 16 Utah 163, 51 Pac. 151; Bignell v. Chapman [1892], 1 Ch. 59.

fraud in his conduct of the affairs of the corporation. Consequently the court will, under such circumstances, not consider the fact that one has been connected with the receivership corporation in the capacity of manager, officer, director, or employee as an objection to his appointment if otherwise satisfactory.[13] And likewise a

[13] Ralston v. Washington, etc., R. Co., 65 Fed. 557.

The president of the corporation was appointed in Clarke v. Central R. R., etc., Co., 54 Fed. 556.

In one case where the proceeding was initiated by the state, the president and directors of the corporation were appointed. In re Fifty-four First Mortgage Bonds, 15 S. C. 304.

The board of directors has been appointed. In re Manchester, etc., Ry. Co., L. R. 14, Ch. D. 645.

An officer or stockholder of the corporation may be appointed to act as auctioneer to sell property belonging to the receivership. Friedrichs v. Friedrichs, Young & Taney, 126 La. 689, 52 So. 996.

In a voluntary proceeding to dissolve a corporation under the statute, the president of the corporation may be appointed receiver if otherwise not disqualified. Matter of Eagle Iron Works, 8 Paige (N. Y.) 385.

Where the receivership is the result of financial embarrassments and the receivership is expected to tide it over, it has been stated that at least one of the receivers should be selected from the management on account of his familiarity with the business of the corporation and the nature of its affairs and transactions. Lotte Bros. v. American Silk Co., 159 Fed. 499.

In Scattergood v. American Pipe & Const. Co., 249 Fed. 23, 161 C. C. A. 83, the president of the defendant corporation was appointed as temporary receiver by the federal court, and with the approval of a considerable majority of the stockholders and of a large number of creditors, was a month later appointed permanent receiver. The corporation was a large industrial concern, furnishing supplies to public utility companies, principally water companies, and owned control of a large number of such corporations.

A trustee of deed of trust may be appointed receiver in a suit by the trustees and beneficiaries to foreclose a landlord's lien upon the premises where it appears to the best interests of the estate, the matter being in the discretion of the court. Patterson v. Northern Trust Co., 230 Ill. 334, 82 N. E. 837.

A trustee invested with the power to sell the property of an insolvent corporation and to collect demands due it is properly appointed receiver to take charge of its real estate until the validity of liens thereon can be adjudicated. Weigand v. Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803.

When a director of a corporation has been appointed its receiver, he may, as receiver, bring an action against himself for any

court may, under similar circumstances, appoint a stockholder or creditor of the corporation as its receiver.[14] In one case[15] where it was urged against the appointment of a proposed person as receiver that he was a stockholder of the defendant corporation, the court in holding that the mere fact of being a stockholder was not sufficient to disqualify him from being appointed, said: "Ordinarily, the fact that a receiver has an interest is a recommendation that he will safeguard the interests of his fellow-stockholders, as well as his own. There may be exceptions rendering it prudent, from a business point of view, not to appoint a stockholder. This case is not brought within any exception."

In some jurisdictions, cases may be found which make the statement that a person who has been connected with the management of the corporation as an officer or director should not be appointed as its receiver, but it will be found that either such cases were early cases in which

liability he sustained as a director. Murphy v. Penniman, 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282.

When a director, or trustee, is appointed receiver and it is necessary to bring suit against him, he should be sued as receiver; in an action for conversion of property in his possession he can not claim that he should have been sued as director, or trustee, even though the property has been in his possession, or that of the company, prior to the receivership. Hyde v. Clausin, 82 Wash. 218, 144 Pac. 50.

14 Court may appoint a stockholder. See Friedrichs v. Friedrichs, etc., 126 La. 689, 52 So. 996.

It has been held that the fact that one is a member of a reorganization committee of the failing company is no objection to his appointment as receiver, but he should resign from the committee. Fowler v. Jarvis-Conklin M. Co., 63 Fed. 888.

A creditor may be appointed. Barber v. International Co., 73 Conn. 587, 48 Atl. 758; State v. Johnson, 103 Wis. 591, 51 L. R. A. 33, 79 N. W. 1081.

A director or stockholder who is the complainant in the receivership proceeding ought not to be appointed. Mercantile Trust, etc., Co. v. Florence Water Co., 111 Ala. 119, 19 So. 17.

15 McGilliard v. Donaldsonville, etc., Works, 104 La. 544, 81 Am. St. Rep. 145, 29 So. 254.

See, also, to the same effect, Barker v. Wayne Circuit Judge (Lithbridge), 117 Mich. 325, 75 N. W. 886; Gypsum Plaster, etc., Co. v. Kent Circuit Judge, 105 Mich. 497, 63 N. W. 518.

the courts did not take the broader view of disregarding the official connection where the person had some special fitness under the circumstances, or the cases may be such as show facts which if true made the officials unfit for the appointment, or they had some interests in the matter which were in conflict with the interests of all parties concerned.[16] Of course if the receivership is the result of mismanagement, whether occurring in good faith or not, or if the officers are charged with bad faith in their transactions with or on behalf of the corporation, the court naturally will not consider appointing them to the position of receiver.[17]

16 It is sometimes said that an officer or stockholder of the corporation should not be appointed. Covert v. Rogers, 38 Mich. 363, 31 Am. Rep. 319; Re Engle Iron Works, 8 Paige (N. Y.) 385; Re Bowery Bank, 5 Abb. Prac. (N. Y.) 415, 16 How. Pr. 56; Atkins v. Wabash, etc., Ry. Co., 29 Fed. 161; Finance Co. v. Charleston, etc., R. Co., 45 Fed. 436; Middlesex County Freeholders v. State Bank, 28 N. J. Eq. 166.

The court refused to appoint the vice president of the corporation. Richards v. Chesapeake, etc., R. Co., 20 Fed. Cas. 692, Fed. Cas. No. 11, 771.

The principal manager of a corporation should not be appointed its receiver where his personal interest might conflict with those of the creditors. In re Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

17 In McCullough v. Merchants' Loan, etc., Co., 29 N. J. Eq. 217, it was said:

A director of a corporation at the time of its suspension is not a proper person to be appointed its receiver, since "a person who can not, with the aid of others, manage a business successfully, is, as a general rule, unfit to keep it up alone."

An officer of the corporation when the fraud and mismanagement for which a receiver is asked were committed, should not be appointed as a receiver. Williams v. United Wireless Telegraph Co., 131 N. Y. Supp. 41; Graham v. Hundley Dry Goods Co. (Mo.), 177 S. W. 600.

Where the corporation is insolvent an officer of the corporation should not be appointed except under exceptional circumstances. Cay v. Title, etc., Trust Co., 157 Fed. 794.

If an officer of a corporation is appointed and charges of fraud are made which it will be his duty to investigate, he should be removed. McCullough v. Merchants' Loan, etc., Co., 29 N. J. Eq. 217.

If there is an objection, statutory or otherwise, to the appointment of a stockholder, as such, he may remove the disqualification by disposing of his stock.[18]

It has been held that an attorney in the cause of action in which the receivership arises may be appointed, although it is also stated that the practice is not to be commended.[19]

It is customary for ancillary courts to appoint either the primary receiver alone or join with him a person of the local jurisdiction.[20]

c. General Duties of Receiver Respecting the Property of the Estate.

A. In General.

§ 344. General Duty of Reducing to Possession the Assets of the Corporation.

It is the duty of the receiver to reduce to possession all of the assets of the company. The appointment order usually contains a general provision authorizing him to resort to litigation if necessary.[1] Special authority to

[18] People v. Illinois, etc., Loan Assn., 56 Ill. App. 642.

[19] Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358.

[20] Primary receivers are often appointed ancillary. Farmers Loan & T. Co. v. Northern Pac. R. Co., 72 Fed. 26; Sands v. E. S. Greeley & Co., 88 Fed. 130, 31 C. C. A. 424; Dunlop v. Paterson, etc., Ins. Co., 12 Hun (N. Y.) 627; United States Trust Co. v. New York, etc., Ry. Co., 25 Fed. 797; Shinney v. North American, etc., Co., 97 Fed. 9; Irwin v. Granite, etc., Assn., 56 N. J. Eq. 244, 38 Atl. 680; Conklin v. United States, etc., Co., 123 Fed. 913.

In Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 N. E. 355, the court appointed the primary receiver as receiver in its ancillary receivership.

Where a court in an ancillary receivership proceeding appoints as receiver the same person appointed in the primary suit, it may join with such appointment another person as co-receiver. Coltrane v. Templeton, 106 Fed. 370, 45 C. C. A. 328.

[1] Vallery v. Denver, etc., R. Co., 236 Fed. 176, 177, 149 C. C. A. 366; Hundley v. Hewitt, 195 Ala. 647, 71 So. 419; Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187.

The court has not authority in determining whether or not a receiver should be appointed to adjudicate questions of title and in

sue in a particular matter may be granted;[2] and on the receiver's suggestion that recovery in a particular case would be doubtful the court may authorize the receiver not to sue.[3] The receiver has the right to control all necessary litigation and neither a stockholder nor a creditor may interfere with that right. In an appellate decision affirming an order of the receivership court denying a petition of a stockholder for leave to intervene in order that he might be in a position to institute litigation on behalf of the estate the rule has been stated as follows: "It follows that appellant, when he filed his petition, was, in a sense, already in court: That is to say, the corporation in which he is a stockholder was in court, and, generally speaking, the stockholders of a corporation, for the purposes of all litigation growing out of the relations between such corporation and a third person, surrender their personal or individual entity to the corporation in which they are stockholders and, when such corporation is properly in court, the stockholders are, under the law, also in court, so far as is necessary for the purpose of adjudicating all matters incident to the issues tendered between such corporation and such other party or parties litigant. It is only in exceptional cases that stockholders will be permitted to sue or defend a suit for and on behalf of themselves as stockholders of such corporation. [Here are set forth the exceptional cases.[4]] Such being the rules governing stockholders of a corporation in bringing actions originally, for and on behalf of themselves, there would seem to be even more reason for there application where the corporation is insolvent and its affairs are being managed and settled

the order of appointment to deprive him of the right to pursue property claimed adversely to the company. Mirabal v. Albuquerque Wool Scouring Mills, 23 N. M. 534, 170 Pac. 50.

2 Vallery v. Denver, etc., R. Co., 236 Fed. 176, 177, 149 C. C. A. 366.

3 Kelly v. Dolan, 233 Fed. 635, 147 C. C. A. 443.

4 See §§ 348 et seq., supra.

through a receiver appointed by and acting under the direction and orders of the court. . . . The receiver in such a case is the proper party to bring any action which the corporation might have brought. . . . While our Supreme Court recognizes that a general creditor, by reason of his lien upon the property so held in trust by such receiver has the right to intervene and contest the validity as well as the priority of other claims or asserted liens . . . yet such court has also frequently held that such receiver represents the creditors and has the exclusive right to recover and protect the assets of the corporation and that such actions can not be maintained by the creditors in their own names. . . . 'The petition and proposed complaint . . . were nothing more nor less than a proposal on the part of the petitioner to usurp the functions of the receiver, or practically to appoint another receiver' [Voorhees v. Indianapolis, etc., Co., 140 Ind. 239]."[5]

In this matter there is, as shown in the above quotation, the same restriction upon the creditors and the stockholders as to their right to institute or control litigation on behalf of the estate as exists in the case of stockholders with reference to litigation on behalf of the corporation when it is managing its own affairs. To show capacity to litigate, a creditor or a stockholder must show that the receiver has declined to do so, or that he is in such a way interested in the matter that it would be

5 Marcovich v. O'Brien (Ind. App.), 114 N. E. 100; Southern Cotton Mills v. Ragan, 136 Ga. 789, 72 S. E. 158; Wheeler v. Thayer, 121 Ind. 64, 22 N. E. 972; Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 391, 1 Ann. Cas. 509, 66 L. R. A. 89, 70 N. E. 489; Coddington v. Canaday, 157 Ind. 243, 256, 61 N. E. 567; Jacobs v. E. Bement's Sons, 161 Mich. 415, 126 N. W. 1043; Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310; Merchants' Nat. Bank v. Northwestern Mfg., etc., Co., 48 Minn. 361, 51 N. W. 119; Lang v. Lutz, 39 Misc. Rep. 3, 78 N. Y. Supp. 200; Herf & Frerichs Chemical Co. v. Brewster, 54 Tex. Civ. 217, 117 S. W. 880.

useless to request him to do so, or that the court has consented to placing responsibility upon the creditor or the stockholder. "The receiver represents the corporation, and also the creditors, and the funds and causes of action which became vested in him on his appointment are *in custodia legis* and should not be diverted and taken from his hands or placed beyond the control of the court whose duty it is to see that all the funds of the corporation are justly and equitably distributed among its creditors and members. . . . If it had been made to appear that the receiver was in league with the other defendants or had been guilty with them in misappropriating the funds of the company, that would perhaps be a sufficient excuse for not applying to him to prosecute the defendants in a proper action."[6]

The receivership court may enjoin actions commenced contrary to this rule.[7]

As to domiciliary litigation the receivership court has entire control of the question as to the form in which it shall occur. Through its jurisdiction over the receivership proceedings it has jurisdiction of any subject matter that is ancillary to the administration of the estate and it can itself determine any such matter, as a mere incident to those proceedings, if it can obtain jurisdiction of the persons interested therein. On the other hand it may permit or order any such matter to be heard in a separate action instituted in the court itself or in some other forum of proper jurisdiction. The rule has been stated as follows: "The fact that the circuit court had

6 Fisher v. Andrews, 37 Hun. (N. Y.) 176, citing Greaves v. Gouge, 69 N. Y. 154 and Brinckerhoff v. Bostwick, 88 N. Y. 52; Porter v. Sabin, 149 U. S. 473, 37 L. Ed. 815, 13 Sup. Ct. 1008; Finance, etc., Co. v. New Jersey Short Line R. Co., 183 Fed. 830; Big Creek Stone Co. v. Seward, 144 Ind. 205, 42 N. E. 464, 43 N. E. 5; Goodbody v. Alelaney, 82 N. J. Eq. 140, 91 N. Y. 724; Ackerman v. Halsey, 37 N. J. Eq. 356; Brinckerhoff v Bostwick, 88 N. Y. 52; Meyer v. Page, 112 App. Div. 625, 98 N. Y. Supp. 739.

7 Attorney General v. Guardian, etc., Ins. Co., 77 N. Y. 272.

possession of all the assets of the [defendant corporation] for the purpose of winding up its affairs as an insolvent corporation is the fact which made it admissible to bring a debtor of that corporation into the court to the end that his debt might be ascertained and payment coerced. For the purpose of collecting in choses in action the court might direct its receivers to institute independent suits in that or courts of the state or cause such debtors to be made defendants in the principal cause and determine for itself any question which might be involved by the defenses to the claim. Such a proceeding would not involve any question of citizenship, nor amount in controversy, nor mode of trial. The complete jurisdiction of the court over the *res*, the property, and assets of this corporation, involved its right to bring before it persons having possession of any of those assets or having claims thereon or who were indebted to it and either itself hear and determine all controversies, or refer them to a master or to a jury as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. (The right of the court to appoint a receiver can not be questioned.) It might in its discretion submit such controversy upon issues made to a jury, or dispose of them without doing so. That the liability of appellee was one of a legal character did not operate to defeat the jurisdiction and bring its proceedings against him to a stand. These questions seem conclusively settled by White v. Ewing, 159 U. S. 36, a case which arose upon a like proceeding in the same court and in which certain questions were certified by this court under the writ of appeals statute."[8] The court, having jurisdiction of the neces-

[8] Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616; In re Hollander v. Heaslip, 222 Fed. 808, 137 C. C. A. 1. Circuit Judge Walker, for the Circuit Court of Appeals, said: "We are not of opinion that the court was in error in overruling the above-mentioned demurrer. The bill to which it was interposed was auxiliary to

sary parties, may permit creditors, with proved claims, to intervene in the receivership proceedings and have cancelled invalid contract liens against the company or have judgment on claims in favor of the estate, conditioning, if considered proper, the privilege upon the

the original suit in which, by means of a receivership, the court had acquired possession of the assets of the World Publishing Company, Limited, for the purpose of applying them to the payment of its debts. This enabled it to cause a debtor to that corporation who was within reach of its process to be brought into the original cause, to the end that his debt might be ascertained and payment coerced. It was for the court, in its discretion, to decide whether it would determine for itself all claims of the corporation whose estate it was administering, or would allow them to be litigated elsewhere. It was within its power to hear and determine all controversies regarding such claims, at least in so far as it could acquire jurisdiction of the persons of those who were parties to such controversies, though the questions thus collaterally involved were of a purely legal nature. White v. Ewing, 159 U. S. 36, 40 L. Ed. 67, 15 Sup. Ct. 1018; Porter v. Sabin, 149 U. S. 473, 37 L. Ed. 815, 13 Sup. Ct. 1008; Bottom v. National Ry. Building & Loan Association (C. C.), 123 Fed. 744; Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616; Ross-Meehan Brake Shoe F. Co. v. Southern Malleable Iron Co. (C. C.), 72 Fed. 957. It could not have so dealt with a purely legal demand if the bill which asserted it had not been an ancillary or auxiliary one, but was an original suit brought by a receiver who derived his authority from a court of another jurisdiction. Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. 244; Fidelity Trust & Safe Deposit Co. v. Archer, 179 Fed. 32, 103 C. C. A. 16."

Where a receiver sues to obtain property on the ground that it was fraudulently transferred, he need not tender any sums of money which it may appear that the parties guilty of the fraud may have received, but it is sufficient if he offers to do equity. Vallery v. Denver & R. G. R. Co., 236 Fed. 176, 149 C. C. A. 366.

A corporation officer, against whom a claim for misappropriated funds has been made in a petition filed by the receiver in the receivership proceedings, may, by participation in proceedings based upon the petition, waive his right to object to a decree against him on the ground of irregularity in the appointment of an auditor who heard and reported the matter and on the ground of other irregularities. Howard v. Charles J. Cassidy Co., 42 App. Cas. (D. C.) 44. The rule may be changed by statute. See Dilzell, etc., Construction Co. v. Lehmann, 120 La. 273, 45 So. 138.

assumption of the costs by such creditors and confining the benefits to them.[9]

As to actions in forums other than the receivership court, the receiver may proceed at law or in equity as the nature of the case may require. If the issues are purely legal the receiver must establish his claim in a court of law. A court of equity by means of a receiver may use a court of law in aid of the collection of the assets that are to be distributed.[10] On the other hand if the cause of action is in its nature essentially of equitable cognizance or if there is necessity for an accounting, cancellation of an agreement, or other equitable incident involved in the obtaining of complete relief the receiver may proceed in equity.[11]

9 Williamson v. Collins, 243 Fed. 835, 156 C. C. A. 347 (cancellation of invalid bonds of the corporation); Equitable Trust Co., etc., v. Great Shoshone, etc., Co., 245 Fed. 697, 158 C. C. A. 99 (cancellation of invalid chattel mortgage); Hospes v. Northwestern Mfg., etc., Co., 48 Minn. 174, 31 Am. St. Rep. 637, 15 L. R. A. 470, 50 N. W. 1117 (claim against stockholder for stock subscription); McKusick v. Seymour, etc., Co., 48 Minn. 158, 50 N. W. 1114 (claim against stockholder on statutory liability).

10 Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187; McDermott v. Woodhouse, 87 N. J. Eq. 615, 101 Atl. 375; Smith v. Johnson, 57 Ohio St. 486, 49 N. E. 693. Since a judgment rendered by a court of equity is not void even though the court was in error in ruling that the action was in equity and not at law, a defendant who does not appeal from a judgment against him is bound by it, even though as to other defendants the judgment is on appeal set aside because of the court's error in the ruling as to the jurisdiction. Brown v. Allebach, 182 Fed. 264.

11 Howland v. Corn, 232 Fed. 35, 146 C. C. A. 227; Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189; Borland v. Haven, 37 Fed. 394, 13 Sawy. 551; Wheeler v. Matthews, 70 Fla. 317, 70 So. 416; Fitzpatrick v. McGregor, 133 Ga. 332, 25 L. R. A. (N. S.) 50, 65 S. E. 859; Whitman v. United Surety Co., 110 Md. 421, 72 Atl. 1042; Hughes v. Hall, 117 Md. 547, 83 Atl. 1023; Hopper v. Brodie, 130 Md. 443, 100 Atl. 644; Ventrees v. Wallace, 111 Miss. 357, L. R. A. 1917A, 971, 71 So. 636; Thompson v. Greeley, 107 Md. 577, 17 S. W. 962; Easton Nat. Bank v. American Brick, etc., Co., 70 N. J. Eq. 722, 64 Atl. 1095; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618; Gray v. Heinze, 82 Misc. Rep. 618, 144 N. Y. Supp. 1045; Dill v. Ebey, 27 Okla. 584, 46 L. R. A. (N. S.) 440, 112 Pac. 973; Cham-

§ 345. Compelling Officers of Corporation to Testify Regarding Assets and Turn Its Books Over to Receiver.

A failure of the officers of a corporation over which a receiver has been appointed to deliver its assets to such receiver, even though the delivery is not specifically ordered by the court, constitutes a contempt of court.[1] In some states statutory provisions exist under which a receiver may have a summons issued to compel an officer of the corporation over which he has been appointed receiver to testify concerning the existence and whereabouts of property of the receivership and give other necessary information concerning its affairs. Under such statutes it is necessary for the statutory preliminaries to be complied with before an officer may be found guilty of contempt in refusing to testify.[2]

The general rule is that the receivership court may compel the officers of a corporation to turn over to its receiver the books and papers of the corporation.[3] A

berlain v. Piercy, 82 Wash. 157, 143 Pac. 977; Morrow v. Superior Ct., 64 Cal. 383, 1 Pac. 354; Potter v. Dear, 95 Cal. 578, 30 Pac. 777; Barnes v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

In a receiver's action against directors based upon their liability for the payment of wrongful dividends, it was said: "It is true that the right of action is given to creditors, but the liability is limited to the amount of the dividend declared and paid, and this constitutes a single fund in which many of the creditors have an equity and should in equity be prorated among the several creditors beneficially interested. This can best be accomplished in a court of equity." Metzger v. Joseph, 111 Miss. 385, 71 So. 645

When a receivership court refuses to give its receiver authority to institute an action against directors for damages for negligence in their conduct of the corporate business, and simply consents that a stockholder may do so, without having the cause of action assigned to the stockholder, the stockholder is not qualified to institute an action in equity when the receiver's action would be one at law. Kelly v. Dolan, 233 Fed. 635, 147 C. C. A. 443.

1 Blaise v. Security, etc., Co., 124 La. 979, 50 So. 816; Young v. Rollins, 90 N. C. 125.

2 Conover v. West Jersey Mortgage Co., 87 N. J. Eq. 16, 99 Atl. 604.

3 American Const. Co. v. Jacksonville, etc., Ry. Co., 52 Fed. 937.

very interesting question arises, however, where the officers of the corporation refuse to turn over its books or give testimony in regard to its affairs on the ground that to do so will incriminate them, and especially where the officers are under indictment or formal criminal charges for their actions in the affairs of the corporation. In the case of Manning v. Mercantile Securities Company,[4] arising in Illinois, the court compelled an officer of a corporation, by means of contempt proceedings, to turn over the books of the corporation to its receiver, notwithstanding that the officer had refused to do so on the ground that they would tend to incriminate him. In so deciding, the court said:

"The right of a witness to refuse to furnish evidence which will incriminate himself is a constitutional right, too firmly established to be questioned. Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781; Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195. To hold, however, that a party to a chancery suit may assert his constitutional privilege by saying, in response to an order of the court that he turn over to a receiver the books, etc., of an insolvent corporation: 'I have been indicted for a criminal offense by reason of my connection with the corporation of which I am an officer, as will appear in reading the indictment found against me, and if I obey the order of the court, and turn over to the receiver the books, etc., of the corporation, they may contain certain matters which will tend to incriminate me,' would be to hold that an officer

[4] Manning v. Mercantile Securities Co., 242 Ill. 584, 30 L. R. A. (N. S.) 725, 90 N. E. 238.

An officer of a corporation can not refuse to turn over its assets to a receiver appointed over it or refuse to inform him what was done with its assets on the ground that to do so would incriminate him. Tolleson v. Greene, 83 Ga. 499, 10 S. E. 120.

But in re Kanter, 117 Fed. 356, the court refused to compel a bankrupt to turn over to a bankruptcy receiver his books of account where he made a showing that to do so would incriminate him.

of an insolvent corporation ordered to turn over the books, etc., of the corporation might set himself up as the sole and absolute judge as to whether the books, etc., which he had been ordered to turn over by the court to the receiver would incriminate him, which would be to place in the hands of an officer of an insolvent corporation the power to withhold from the receiver of said corporation the books, papers, documents, and assets of the corporation to whatever extent he might see fit. We think, therefore, that the bare statement of a party to such a proceeding, that the books, etc., which he had been ordered to turn over to the receiver might tend to incriminate him, is not sufficient to excuse him from obeying the order of the court; but that his answer should place the matter in such shape that the court can intelligently determine the question from an examination of the averments of the answer, or, if necessary, from an inspection of the books, etc., whether they would tend to incriminate the party required to surrender them to a receiver.

"We think the rule announced by Chief Justice Cockburn in R. v. Boyes, 1 Best & S. 311, to be a practicable one, where he said: 'To entitle a party called as a witness to silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness in his being compelled to answer.' Applying this rule to the case at bar, we think it apparent that it does not appear from the averments of the answer of the appellants that the books, etc., of the said corporation contain any evidence of an incriminating character against the appellants, and that their surrender to the receiver would tend to incriminate the appellants. People ex rel. Akin v. Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349; State v. Thaden, 43 Minn. 253, 45 N. W. 447; Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

"The books, etc., declined to be turned over to the receiver of the Mercantile Securities Company by the appellants may be presumed to be numerous, and it may be safely presumed that a large proportion of them—at least some of them—evidence transactions which would not tend to prove the appellants were guilty of the commission of a crime. By reason of the fact, therefore, that some of the books, etc., of said corporation, in the hands of the appellants, might show guilt, and others might not furnish evidence of criminal misconduct, the fact that some would tend to incriminate them would be no reason for their withholding other books, papers, documents, etc., from the receiver, which would in no way tend to incriminate them. We think their answer should, therefore, have pointed out, from the numerous books and documents in their hands, such books and documents as were incriminating in their character, and accompany their answer by an offer to turn over to the receiver the remaining books, etc., in their possession. Such seems to be the practice with reference to the discovery and inspection of documents which are privileged, and we can see no reason why the rule thus established should not be applied to a case like this if the constitutional privilege contended for by the appellants can be invoked in a case like this, which question we will consider hereafter in this opinion. . . . It is apparent that a party called to give evidence as a witness, or to produce in court, to be used in evidence, the books, etc., of a corporation, of which he is in possession as an officer, is in entirely a different situation from what an officer of an insolvent corporation is, who is directed by the court in which the affairs of the corporation are being wound up, and to which proceeding he is a party, to turn over the books, etc., of the corporation in his possession, to a receiver of the corporation. In one case the party is required to produce the books, etc., of the corporation to be used in evidence, and in the other case the court is granting to

the complainant the relief prayed for in his bill; and, while a court of equity will not force a party to subject himself to punishment for a criminal offense, it will not permit him to protect himself against equitable relief by alleging that he answers the bill filed against him, or turns over to a receiver property belonging to an insolvent corporation of which he is an officer, he will subject himself to the consequences of a crime. Story, Eq. Pl., sec. 525. In this case the complainants by their bill made a case against the appellants and the corporation of which they were officers, which entitled them to equitable relief, a part of which relief was to have turned over to the receiver of the corporation, the books, etc., of said corporation. If an officer of a corporation could, by claiming that the books, etc., of the corporation in his possession contained evidence of his criminal misconduct in the management of the affairs of the corporation, prevent the receiver of the corporation from obtaining the possession of the books, etc., of the corporation, which were necessary for him to have in order to properly administer the affairs of the corporation, and close up its business under the direction of the court, such officer would have the power, in effect, to deprive a court of equity of jurisdiction to close up the affairs of an insolvent corporation, by declining to deliver possession of the books, etc., of the corporation to the receiver appointed by the court. We are of the opinion that while the appellants could not be called upon to explain any of their conduct as officers of said Mercantile Securities Company, which would tend to incriminate them, they could be required by the court to turn over to the receiver the books, etc., of the corporation. Tolleson v. Greene, 83 Ga. 499, 10 S. E. 120. The possession of a receiver is the possession of the court making the appointment, the property being regarded, while in the hands of the receiver, as in the custody of the law. The receiver's possession, therefore, is neither adverse to the complainant

nor to the defendant in the litigation, but the possession of the property is in the court, through its receiver, where it must remain for the protection of all parties in interest, until the court disposes of the possession by ordering the receiver to sell the property, or to turn it over to the party to whom it may ultimately be found to belong. High, Receivers, sec. 134. If, therefore, the books, etc., turned over to the receiver under the order of the court entered in this case should, upon examination by the court, be found to contain evidence which would incriminate appellants, the appellants could be fully protected by the court from the use of such evidence against them, while the books, etc., are in the hands of the receiver and under the direction of the court. Where books and other documents are produced upon the service of a subpœna *duces tecum* they are brought directly into court to be used as evidence, while books, documents, and other papers turned over to a receiver under the direction of a court remain in the custody and control of the court, and could not be used as evidence against the party turning them over, except by the order of the court whose receiver had them in his possession."

In a bankruptcy case, the court in ordering the bankrupt to turn his books over to the bankruptcy court made an order limiting the use to be made of them to the administration of the bankrupt estate and making him the agent of the bankrupt in the care and custody of the books.[5]

It has, however, been held that the prosecuting officers may examine the books and papers of a banking corporation in the hands of a receiver where its president subsequent to the receivership had been indicted for knowingly receiving deposits while the bank was insolvent.[6]

5 In re Harris, 164 Fed. 292.

6 McElree v. Darlington, 187 Pa. 593, 67 Am. St. Rep. 592, 41 Atl. 456.

In this connection see State v. Strait, 94 Minn. 384, 102 N. W. 913, where the receiver of a partnership took the book of the receiver-

§ 346. Extent to Which Receiver Is Affected by Right of the Corporations to Recover Property — Doctrine of Estoppel.

From the point of view of the nature of the claims which the receiver may seek to enforce on behalf of the estate which he is administering, actions brought by the receiver may be divided into two classes: (1) actions brought to establish claims which the corporation itself could enforce if it had continued in control of its affairs; and (2) actions to recover property as to which the company itself would be estopped to claim it from those to whose possession or ownership it has passed, although the possession or ownership of those having it is due to some wrongful or illegal act on the part of the company.[1] In regard to the former the rule is that with reference to claims that the company could enforce the receiver stands in its shoes. He has no right of action where the company had none and any claim on his part is subject to the same defenses with which it might be met if presented by the corporation.[2] Since the management of the corporate affairs has passed out of the hands of the directors the receiver does not first have to ask them to proceed as a stockholder would have to do in the absence of a receivership. The receiver obtains

ship before the grand jury; and Blum v. State, 94 Md. 375, 56 L. R. A. 322, 51 Atl. 26, where similar use of the books was criticized.

1 For latter class see § 353, infra.

2 Allen v. Roydhouse, 232 Fed. 1010; Howland v. Corn, 232 Fed. 35, 146 C. C. A. 227; Metropolitan Coach Co. v. Freund, 42 App. Cas. (D. C.) 283; Great Western Tel. Co. v. Loewenthal, 154 Ill. 261, 40 N. E. 318; Reid v. Owensboro Savings Bank & Trust Co., 141 Ky. 444, 132 S. W. 1026; Reynaud v. C. J. Walton & Son, 136 La. 88, 66 So. 549; Haskell v. Gardner (Ind. App.), 93 N. E. 458; Farwell v. Metcalf, 63 N. H. 276; Lincoln v. Fitch, 42 Me. 456; Mayer v. Metropolitan Traction Co., 165 App. Div. 497, 150 N. Y. Supp. 1026; Curtis v. Leavitt, 15 N. Y. 9; Cutting v. Damerel, 88 N. Y. 410; Murphy v. Panton, 96 Wash. 637; 165 Pac. 1074; McLaren v. First Nat. Bank of Milwaukee, 76 Wis. 259, 45 N. W. 223; Haben v. Harshow, 49 Wis. 379, 5 N. W. 872.

his authority entirely from the court. Actions brought by the receiver may be directed against (a) strangers to the corporation, or (b) directors, trustees, or officers, or (c) stockholders, as will be shown in subsequent sections.

§ 347. Sale in Lieu of Litigation Attempting to Reduce to Possession.

Instead of reducing all of the assets of the corporation to possession the receiver may, upon proper proceedings and order, sell them as he has them, including such choses in action as have not been reduced to possession or judgment. Unless provision to the contrary is made in the terms of the sale, the purchaser at such a sale takes the assets with all the rights of the receiver, including the right to sue.[1] The order of sale may provide that any person having a defense to any claim advanced on behalf of the corporation must present the defense in advance of the sale.[2] The order of sale may provide for equitable treatment of stockholders who have fully paid for their stock in the event that the purchaser realizes more than he paid.[3]

1 Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507; Bailey v. Anderson, 142 Ga. 11, 82 S. E. 290; Harrington v. Connor, 51 Neb. 214, 70 N. W. 911. The fact that directors to whom such a sale was made borrowed part of the purchase price from the receiver, a corporation, and allowed the assets to remain in the receiver's possession until it had, by collecting, reimbursed itself for the advances made, does not in itself show that the sale was fraudulent as being to the receiver itself. Commerce Trust Co. v. Hettinger, 181 Mo. App. 338, 168 S. W. 911.

2 Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507.

3 Commerce Trust Co. v. Hettinger, supra, 181 Mo. App. 338, 168 S. W. 911.

B. Suits by Receiver to Recover Corporate Assets Recoverable by Corporation if no Receivership.

§ 348. Suits Against Strangers to the Corporation.

As far as actions against strangers to the corporation are concerned the receiver is likely to have all the occasions to institute litigation that arise in the experience of any going concern. He may foreclose a mortgage,[1] or sue to recover possession of real estate,[2] or to quiet title.[3] He may sue to recover a tax paid under protest.[4] He may maintain an action in trover for the conversion of personal property.[5] A receiver, having been appointed on the resignation of a predecessor, may sue the latter to recover the value of a secret trust reserved in his own favor when assigning, as receiver, a contract by which the bank undertook to purchase certain lands from the state. In such an action the usual rule as to laches will prevail. No action looking toward a complaint based upon the fraud in the transaction could be expected until knowledge of the fraud had been acquired and reasonably prompt action after that would meet all equitable requirements.[6] When one corporation through ownership of another corporation controlled the latter's board of directors and thereby practically managed its business, the receiver of the latter could maintain an action for an accounting and damages against the former based on a claim of fraudulent manipulation of the accounts of interchange of business between the two companies and of a fraudulent sale of bonds owned by the receiver's company and pledged to the other.[7] Where

1 Comer v. Bray, 83 Ala. 217, 3 So. 554.

2 Baker v. Cooper, 57 Me. 388.

3 Texas Rice Land Co. v. Langham (Tex. Civ. App.), 193 S. W. 473.

4 Lusk v. Botkin, 240 U. S. 236, 60 L. Ed. 621, 36 Sup. Ct. 263.

5 Gillet v. Fairchild, 4 Denio (N. Y.) 80.

6 Baker v. Schofield, 243 U. S. 114, 61 L. Ed. 626, 37 Sup. Ct. 333.

7 Vallery v. Denver & R. G. R. Co., 236 Fed. 176, 149 C. C. A. 366.

one corporation had agreed with the receiver's corporation to lease to it certain real property for a term of years and, after the proposed lessee had expended large sums of money preparatory to occupying the property, refused to grant the lease as agreed upon, the receiver may sue the proposed lessor for damages. In such an action the general principles of law as to the binding force upon a company of the acts of its agent and as to estoppel by conduct, the defendant company having stood by and permitted the receiver's company to improve its property, would prevail.[8] Where a judgment against the receiver's company for tort is obtained and prosecuted successfully through appeal, the receiver has the right to commence in the receivership court an action to have the judgment set aside on the ground that it had been secured on perjured testimony through a conspiracy fraudulently to fasten the debt on the company. It is not premature to bring suit before the surety on the appeal bond has been compelled to pay the judgment and is in a position to present a claim against the estate as one innocent of the fraud that deprives the judgment of any validity against the company in the hands of the original owner. In so far as the execution of the judgment is dependent upon property in the equity court's charge being subjected to the satisfaction of it that court may inquire into the conduct of the plaintiff in procuring it. One who is shown to have fraudulently procured a judgment in his favor can not expect to have the aid of a court of equity to carry it into execution.[9]

In general it may be said that in regard to all choses in action, existing at the time of the commencement of

[8] Underhill v. Rutland R. Co., 90 Vt. 462, 98 Atl. 1017.

[9] Ewen v. Clifton, 232 Fed. 136, 146 C. C. A. 328; Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552, 34 L. Ed. 1005, 11 Sup. Ct. 402; Gay v. Parpart, 106 U. S. 679, 27 L. Ed. 256, 1 Sup. Ct. 456; Lewers & Cooke v. Atcherly, 222 U. S. 285, 56 L. Ed. 202, 32 Sup. Ct. 94; Peabody v. New England Waterworks Co., 184 Ill. 625, 75 Am. St. Rep. 195, 56 N. E. 957.

the receivership, or accruing during its course out of some precedent activity of the corporation, it is the duty of the receiver to undertake to reduce them to possession; and in regard to all outstanding claims that are unfounded and whose enforcement would reduce the assets in the receiver's possession to the detriment of the creditors or the stockholders it is his duty to take all proper steps to remove the danger of their threat to the estate. The receiver is within his right and duty in defending the estate against any claim which is antagonistic to the rights or interests of the parties to the suit in which he was appointed.[10]

§ 349. Actions Against Trustees, Directors, or Officers for Malfeasance, Misfeasance, or Negligence.

Under the general rule as to the right and duty of a receiver to reduce to possession all of the assets of the company, as above set forth, the receiver may prosecute against trustees, directors, or officers any claim or chose in action which the company itself might have enforced but for the receivership or which a stockholder might have enforced if the directors or the company neglected or refused to take proper action. The receiver may compel from directors an accounting for property in their hands;[1] he may recover from a director a preference wrongfully obtained while the company was insolvent;[2] he may recover property converted by directors to their own use,[3] or profits wrongfully made in corporate trans-

10 Owen v. Clifton, supra; Bosworth v. Terminal R. Association of St. Louis, 174 U. S. 182, 43 L. Ed. 941, 19 Sup. Ct. 625.

1 Gray v. Heinze, 82 Misc. Rep. 618, 144 N. Y. Supp. 1045.

2 Ronald v. Schoenfeld, 94 Wash. 238, 162 Pac. 43.

The receiver may recover a preference from a director, although the claim paid was one that had been assigned to the director when he advanced money to release an attachment on corporate property in another state and was thereby entitled to a preference out of the property in that state. Gray v. Taylor, 59 N. J. Eq. 621, 44 Atl. 668.

3 Folsom v. Smith, 113 Me. 83,

actions.[4] Probably, however, the great majority of the claims that receivers find it necessary to prosecute against trustees, directors, or officers are for damages due to malfeasance, misfeasance, or negligence by which, for the most part, the conditions leading to the receiverships themselves, are caused.[5] It is not a defense to any of these actions that the money, or property, sought to be recovered is not needed to satisfy the claims of creditors.[6]

92 Atl. 1003; Bowers v. Male, 186 N. Y. 28, 78 N. E. 577, affirming 111 App. Div. 209, 97 N. Y. Supp. 722.

4 Where an officer and director who dominated the board of directors, induced them to purchase worthless bonds of another corporation in which he was interested, and by which he made a large profit, the receiver of the corporation may recover such property from him. Pepper v. Addicks, 153 Fed. 383.

5 Re National Funds Assurance Co., L. F. 10 Ch. Div. 118; Kelly v. Dolan, 233 Fed. 635, 147 C. C. A. 443; Noyes v. Wood, 247 Fed. 72, 159 C. C. A. 290; Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Becker v. Billings, 161 Ill. App. 351; Foutz v. Miller, 112 Md. 458, 76 Atl. 1111; Ventrees v. Wallace, 111 Miss. 357, L. R. A. 1917A, 971, 71 So. 636; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962; Bank of Niagara v. Johnson, 8 Wend. (N. Y.) 645; Butterworth v. O'Brien, 39 Barb (N. Y.) 192; Gillet v. Phillips, 13 N. Y. 114; Pierson v. Cronk, 13 N. Y. Supp. 845; Bowers v. Male, 186 N. Y. 28, 78 N. E. 577; Hayes v. Kenyon, 7 R. I. 136; Hodges v. New England, etc., Co., 1 R. I. 312, 53 Am. Dec. 624; Richardson v. Agnew, 46 Wash. 117, 89 Pac. 404.

Where directors are sued for damages due to the fact that they sold increase capital stock for worthless notes they are liable for the par value of the stock unless they show that it could not have been sold for that price. Cockrill v. Abeles, 86 Fed. 505, 30 C. C. A. 223.

The receiver may recover illegal dividends paid by directors under the statute regardless of whether the corporation has been dissolved. Stoltz v. Scott, 23 Idaho 104, 129 Pac. 340.

A settlement of claims against directors of a corporation by a receiver with the permission of the court precludes a stockholder from maintaining a suit upon the same cause of action. Craig v. James, 71 App. Div. 238, 75 N. Y. Supp. 813.

6 McCarty's Appeal, 110 Pa. 379, 4 Atl. 925.

§ 350. Actions Against Stockholders for Unpaid Subscriptions to Stock.

The actions that a receiver finds it necessary to institute against stockholders as such are usually suits to collect unpaid stock subscriptions or other statutory liabilities. While the corporation is in control of its own affairs subscriptions are, unless there are statutory provisions to the contrary, collectible only by the company. They form an asset of the company and pass to the receiver. This is the common law rule[1] and statutes making provision to this effect are merely declaratory of the common law.[2] So generally recognized is the rule that stockholders are liable to the receiver on their unpaid subscriptions that it is the common practice to include in the appointing order a provision authorizing and directing the receiver to collect them.[3] The rule applies alike to subscriptions for all classes of stock. There is

1 Unpaid stock is as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction as between such a demand and any other asset which form a part of the property and effects of the corporation. Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220.

"Independent of statute the unpaid capital due from stockholders always was and is a part of the assets of the company and so belongs to the company not to the creditors." John W. Cooney Co. v. Arlington Hotel Co. (Del. Ch.), 101 Atl. 879; McDermott v. Woodhouse, 87 N. J. Eq. 124, 99 Atl. 103, 104; Republican Iron & Steel Co. v. Carlton, 189 Fed. 126.

2 Lang v. Lutz, 39 Misc. Rep. 3, 78 N. Y. Supp. 200; Pope v. Merchants' Trust Co., 118 Tenn. 506, 103 S. W. 792.

3 Hollander v. Heaslip, 222 Fed. 808 137 C. C. A. 1; Hundley v. Hewitt, 195 Ala. 647, 71 So. 419; Graves v. Denny, 15 Ga. App, 718, 84 S. E. 187. In this case it is ruled that a provision directing the receiver to collect subscriptions from such stockholders as in his opinion were legally liable was not a delegation of the court's equitable powers to the receiver, but a mandatory direction to the court's officer not to sue when investigation and legal advice led him to believe that one who from the records appeared to be liable had a defense that would defeat recovery.

no difference between common and preferred stock in this regard;[4] and while there may be a difference between original and increase stock as to the right of the company to sell the latter class for less than par there is no difference between the two as far as a holder's liability for a subscription is concerned.[5]

Notwithstanding the well known character of unpaid stock subscriptions as an asset of the corporation, from time to time, cases will be found in which the question arises as to whether the receiver is in a position to sue for their recovery. Some confusion at times arises from a failure to recognize the purpose of statutes creating the liability for such unpaid stock subscriptions and confusing them with statutes creating what is often called a double liability or liability for a proportionate share of the debts of the corporation.

It is, of course, outside of the domain of this work to go into the whole question of the right to recover for unpaid subscriptions since that subject may be found thoroughly discussed in the standard works upon Corporation Law. Our concern is limited to the right of a receiver to maintain suits of this character.

The liability is specifically created by the statutes of the various states though sometimes in variant form as to the procedure to be employed in collecting the assessment for such unpaid stock. Under the form of statute in general use the liability for such unpaid stock is an asset of the corporation and the receiver is placed in the shoes of the corporation respecting its collection, and hence is allowed to collect it in behalf of the corporation, at least, in the jurisdiction of its domicile.[6] There may

[4] John W. Cooney Co. v. Arlington Hotel Co. (Del. Ch.) 101 Atl. 879.

[Affirmed on this point by Supreme Court under title of Du Pont v. Ball (Del.), 106 Atl. 39.]

[5] Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187.

[6] Where under the decisions of the state in which a corporation is domiciled, construing its own statutes, the receiver is authorized

be statutes, of course, which limit the collection of such assets to the meeting of claims against the corporation.

The distinction between the liability for unpaid stock and the liability of the stockholder which is more generally known as statutory liability in addition to the par value of his stock was well set forth by Mr. Chief Justice Pennewill in a very recent case from Delaware,[7] in which he said:

"The appellants argued strongly and with much confi-

to enforce the liability of stockholders upon their stock holdings, as an asset of the corporation, the right of the receiver to maintain such an action in a foreign state will be sustained. Miller v. Amoretti (Wyo.), 181 Pac. 420, citing Howarth v. Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; Howarth v. Ellwanger, 86 Fed. 54.

Where receiver is unable to pay debts of an insolvent corporation unless a note given by subscriber for capital stock is collected or sold, a transferee of corporation's assets may recover amount of note, even though the maker may be entitled to a pro rata share of any surplus in hands of receiver. Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507.

In New Jersey the statutes create a liability to make good on stock not fully paid running in favor of the corporation. Under such a statute the receiver of the corporation may maintain a proceeding against the stockholders to require them to contribute for the benefit of creditors such proportions of the amount unpaid upon the shares as may be required to pay the debts of the company. Easton Nat. Bank v. American Brick & T. Co., 70 N. J. Eq. 722, 64 Atl. 1095; Re Remington Automobile, etc., Co., 153 Fed 345, 82 C. C. A. 421.

The Delaware statute is similar to the New Jersey statute respecting unpaid stock subscriptions. The Delaware courts also hold that the recovery in such a case is an asset of the corporation for the benefit of its creditors and may be accordingly collected by the receiver. Du Pont v. Ball (Del.), 106 Atl. 39; John W. Cooney Co. v. Arlington Hotel Co. (Del. Ch.), 101 Atl. 879.

7 Du Pont v. Ball (Del.), 106 Atl. 39. See also Easton Nat. Bank v. American Brick, etc., Co., 70 N. J. Eq. 732, 10 Am. Cas. 84, 8 L. R. A. (N. S.) 271, 64 Atl. 917; Rosoff v. Gilbert Transportation Co., 221 Fed. 972, 986.

In See v. Heppenheimer, 69 N. J. Eq. 36, 78, 61 Atl. 843, 860, the court said:

"In equity, and as against creditors, the acceptance of stock, without paying for it, places the acceptor in the position of a subscriber."

dence that receivers could not, under the law, enforce a stockholder's liability created by statute, as in this case, and cited many authorities which seemed to sustain such proposition. But upon examination the cases referred to do not seem to us to be applicable to the present case. The statute of this state is unlike those that impose a liability upon the stockholder beyond the amount of his unpaid stock, such as double liability statutes. Appellants' cases, for the most part, as well as their citation from 1 Cook on Corporations (7th Ed.) § 218, involved what may be termed double or additional liability laws. At the beginning of the section mentioned it is said:

"'The state legislatures, however, in many instances desire to increase the liability of stockholders to corporate creditors. Accordingly statutes are passed expressly declaring that the stockholders shall be liable for a specified sum, in addition to their unpaid subscriptions.'

"It is this kind of liability that is meant when 'statutory liability' is referred to, and Mr. Cook says: 'This is called the statutory liability of stockholders.'

"The failure to note the distinction between the liability of stockholders to the extent of the par value of their stock and the statutory liability in excess thereof has resulted in some confusion in the cases and textbooks. The first mentioned, or ordinary liability, is an asset of the corporation, and the second or additional liability is not, it being a liability directly to the creditors, which a receiver, in the absence of statutory authority, has no power to enforce; and it is not resorted to if the assets of the corporation, including unpaid stock, are sufficient to pay the creditors.

"Are the amounts unpaid by stockholders on their shares of capital stock assets within the meaning of the law? We think that much of the confusion in the law upon this subject is removed, and the solution of some

of the questions in this case simplified when we recognize, as we must, that before the enactment of our incorporation law it had become a well-settled American doctrine that unpaid stock of a corporation constitutes in equity a trust fund for the benefit of creditors of the corporation. The doctrine was first announced by Mr. Justice Story in Wood v. Dummer (1824), 3 Mason 308, Fed. Cas. No. 17944. And in Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220, it was said:

" 'The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. . . . It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation.'

"One reason urged for the contention that unpaid stock is not liable for the debts of the corporation, as we understand the arguments, is because the company issued the stock as full paid, and agreed that it should be non-assessable. There can be no question, in view of the authorities, that, in the absence of such an agreement, unpaid stock is liable for the debts of the corporation and constitutes assets for such purpose.

"And clearly, according to the authorities, the agree-

ment referred to was *ultra vires* and void, so that the situation is the same as though there was no such agreement. Stripped of the agreement it is a plain case of an issuance of stock by the company and acceptance by the holder without being paid for. Under such circumstances there can be no doubt that the acceptor impliedly agreed, and is equitably bound, to pay for the stock. Then it follows that even if the corporation, because of its agreement, could not enforce payment, the receiver appointed under the insolvency statute would have a right, in a court of equity and under the direction of the chancellor, to collect it, there being no other assets out of which the debts of the corporation could be paid. Money or property paid for capital stock are assets liable for the debts of the company, and why should money due but unpaid for such stock not be equally liable? Unpaid subscriptions unquestionably are liable because they are legal assets, and in our opinion the acceptor of stock not paid for or subscribed for, is likewise bound to pay for it, and his liability constitutes an equitable asset which a statutory receiver can enforce. It is admitted that such a receiver has power to collect unpaid subscriptions to the corporation for capital stock because the relation between the stockholder and the company is contractual and the unpaid subscription an asset of the corporation. But a contract or promise to pay may be implied as well as express, and it clearly appears from the authorities that the acceptance of shares of stock under a law similar to ours, without subscription, raises an implied promise to pay for them. Some courts call such a liability an equitable asset, but whatever it may be called it is a liability that may be enforced to pay the debts of the corporation, and by no one more properly than a receiver appointed under the insolvency statute."

§ 351. Matters Relating to the Procedure in Such Actions.

As was suggested in the preceding section statutes imposing the obligation to pay the unpaid par value of stock may often be variant, and resort must be had to the statute, itself, in any particular case. Undoubtedly where the corporation has issued its stock as fully paid and non-assessable, the corporation, where no rights of creditors are involved, may be estopped from asserting that it is unpaid and subject to assessment for the unpaid portion of the par value.[1] But the corporation can not by its acts in issuing unpaid stock as fully paid interfere with the rights of creditors to resort to such unpaid asset in payment of their claims, for that is the main purpose of statutes and constitutional provisions requiring the full payment of the stock of corporations. As a practical proposition people often form a corporation with but a small amount of their stock paid for, and if the business meets their expectations the stockholders may never be called upon to pay the balance, but there always exists a potential call for such balance if the need arises to pay the creditors of the corporation therefrom. Where the stock is issued as fully paid, as above stated, we believe that the corporation will be precluded from calling in the unpaid portion for any purpose which does not concern the rights of creditors, but the corporation can not in so issuing its stock deprive its creditors of the rights given them by the very statutes which form the body and soul of the corporate entity—for it must be remembered that the equity courts are developing the latent soul of the former so-called soulless corporations.

Acting upon the theory that the amount remaining unpaid on stock subscriptions is an asset of the corporation which may be collected by the receiver in like

1 Lum v. American Wheel & Vehicle Co., 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303.

manner as any other obligation of the corporation, it is held that the receiver may, in the absence of statutory restrictions, marshal the assets by collecting the same from the delinquent stockholders and the court of equity, having all of the parties at interest before it, will protect the equities of all, both creditors and stockholders.[2] On the other hand, under statutes giving prominence to the idea that such a recovery is particularly for the benefit of creditors, it is also stated that the receivership court should not collect a greater amount from such delinquent stockholders than is necessary to satisfy the

2 Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507. This was an action against a stockholder based upon an unpaid subscription by one who had purchased all the assets of the company at a receiver's sale. To the objection that the amount of a proper judgment could not be determined because it did not appear how much the plaintiff had paid for this particular asset it was ruled that the stockholder must pay the subscription in full "because the order of sale and the confirmation of the sale were the equivalent of a judicial finding, that sale by this procedure was the equivalent of a collection in full of these assets by the receiver in so far as he would have been enabled to accomplish the collection." The subscriber must look to the receivership court for an adjustment of equities among the stockholders.

Where the court determines that the assets of the corporation should be marshaled, it is not essential that the amount of the debt to the corporation be judicially determined prior to a suit by the receiver to recover the debt. Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187; Wilkinson v. Butock, 111 Ga. 187, 36 S. E. 623, and see the following cases to the same effect: Hundley v. Hewitt, 195 Ala. 647, 71 So. 419; Knight & Wall Co. v. Tampa Sand, Lime & Brick Co., 55 Fla. 728, 46 So. 285; Preston v. Jeffers, 179 Ky. 384, 200 S. W. 654; Guilbert v. Kessinger, 173 Mo. App. 680, 160 S. W. 17; Nathan v. Whitlock, 9 Paige (N. Y.) 152; Dayton v. Borst, 31 N. Y. 435; Clarke v. Thomas, 34 Ohio St. 46.

So far as creditors are concerned stock not paid for may be treated as cash or property because it is liable for the payment of their debts.

It is, of course, no defense to notes given in part payment of stock of the corporation that the creditors of the corporation have been paid in full. Pope v. Merchants' Trust Co., 118 Tenn. 506, 103 S. W. 792; In re Causey, 118 Tenn. 506, 103 S. W. 792; In re Swaetman, 118 Tenn. 506, 103 S. W. 792.

claims of corporate creditors and meet the expenses of winding up its affairs.[3] Where, under the practice or the statutes, the receivership court will not call upon the delinquent stockholders for a greater amount than is necessary to satisfy the claims of the creditors, it naturally follows that the amount to be so raised must be judicially ascertained by finding both the total amounts of the debts and assets of the corporation prior to calling upon the delinquent stockholders for their pro-rata, so that they may be assessed for only what they are legally liable to pay.[4] Although the proceeding is generally initiated by a petition by the receiver there is no objection to the matter being called to the attention of the court by any other party.[5]

Where the statute imposing the liability makes no distinction and creates no priority as between common and preferred stock, none can be made by the court without adding something to the statute. The test in such cases is merely whether the stock has been paid for and whether it belongs to a certain class or character of stock.[6]

3 Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co., 57 N. J. Eq. 627, 42 Atl. 585. See also McDermott v. Woodhouse, 87 N. J. Eq. 615, 101 Atl. 375.

4 Du Pont v. Ball (Del.), 106 Atl. 39. See also Irwin v. Granite State Provident Association, 56 N. J. Eq. 244, 38 Atl. 680; Wetherbee v. Baker, 35 N. J. Eq. 501.

In Cumberland Lumber Co. v. Clinton Hill Mfg., etc., Co., 64 N. J. Eq. 517, 54 Atl. 450, it is said: "The whole of this court's authority on an application of this character, as I understand it, extends, first, to the ascertainment of the amount of the debts which are valid as against the company itself; second, the ascertainment of the stockholders of the company who have not fully paid their subscriptions or for their stock; and, third, the amount of the call for unpaid subscription or stock necessary to pay the debts, taking into account the assets of the company in the receiver's hands and the solvency or insolvency of the stockholders liable or claimed to be liable."

5 In re People's Live Stock Ins. Co. (Spilman v. Mendenhall), 56 Minn. 180, 57 N. W. 468; In re Jassay Co., 178 Fed. 515, 101 C. C. A. 641.

6 Du Pont v. Ball (Del.), 106 Atl. 39.

Although a court may have the right to require a resident stockholder to pay the whole amount of his unpaid stock assessment with a right to subrogate him to compel contribution from others, it is undoubtedly unequitable to require a single resident stockholder to pay the whole amount of his assessment without effort on the part of the receiver to also collect from non-resident stockholders. Even though such a course might be convenient for the receiver and expeditious for the creditors, it is not regarded as fair treatment of the single stockholder by a court of equity. Under such circumstances the receivers should be directed to collect every assessment which they find collectible and which would justify the expense of collection. And this is particularly true where the receivers are statutory ones and are by that fact well fitted to collect claims outside of the jurisdiction. Nor would it be fair to such a single resident stockholder to require him to pay the cost of collecting from other stockholders their proportional parts of the assessment.[7]

In regard to the "exhaustion of the assets," that is, the determination of the value of the assets in the receiver's hands, it is not necessary that they should be actually reduced to cash, if a fair appraisement of their value can be made. In this matter, as in estimating the costs incident to the collection, and similar items, exact accuracy is neither possible nor necessary. If inequalities among delinquents result from the collection, that matter can be adjusted upon distribution.[8] The amount of the assessment imposed upon any stockholder is limited, of course, to the unpaid balance of his stock up to its par value. But in estimating the amount outstanding as unpaid, delinquents definitely known to be insol-

[7] Du Pont v. Ball (Del.), 106 Atl. 39.

[8] Paine v. Mueller, 150 Iowa 340, 130 N. W. 133.

vent are omitted.[9] Equalization among stockholders may be made by exempting from assessment those who have paid a fair percentage of the par value of their stock equal to or greater than that to be levied and giving credit on their assessment for amounts paid to those who have paid less than this percentage. A discount may be allowed, to those who pay their assessments promptly, equal to the estimated saving in the cost of collection.[10] In all of the details of levying the assessment the "shortest, surest, and least expensive" of the equitable ways open to the court will be followed, and ways that will open up ancillary issues to cause trouble in the collection will be avoided, if possible, reliance always being placed upon the propositions that unsubstantial inequalities may be smoothed out upon distribution and that one who is held liable because of his technical obligation as shown by the corporate records may himself seek redress from one whom he may claim to have been the beneficiary owner of the stock.[11]

For the most part, the corporate record, for the purposes of making an assessment, is taken as showing the ownership of stock. When the record owner is not the real owner but only an agent or trustee of the real owner, either one could be held liable for the assessment and the court will levy against the one who is the more available from considerations of residence, solvency, and the like.[12] This principle is especially applicable to a

9 Rosoff v. Gilbert T. Co., 221 Fed. 972; Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187; Cumberland Lumber Co. v. Clinton, etc., Co., N. J. Eq., supra.

10 Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968.

11 Fell v. Securities Co. of N. A. (Del. Ch.), 100 Atl. 788.

12 Pauly v. State Loan, etc., Co., 165 U. S. 606, 41 L. Ed. 844, 17 Sup. Ct. 465; Dunn v. Howe, 107 Fed. 849, 47 C. C. A. 13; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905; McKim v. Glenn, 66 Md. 479, 8 Atl. 130; Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Mann v. Currie, 2 Barb. (N. Y.) 294. As to the principle concerning equity's choice among

person who claims not to be the beneficial owner but to hold the stock simply to qualify himself as director; in such an instance there would be an additional, and, perhaps, controlling, consideration for holding the record owner if there was a statute making ownership of stock a qualification for holding the office of director.[13] However, one who holds stock simply as a trustee for a voting trust and has no other right in the stock than simply to vote it is not liable for an unpaid subscription; the charge will be against the beneficial owners of the stock.[14] The executor or administrator of a deceased stockholder is a stockholder for the purpose of subscription liability.[15]

Since the liabilities of the company have to be determined before an assessment is levied, the creditors have become parties in the matter of the presentation of their

available remedies, see Houghton v. Hubbell, 91 Fed. 453, 33 C. C. A. 574.

13 Finn v. Brown, 142 U. S. 56, 35 L. Ed. 936, 12 Sup. Ct. 136; Fell v. Securities Co. of N. A. (Del. Ch.), 100 Atl. 788. In this case, after a careful consideration of the matter, the following conclusions were stated: "When shares of stock which stand on the books of the company in the name of one person are held as agent for another, either the principal or agent are liable for the unpaid subscription for the shares.

"In case it be necessary for a receiver of the company appointed by the Court of Chancery in voluntary liquidation proceedings, to assess and collect from the shareholders for the benefit of creditors of the company the amount unpaid on the stock, it is not inequitable to permit the receiver to proceed against the agent rather than against the principal, if that course be best for the creditors.

"When one takes shares of stock of a corporation in order to qualify him to be a director of the company, he thereby holds himself out as being the owner thereof in his own right, and cannot escape liability as the record owner of the stock for an assessment made thereon for the benefit of creditors of the company, by showing that he never had a beneficial interest in the stock, but held it as the agent for another, to whom he had delivered the certificate for the shares with a transfer thereof indorsed thereon."

14 See United States Independent Tel. Co. v. O'Grady; O'Grady v. United States Tel. Co., 75 N. J. Eq. 301, 21 L. R. A. (N. S.) 732, 71 Atl. 1040.

15 Converse v. Spargo, 184 Fed. 324; Fell v. Securities Co. of N. A., supra.

claims and are consequently before the court for the purposes of the assessment proceedings. It is not necessary that stockholders should have notice of the proceedings or be individually present or represented, unless there is a statutory requirement to that effect,[16] but under general rules of equity practice such notice as the court

[16] Brown v. Allebach, 156 Fed. 697; Mester v. Thomas, 122 Md. 445, 89 Atl. 844; Gilson v. Appleby, 79 N. J. Eq. 590, 81 Atl. 925.

"The authorities hold that the corporation itself represents its stockholders in a proceeding brought in equity for its liquidation in so far as concerns the ascertainment of the amount of assets and debts and the necessity of a call, leaving open to such alleged stockholder the question whether he was in fact a stockholder, and the amount of his stock, and cross-claims or credits against the corporation." Van Tuyl v. Carpenter, 135 Tenn. 629, 188 S. W. 234, citing Coe v. Armour, etc., Wks., 237 U. S. 413, 59 **L. Ed.** 1027, 35 Sup. Ct. 625.

In McDermott v. Woodhouse, 87 N. J. Eq. 615, 101 Atl. 375, it was said:

"Again, in order to fix a stockholder's liability, he must be bound by the proceedings to determine the amount thereof. He can not be bound without some sort of notice, and it can rarely happen in the case of a large corporation that all the stockholders are subject to a single jurisdiction, and it is probable that even in the case of a small corporation some of the stockholders reside in different jurisdictions. That seems to be the present case where the stockholders are only seven in number. For a time this difficulty of subjecting stockholders to the jurisdiction of a single tribunal seemed insuperable. It was finally settled in Hawkins v. Glenn, 131 U. S. 319, 33 **L. Ed.** 184, 9 Sup. Ct. 739, applying the rule of Sanger v. Upton, 91 U. S. 56, 23 **L. Ed.** 220, that a stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member. We have adopted this rule (Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co., 57 N. J. Eq. 627, 42 Atl. 585), after expressing some doubt as to its soundness in Meley v. Whitaker, Receiver, 61 N. J. L. 602, 604, 68 **Am. St. Rep.** 719, 40 Atl. 593. See, also, Gilson v. Appleby, 79 N. J. Eq. 590, 81 Atl. 925.

Where the assessment is made in a proceeding at the domicile of the corporation to which the corporation is a party, the stockholder can not question the propriety or amount of the assessment, although he may contend in a subsequent action against him personally to collect the assessment that he is not liable at all. Coe v. Armour Fertilizer Works, 237 U. S. 413, 423, 59 **L. Ed.** 1027, 35 Sup. Ct. 625."

deems proper and sufficient is usually given.[17] Any statutory provision must, of course, be followed.[18]

Where an assessment by the court is considered a necessary preliminary to actions by the receiver it is the duty of the court to make an assessment upon proper application of the receiver. If the receiver makes a *prima facie* case by showing the existence of claims against the estate and entire lack of assets except unpaid subscriptions, and asks for an order levying an assessment, it is neither proper nor has the court authority to make an order granting the receiver permission to sue delinquents providing he files a bond "conditioned for the payment of the costs of said suit so prayed for, including a reasonable attorney's fee for defendant's attorney in case the receiver shall not recover"; and directing that all questions as to the validity of the claims against the company be determined in the receiver's suit.[19]

17 See Fell v. Securities Co. of N. A. (Del. Ch.), 100 Atl. 788.

18 Under the provisions of the English General Corporations Acts the whole matter of a stockholder's liability is determined in the receivership proceedings themselves. See Leifchild's Case, L. R Eq. 1, 231; Waterhouse v. Jamieson, 2 Paters. (Scotch) 1812, L. R. 2 H. L., Sc. 29; Hamilton v. Simon, 178 Fed. 130; Cox v. Dickie, 48 Wash. 264, 93 Pac. 523.

Any stockholder who was entitled to notice of the assessment proceedings but was not given any notice, may, in the receiver's suit against him, question the validity and amount of the alleged debts of the company and need not go into the receivership proceedings themselves for that purpose. Grady v. Graham, 64 Wash. 436, 36 L. R. A. (N. S.) 177, 116 Pac. 1098. See Chandler v. Brown, 77 Ill. 333; Lamar Ins. Co. v. Hildreth, 55 Iowa 248, 7 N. W. 573; Paine v. Mueller, 150 Iowa 340, 130 N. W. 133.

19 Hosner v. Conservative Casualty Co., 99 Wash. 161, 168 Pac. 1122, concerning the portion of the order directing a bond in this case, the Appellate Court said:

"The court's orders prevented the receiver from proceeding. He was ordered to give a bond within ten days, when he had just made a showing that he had no funds with which to pay costs or expenses. As an officer of the court he could not be required nor expected to procure private or personal bond, nor could he be required or expected to pay out of his own individual funds for procuring a compensated bond."

Where an assessment is considered necessary an action brought before the making of an assessment is premature; and, if such an action is brought, it is error to render a judgment against the stockholder for the full amount of his delinquency, but staying execution until an assessment has been levied by the receivership court, and directing that execution then issue for the amount of the assessment.[20]

As a rule the court in levying the assessment considers only defenses that are open in common to all stockholders; and special defenses, such as the bearing of the statutes of limitation, the right to a greater credit than the books show, the validity of a release by the company, and like matters raised by individual stockholders are left to be determined in the receiver's suit; the court may, however, in its discretion determine any special plea for exemption submitted by any stockholder.[21]

In some important respects the intervention of a receivership cuts off defenses which a subscriber might interpose against an action by the company brought to recover the subscription. Since claims against the company must be presented and determined in the receivership court and since the payment of claims must be taken care of on distribution and determined in accordance with the condition of the funds and the principles governing priorities among claimants, a stockholder, in a receiver's suit, can not set off a claim against the company against his liability for the unpaid portion of his subscription.[22] It is not an objection to the making

20 Rea v. Eslick, 87 Wash. 125, 151 Pac. 256; Grady v. Graham, 64 Wash. 436, 36 L. R. A. (N. S.) 177, 116 Pac. 1098; Beddow v. Huston, 65 Wash. 585, 118 Pac. 752; Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977.

21 Fell v. Securities Co. of N. A., supra. The court could not render a personal judgment against a stockholder who had not personally appeared or had not been made a party by proper process. Howell v. Malmgren, 79 Neb. 16, 112 N. W. 313; Black v. Ore Knob Copper Co., 115 N. C. 382, 20 S. E. 476.

22 Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968 (Bankruptcy

of a subscription assessment and the institution of an action to enforce it that a previous call by the company is outstanding and actions based upon it are pending.[23] The right of the subscriber to rescind his contract or claim an estoppel against its enforcement on the ground that the subscription was induced by false representations by the company or its agents is seriously affected. Based upon the principle that all equities are determined as of the time when the receiver is appointed—that those are creditors who are creditors at that time; and those are stockholders who are stockholders at that time—it is sometimes stated that the creation of the receivership absolutely cuts off the defense of false representations from a stockholder who has made no move with reference to the matter prior to that time.[24] Probably the general rule would be to extend some slight leaway and not to hold the charge of laches too severely against a subscriber who had received no benefits from the stock and who had become a subscriber such a short time before the receivership as to make it inequitable to hold that he should have acted in the intervening interval. The rule is based on the general equity proposition that, where one of two innocent parties must suffer, the loss is placed upon the one who in equity is considered the more cul-

case, see § 351, note 31); Sawyer v. Hoag, 84 U. S. 610, 21 L. Ed. 731; Hamilton v. Simon, 178 Fed. 130; Appleton v. Turnbull, 84 Me. 72, 24 Atl. 592; Williams v. Traphagen, 38 N. J. Eq. 57; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; Holcombe v. Trenton, etc., Co., 80 N. J. Eq. 122, 82 Atl. 618; Easton Nat. Bank v. American Brick, etc., Co., 70 N. J. Eq. 732, 10 Ann. Cas. 84, 8 L. R. A. (N. S.) 271, 64 Atl. 917; Bain v. Clinton L. Assoc., 112 N. C. 248, 17 S. E. 154.

[23] Brown v. Allebach, 166 Fed. 488.

[24] Oakes v. Turquand (Overend & Gurney case), L. R., 2 H. L. 325; Tennent v. City of Glasgow Bank, 4 App. Cas. 615; Scott v. Deweese, 181 U. S. 202, 45 L. Ed. 822, 21 Sup. Ct. 585; Bank of North America v. Pennsylvania Oil, etc., Co., 216 Fed. 377; Roe v. Oradell Farms, etc., Co., 85 N. J. Eq. 146, 96 Atl. 65; Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015; Mitchell v. Hancock (Tex. Civ.), 196 S. W. 694.

pable.[25] For the most part, the same principles of general corporation law that determine what defenses a stockholder may validly and effectively interpose against an attempt to enforce payment of the subscription obligation on the part of the company apply in a receiver's suit for the same purpose.[26] It is to be remembered in

25 Stone v. Walker (Ala.), 77 So. 554; Gress v. Knight, 135 Ga. 60, 31 L. R. A. (N. S.) 900, 68 S. E. 834; Cosmopolitan Life Ins. Co. v. Sheats, 20 Ga. App. 622, 93 S. E. 507.

"In brief, our conclusion is that, when a stockholder has been induced by the false or fraudulent representations of the officers of a corporation to purchase its stock, he may during the solvency of the corporation, if the action is brought within a reasonable time after the fraud is discovered and before the statute of limitation has barred it, have a recission of his contract upon equitable terms or recover the loss sustained by the fraud. But, if the corporation is insolvent when the action for recission or other relief is brought, or if proceedings have then been instituted to liquidate its affairs on the ground of insolvency, and the rights of creditors will be affected, the shareholder who has been induced by fraud or misrepresentation to purchase stock can not obtain relief from his contract unless he became a stockholder so shortly before the insolvency as not to have had reasonable time or opportunity to investigate its affairs and discover the fraud, nor unless upon the discovery he without delay asserts his right to appropriate relief. Having this view of the question, we think the lower court properly refused to permit the shareholders to rescind their contracts. Scott v. Deweese, 181 U. S. 203, 21 Sup. Ct. 585, 45 L. Ed. 822; Scott v. Abbott, 160 Fed. 573, 87 C. C. A. 475; Wallace v. Bacon (C. C.), 86 Fed. 553; Wallace v. Hood (C. C.), 89 Fed 11."

The above is quoted in Preston v. Jeffers, 179 Ky. 384, 200 S. W. 654; a receiver's suit from Reid v. Owensboro Savings, etc., Co., 141 Ky. 444, 132 S. W. 1026.

26 Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189 (condition attached to subscription may be waived by acceptance of stock with knowledge that condition had not been performed; under Nebraska absolute original subscriber, though he has transferred his stock, is liable); French v. Busch, 189 Fed. 480 (part payment by transfer of real estate to company, good defense pro tanto); Hollander v. Heaslip, 222 Fed. 808, 137 C. C. A. 1 (unperformed condition attached to subscription good defense, if not waived); Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187 (extension of time of payment without consideration not effective; that directors were guilty of waste of assets through misconduct not a defense); Preston v. Jeffers, 179 Ky. 384, 200 S. W. 654 (cancellation of other subscriptions by company, mismanagement

this connection as well as in many others concerning corporation receiverships that the decisions of federal courts are likely to be based upon interpretations of and decisions under state statutes by state courts.[27]

Even though the statute prohibits the issuance of stock without its being paid for, still where such stock is issued the acceptors of it are liable to the creditors of the corporation to the extent of the par value. The holders of such stock can not evade the liability which the law imposes upon a stockholder to pay for his stock by contending that it was issued in violation of law. Even though such issue of stock could be held void under familiar constitutional provisions prohibiting the issuance of stock "except for money paid, labor done, or personal property furnished," it does not follow that an acceptor of such stock can claim immunity from assessment. And this would be particularly true where the stockholder has held himself out or permitted himself to be held out as the owner of the stock, or has participated or acquiesced in its issuance.[28]

Whether creditors who extended credit to a corporation with knowledge of the facts and circumstances under which its stock or portion of it was issued in violation of law is a matter to be determined by the phraseology of

and malfeasance on part of directors and officers not good defenses; subscriptions for more than par enforceable); Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713 (subscribing corporation bound by acts of duly authorized officer; ultra vires no defense); Stevens v. Lippman, 85 Misc. Rep. 347, 148 N. Y. Supp. 419 (ineffective subscription can not be enforced); Cox v. Dielsie, 48 Wash. 264, 93 Pac. 523 (defenses on ground of invalidity in organization of corporation and that all capital stock had not been subscribed may be lost by estoppel); Rea v. Eslick, 87 Wash. 125, 151 Pac. 256 (claim that husband's subscription was a community debt and should have been presented as claim against community estate upon the death of wife not sustained on showing that subscription was individual liabilty of husband).

[27] § 312 this chapter.

[28] Du Pont v. Ball (Del.), 106 Atl. 39.

the statute imposing the liability to the creditor. But it has been held that knowledge or participation on the part of the creditor in the issuance of stock as "fully paid" and "non-assessable," when in fact it was not fully paid, will not constitute a defense on the part of stockholders to a suit by the receiver on behalf of creditors to recover for unpaid par value where the claim of the creditor is just and equitable.[29]

In proceedings by a receiver of an insolvent corporation to assess stockholders on their statutory liability for unpaid stock issued to them as fully paid and non-assessable, interest on the creditors claims should be allowed from the time when the receiver has requested the court to make the assessment for the payment of the claims, where nothing was done before that to indicate that the stockholders would be expected to pay such

[29] Du Pont v. Ball (Del.), 106 Atl. 39. But see in this connection the dissenting opinion of Mr. Justice Heisel.

In Dilzell Engineering, etc., Co. v. Lehmann, 120 La. 284, 45 So. 142, the defendant stockholders agreed among themselves that certain stock should be issued and divided between them without paying the corporation therefor. In a receiver's suit the defendants set up the invalidity of the transaction under the constitution. Of this defense the court said:

"While it is not here said expressly that the value of the labor or property received in payment of the stock must be equal to the face value of the stock, that is the idea meant to be conveyed. The defendants in this case do not contend differently, but argue that, inasmuch as the stock is stricken with nullity, no action can arise upon it against the subscriber. How far this may be true, as between the corporation and the subscriber, we need not inquire. It can not be true as between the creditors of the corporation and the subscriber. . . . Such being the situation, the question presented is whether the managers of the affairs of a corporation in this state, who have distributed among themselves in part or in whole the stock of the corporation without value received to the corporation, can by invoking article 266 of the constitution escape liability to the creditors of the corporation who have dealt with the corporation upon the faith of the said stock having been issued for value. The question is not debatable. The answer is that they can not, and that they are liable, not because the stock is a valid contract, but because, as between them and the creditors of the corporation, the

claims.[30] After the liability of the stockholder to an assessment has been determined, together with the amount thereof, it should be enforced in a court of law unless some element of equity jurisdiction appears.[31]

In the absence of a clearly expressed statutory announcement as to the liability for such unpaid stock and the method of its collection, the courts sometimes indulge in speculations as to whether it is based upon the trust fund idea or that the corporation held itself out as having the funds represented by the par value of the stock[32]

validity of the contract will not be permitted to be inquired into. They are estopped from setting up the invalidity or nullity. Ewart on Estoppel, p. 187 et seq."

30 Du Pont v. Ball (Del.), 106 Atl. 39. In this connection see also: Burr v. Wilcox, 22 N. Y. 551; Handy v. Draper, 89 N. Y. 334; Mason v. Alexander, 44 Ohio St. 318, 7 N. E. 435; Corning v. McCullough, 1 N. Y. 58, 49 Am. Dec. 287; Baker v. Bank, 9 Metc. (Mass.) 182; Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365. And under the National Banking Act (Act Cong. June 3, 1864, c. 106, 13 Stat. 99), it has been held that interest runs from the date of the comptroller's order to collect an amount equal to the full par value of the stock, the amount due from the stockholders being then liquidated and payable. Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168.

31 McDermott v. Woodhouse, 87 N. J. Eq. 615, 101 Atl. 375. See also Barkalow v. Totten, 53 N. J. Eq. 573, 32 Atl. 2; Hood v. McNaughton, 54 N. J. L. 425, 24 Atl. 497.

In Cox v. Dickie, 48 Wash. 264, 93 Pac. 523, it was held unnecessary to bring a separate suit against each stockholder where the statute does not require it.

And in Winterholer v. Hoffman, 119 La. 125, 43 So. 980, a suit against a large number of stockholders for different sums alleged to be due for unpaid stock was dismissed for misjoinder of parties defendant.

32 "It would be an impeachment of the trust fund doctrine to hold that one who had opened a line of credit with a corporation (presumptively on the faith of its representations as to capital stock) and who furnished goods from time to time, as the necessity of its customer required, should be denied the status of an existing creditor. To put one accustomed to dealing with a corporation to the hazard of testing its credit upon each transaction would be violative of that sound public policy which impresses a corporations every act, but it would also put upon the corporation a bond that would be embarrassing, if not intolerable. Where relations are once assumed, the law ought to presume, in the absence of evidence of notice, that each transaction, if, in the aggregate, they possess the character of "a course

although generally holding in favor of its recovery by the receiver on one or both theories.[33] But some courts content themselves with merely interpreting the statute as to the provisions contained therein respecting the liability and the methods permitted by it for recovering from the stockholder.[34]

of dealing," is based upon the faith established when the first account was opened. There is no testimony tending to show that the protesting creditors had any notice of the attempted cancellation. Upon either theory of the law, we find no escape from the holding that Mr. Panton is bound by his subscription."

There seems to be in the above statement from Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074, a sort of a mixture of the "trust fund" and the "holding out" theory.

See, also, Hospes v. Northwestern Mfg., etc., Co., 48 Minn. 174, 31 Am. St. Rep. 637, 15 L. R. A. 470, 50 N. W. 1117; First Nat. Bank v. Gustin Minerva, etc., Min. Co., 42 Minn. 327, 18 Am. St. Rep. 510, 6 L. R. A. 676, 44 N. W. 198.

[33] In re Jassoy Co., 178 Fed. 515, 101 C. C. A. 641; Drennen V. Jenkins, 180 Ala. 261, 60 So. 856; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Meholin v. Carlson, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755; Great Western Tel. Co. v. Gray, 122 Ill. 630, 14 N. E. 214; Haskell v. Gardner (Ind. App.), 93 N. E. 458; Marion Trust Co. v. Blish, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 84 N. E. 814, 85 N. E. 344; Hughes v. Hall, 117 Md. 547, 83 Atl. 1023; Frank v. Morrison, 58 Md. 423; Hayes v. Brotzman, 46 Md. 519; Hopper v. Brodie, 130 Md. 443, 100 Atl. 644; In re People's Live Stock Ins. Co. (Spillman v. Mendenhall), 56 Minn 180, 57 N. W. 468; Commerce Trust Co. v. Hettinger, 181 Mo. App. 338, 168 S. W. 911; Van Schoick v. Mackin, 129 App. Div. 335, 113 N. Y. Supp. 408; Rankine v. Elliott, 16 N. Y. 377; Donald v. American Smelting, etc., Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116; Dill v. Ebey, 27 Okla. 584, 46 L. R. A. (N. S.) 440, 112 Pac. 973; Mitchell v. Porter (Tex. Civ. App.), 194 S. W. 981; National Bank, etc., v. Texas Inv. Co., 74 Tex. 421, 12 S. W. 101; Thompson v. First State Bank of Amarillo (Tex. Civ. App.), 189 S. W. 116; National Bank, etc., v. Texas Inv. Co., 74 Tex. 421, 12 S. W. 101; Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977; Evans v. Coventry, 8 De Gex M. & G. 835, 44 Eng. Reprint 612.

A judgment on stockholder's liability may be set off against bonds owned by the stockholder but transferred by him after the receiver had begun proceedings looking toward collection to one who knew of the liability. Hynes v. Illinois Trust & Savings Bank, 226 Ill. 95, 10 L. R. A. (N. S.) 472, 80 N. E. 753 (affirming judgment 126 Ill. App. 409).

[34] See discussion of Delaware and New Jersey statutes in John W. Cooney Co. v. Arlington Hotel Co., supra (Del. Ch.), 101 Atl. 879, and same case in Supreme Court

§ 352. Effect Where the Statutory Liability Is Directly to the Creditor Instead of Corporation.

Statutes imposing a liability upon stockholders sometimes impose that liability for the exclusive benefit of the creditor and in terms which allow the creditor alone to recover it.[1] This is particularly true in respect to what are now properly and generally known as statutory liability statutes such as impose a double liability or a liability to creditors based upon the proportion of shares which the stockholder owns compared with the total number of shares issued. Under the terms of some statutes the statutory liability, whether double or proportionate, is imposed for the express benefit of the creditor alone, while under other statutes the liability though imposed for the benefit of creditors may be enforced in a creditor's suit or by a receiver who is expressly made a quasi-assignee of the creditors for that purpose. An apparent confusion has arisen among the authorities because of a failure to differentiate cases arising under the variant statutes. It is obvious that where the statute in express terms makes the right to recover the liability personal to the creditor, the right of action is not an asset of the corporation and the receiver is not in a legal position to sue

under name of Du Pont v. Ball (Del.), 106 Atl. 39.

[1] In Firestone Tire & Rubber Co. v. Agnew, 194 N. Y. 165, 16 Ann. Cas. 1150, 24 L. R. A. (N. S.) 628, 86 N. E. 1116, the statute read as follows: "Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him." The suit was by a creditor on behalf of himself and other creditors of a bankrupt corporation to recover from the defendants as stockholders the balance unpaid on their stock subscriptions to the extent necessary to satisfy the unpaid indebtedness of the corporation. The bankrupt corporation had made a compromise with its creditors and was discharged. The court held that the discharge excused the plaintiffs from procuring a judgment against the corporation as required by the statute and that the action would lie against the defendants.

upon it.[2] On the other hand if by the statute he is made a quasi-assignee for the creditors for the purpose of

[2] Where a statute imposing a double liability upon the holders of corporate stock does not include or authorize an action by a receiver and the courts of the state hold that the statute provided the only remedy, a single action in which all persons having an interest in the matter should be joined or represented and that the receiver of an insolvent corporation could not maintain an action to enforce the superadded liability, the receiver will not be permitted to enforce the liability in a foreign state. Such statutes do not make such liability an asset of the corporation to be recovered by him nor do they provide for a transfer of any right or title to a receiver to enforce the liability. Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. 244. See also, Finney v. Guy, 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. 558.

In other words where under the statute the stockholders liability is not an asset of the corporation but runs directly to the creditors, a receiver who has no greater rights than that of an ordinary chancery receiver is not in a position to sue to enforce such liability. Miller v. Amoretti (Wyo.), 181 Pac. 420.

In Bostwick v. Young, 118 App. Div. 490, 103 N. Y. Supp. 607, the receiver of the corporation sued upon the theory of an unpaid subscription. A demurrer was sustained upon the ground that insufficient facts were averred to make out a cause of action under the terms of the New York statute a personal obligation of the stockholder direct to the creditor appears to be created. The court in discussing the question, said: "There can be no doubt that the appointment of this receiver did not vest in him a right which was personal to the creditors, or enable him to receive under circumstances in which the corporation could not have maintained an action. It is equally clear that the corporation itself would have no standing to demand that the defendants should pay the par value of stock issued to them as full paid-up stock, pursuant to an agreement which was between the corporation, and the defendants, was valid and binding."

In Farnsworth v. Wood, 91 N. Y. 308, a receiver was appointed of a corporation upon the sequestration of its property on the return of an execution. He sought to enforce against the stockholders the personal liability to creditors imposed by the statute upon stockholders of the character of the one of which he was receiver. The court held that the liability under the Act of 1848 was a several individual liability of each stockholder directly to such of the creditors as have complied with the requisite conditions precedent. The court held that there was no provision in the statute by which the right of such creditors can be vested in a receiver of the corporation. And speaking to the point the court said: "The liability does not exist in favor of the corporation itself, nor for the benefit of all its creditors, but only in favor of such creditors as are within

collecting this liability for their benefit, the right of action is one which passes to the receiver and is, of course, properly exercised by him, and under such circumstances the receiver being vested with the creditor's right of action against the stockholders with full authority to enforce it, is under no difficulty in enforcing that right of action in jurisdictions beyond that of the court which appointed him.[3] Statutes which impose statutory liability upon stockholders generally require the creditor to attempt the collection of his claim against the corporation before suing the stockholder. Under such statutes he is excused from suing the corporation if the order appointing a receiver has directions restraining creditors from suing the corporation.[4]

the prescribed conditions. It is not a general right but one which attaches to the particular creditors only who are within the conditions, and it is to be enforced by those, by these in their own right and for their own special benefit. The receiver in this case is not vested with the rights of action of these creditors, but only with the property which was sequestrated under the provisions of section 36, chapter 8, title 4, article 2 of the Revised Statutes, viz.: 'the stock, property, things in action and effects of the corporation.' The rights of certain creditors to prosecute their claims against certain of the stockholders never were the property of the corporation, no rights of action vested in it, nor is there any provision of the statute which transfers these rights of action from the creditors to the receiver."

3 See Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913D, 1292, 32 Sup. Ct. 415.

Under Ohio statute a receiver of an insolvent corporation may sue in the federal court of another state for assessments levied by an Ohio court on the stockholders. Irvine v. Baker, 225 Fed. 834.

4 In Hunting v. Blun, 143 N. Y. 511, 38 N. E. 716, a sequestration action had been commenced by a creditor against a corporation and a receiver appointed accompanied by a restraining order against suits by creditors. The final judgment made the injunction perpetual. A creditor commenced an action against a stockholder to enforce the statutory liability without having obtained a judgment against the corporation. The court held that the injunction excused the creditor from first obtaining judgment against the company.

In Kincaid v. Dwinelle, 59 N. Y. 548, it was held that the appointment of a receiver in a suit to dissolve a corporation before the obtaining of a final judgment against the corporation by a creditor did not prevent such a suit

An order levying an assessment or one refusing to levy an assessment is appealable as on order, a decree, or judgment finally determining a right.[5] An assessment decree not appealed from can not be collaterally attacked and is binding upon stockholders as to all matters properly decidable therein, such as the necessity for an assessment, the amount of the indebtedness of the corporation, and the number of shares standing in the name of the stockholder.[6]

against the corporation and a subsequent suit against a stockholder upon the statutory liability.

"While section 3744 of the Code of 1907 only authorized a judgment creditor of a corporation, having an execution returned 'no property found,' to file a bill in equity to subject to the payment of his judgment the unpaid subscriptions of one or more stockholders without joining the other stockholders . . . or could maintain a suit therefor against the stockholders, yet the averments of the bill in this case relieve the complainant from the necessity of complying with the provisions of this section before filing the bill; or, in other words, they showed this section was not applicable because it would be impracticable to get judgments," the company having been dissolved. This statement is quoted from Drennen v. Jenkins, 180 Ala. 261, 60 So. 856, a case in which a creditor brought suit on the subscription liability in place of the receiver, in Hundley v. Hewitt, 195 Ala. 647, 71 So. 419, a receiver's, though not an assessment, case. See also, Pankey v. Lippman, 187 Ala. 199, 204, 65 So. 771, in which it was said on the same point: "The status of a trust established by the statute . . . brings into play the general doctrines and practices of equity in the administration of a trust brought within its jurisdiction and to justify—indeed to require—the full exercise of its powers to the end that adjustment and relief may be made and awarded. Equity's customary thoroughness so requires."

5 Mister v. Thomas, 122 Md. 445, 89 Atl. 844; Pacific Coast Coal Co. v. Esary, 85 Wash. 448, 148 Pac. 579; Hosner v. Conservative Casualty Co., 99 Wash. 161, 168 Pac. 1122.

6 Mister v. Thomas, 122 Md. 445, 89 Atl. 844; Hamilton v. Levison, 198 Fed. 444; Holcombe v. Trenton White City Co., 82 N. J. Eq. 364, 91 Atl. 1069, affirming decree 80 N. J. Eq. 122, 82 Atl. 618.

In an action by the receiver of an insolvent corporation to enforce payment of a certain percentage of the par value of unpaid bonus stock, a court is not authorized to inquire into the consideration paid after insolvency for claims fixed by judgment, in the absence of any allegations of fraud. Gordon v. Cummings, 78 Wash. 515, 139 Pac. 489.

That the corporate records erroneously show the number of shares subscribed for by a defen-

C. Right of Receiver to Sue for Assets in Cases Where Corporation Itself is Estopped to Sue.

§ 353. Receiver's Right to Sue for Assets as to Which the Corporation Is Estopped to Sue.

Many of the principles discussed in the preceding section are applicable to the discussion in this section and should be considered in this respect.[1]

"The receiver unites in himself the right of the trust combination and also the right of creditors, and he may assert a claim as the representative of creditors which he might be unable to assert as a representative of the combination merely. The general rule is well established that a receiver takes the title of the corporation or the individual whose receiver he is and that any defense which would have been good against the former may be asserted against the latter. But there is a recognized exception which permits a receiver of an insolvent individual or

dant in a receiver's suit is an objection to be urged in the assessment proceedings. Hamilton v. Simon, 178 Fed. 130.

An assessment decree is not binding upon a stockholder who has fully paid for his stock and is not subject to assessment either as to the validity of claims or their priority. Dickinson v. Kline, 96 Neb. 435, 148 N. W. 141.

An assessment having been duly levied the receiver may institute proceedings for the discovery of the real owner when that fact has been concealed by having the stock recorded in the name of an irresponsible person. Kurtz v. Brown, 152 Fed. 372, 81 C. C. A. 498, 11 Ann. Cas. 576.

Assessment proceedings may not be re-opened for the purpose of giving a stockholder's attorney opportunity to raise questions which he failed to raise on the hearing through a misapprehension of the legal scope and effect of the hearing. Cumberland Lumber Co. v. Clinton, etc., Mfg., Co., 84 N. J. Eq. 557, 94 Atl. 647.

1 In many of the details concerning matters presented in this and the preceding section, as, for instance, the matter of levying an assessment on delinquent stockholders, the controlling principles are the same, and we therefore have not hesitated, in the preceding section, to cite cases in which the main matters involved may have been such as belong here. In this section, however, no authorities will be intentionally used except such as exclusively pertain to its own subject matter.

corporation in the interest of creditors to disaffirm dealings of the debtor, in fraud of their rights."[2]

The general rule stated in the quotation is, as we have seen in the preceding section, universally recognized. The exception mentioned is given equally unanimous recognition. "It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation but also its creditors and stockholders, and

2 Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 7 **L. R. A.** 46, 23 N. E. 530. In this case the action was as follows: Several corporations formed a combination contrary to the anti-trust laws of the state. A receiver of the trust —the "trust combination" referred to in the quotation—was appointed. One of the constituent companies, Pittsburg Carbon Co., that had withdrawn from the trust prior to the receivership, sued a party on a claim that had accrued prior to the receivership. The debtor interpleaded McMillin, the trust receiver. It was held that the receiver was entitled to the money, notwithstanding that the debtor might have successfully defended against the trust because of its illegal character. See also, Gillet v. Moody, 3 N. Y. 479; Porter v. Williams, 9 N. Y. 142, 59 **Am. Dec.** 519; Alexander v. Relfe, 74 Mo. 495.

In Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184, it is held: (1) That the directors of the corporation are trustees of all the property belonging to it and have no right to secure to themselves any preference or advantage. Marr v. Bank of West Tennessee, 4 Coldw. (Tenn.) 471, 484; Koehler v. Black River Falls Iron Co., 67 U. S. (2 Black.) 715, 17 **L. Ed.** 339; Curran v. Arkansas, 56 U. S. (15 How.) 304, 306, 14 **L. Ed.** 705, 706; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Bradley v. Farwell, Holmes, 433, Fed. Cas. No. 1779; Drury v. Milwaukee & S. R. Co., 74 U. S. (7 Wall.) 299, 19 **L. Ed.** 40; Paine v. Lake Erie & L. R. Co., 31 Ind. 283, 353; Gaslight Improv. Co. v. Terrell, L. R., 10 Eq. Cas. 168; Smith v. Lansing, 22 N. Y. 520, 521; Whitwell v. Warner, 20 Vt. 425; Buell v. Buckingham, 16 Iowa, 284, 85 **Am. Dec.** 516; Hopkins' Appeal, 90 Pa. 69. (2) Nor to take a mortgage to themselves for their own benefit to the injury of others in equal right. Corbett v. Woodward, 5 Sawy. 403, Fed Cas. No. 3223; Koehler v. Black River Falls Iron Co., 67 U. S. (2 Black) 715, 17 **L. Ed.** 339; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 **Am. Rep.** 595; European & N. A. R. Co. v. Poor, 59 Me. 277; Butts v. Wood, 38 Barb. (N. Y.) 181; Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438; Great Luxembourg Ry. Co. v. Magnay, 25 Beav. 586, 53 Eng. Reprint 761; Cook v. Berlin Woolen Mill Co., 43 Wis. 433, 434; Pickett v. School Dist., 25 Wis. 551, 553, 3 **Am. Rep.** 105; Re Taylor Orphan Asylum, 36 Wis. 534, 552.

that in his character as trustee for the latter he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers or to recover its funds or securities invested or misapplied."[3] In most of the instances in which the receiver sues under this exception the illegality or fraud in the transaction complained of was committed by the directors or officers and there remained a right of action in the company which could have been enforced by stockholders on behalf of the company; but either the acquiescence or express ratification of the stockholders destroyed this right and a situation was created similar in legal effect to what would have been the result if the stockholders had directly participated in the transaction in the first place. The company, the directors, and the stockholders are estopped to complain. Since the receiver acts as representative of the creditors alone in this respect the re-

[3] Attorney-General v. Guardian Mut. Life Ins. Co., 77 N. Y. 272.

To the same effect and generally speaking of the receiver as "trustee" for creditors as distinguished from either the corporation or the stockholders, are: Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. Ed. 971, 7 Sup. Ct. 899; Sawyer v. Hoag, 84 U. S. 610, 21 L. Ed. 731; Peabody v. New England Waterworks Co., 184 Ill. 625, 56 N. E. 957, 958, 75 Am. St. Rep. 195; Marion Trust Co. v. Blish, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 84 N. E. 814 (rehearing denied, 85 N. E. 344); Marcovich v. O'Brien (Ind. App.), 114 N. E. 100; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 583, 63 Am. St. Rep. 302, 39 L. R. A. 725, 49 N. E. 592; Hammond v. Cline, 170 Ind. 452, 84 N. E. 827; Parker v. Nickerson, 137 Mass. 487; Detroit Trust Co. v. Goodrich, 175 Mich. 168, Ann. Cas. 1915A, 821, 141 N. W. 882; Payne Hardware Co. v. International Harvester Co., 110 Miss. 783, 70 So. 892; Lyons v. Benvey, 230 Pa. 117, 34 L. R. A. (N. S.) 105, 79 Atl. 250.

Sale of assets as a whole by receiver does not include asset that company could not claim but which receiver might recover on behalf of creditor. Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310. See Stokes v. Williams, 226 Fed. 148 141 C. C. A. 146.

Receivers appointed by courts of equity appointed in the administration of insolvents are, in the absence of restrictive statutes authorized to enforce the rights of creditors as well as the rights of the debtor. King v. Pomeroy, 121 Fed. 287, 58 C. C. A. 209.

covery, if any, inures to their benefit alone; and he can not recover without showing that claims of creditors remain unsatisfied, nor can he recover more than is requisite to meet such liabilities of the company.[4] In an Illinois case,[5] it is stated that "the actions which a receiver may maintain to set aside transactions binding on the receivership corporation or individual" are only those where (1) the receiver by force of some statute can act for the creditors; (2) the act complained of was *ultra vires* and not binding on the corporation; (3) the receiver was appointed in a proceeding prosecuted by creditors in actions supplemental to execution and the receiver had the rights of the creditors at whose instance and to secure whose claims he was appointed; and (4) the receiver was suing for property, or assets, that belonged to the debtor. This classification is, perhaps, as complete a one as could be made. Like all such attempted classifications it is either subject to exceptions or its

[4] Lynn v. McCue, 94 Kan. 761, 147 Pac. 808; Pryor v. Gray, 72 N. J. Eq. 436, 65 Atl. 1016, affirming 70 N. J. Eq. 413, 62 Atl. 439; Easton Nat. Bank v. American Brick, etc., Co., 70 N. J. Eq. 722, 64 Atl. 1095.

Where the directors of a corporation had wrongfully transferred all its assets to another company, in exchange for the latter's stock, which they divided among themselves, to the prejudice of their creditors, and the latter company thereafter became insolvent, the receiver of the company whose assets were sold is entitled to prove his claim against the latter company for the full value of the assets so conveyed, though he could not recover as his pro rata share of defendant's assets more than would be sufficient to pay the debts of the selling company, with interest, costs, and expenses. McIver v. Young Hardware Co., 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169.

In an action against certain stockholders on a claim of conversion by them of certain assets received on the sale of the business of the receivership company to another corporation it is competent for defendant to show that at the time of the transaction complained of there was set aside a fund, sufficient for the purpose, to pay all the claims against the company and that other parties who had joined in the transaction with defendant and were equally liable with him had not been sued. Jacobs v. Morgenthaler, 149 Mich. 1, 112 N. W. 492.

[5] Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680.

terms must be given considerable elasticity in special cases. To be taken as a separate class, exclusive of the others, the first class mentioned must be taken to refer only to cases in which the receiver must expressly rely upon statutory authority to support his right to sue. There are such cases, or class of cases, and we will refer to some of them hereafter for all the other classes, it is to be understood, the receiver's right to sue depends upon the inherent equitable powers of the court. There seems to be some inconsistency between the language designating the second class and that used in the introduction to the classification itself—between the use of "not binding" in the class designation and "binding" in the introduction. In an action in which a receiver of a corporation sued another corporation on a stock subscription liability and in which was interposed the defense that the purchase of the stock was not binding as being *ultra vires,* it was said:[6]

"The doctrine of *ultra vires* is calculated to protect first, the interest of the public that the corporation shall not transcend the powers granted to it, and second, the interest of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the articles of incorporation, and therefore not authorized by the stockholders in subscribing for the stock. Railway Companies v. Keokuk Bridge Co., 131 U. S. 371, 384, 9 Sup. Ct. 770, 33 L. Ed. 157. The interest of the public is to be conserved by the state and not by the individual stockholder. The right of the stockholder himself to object for the protection of his own interest may be lost by his own consent or acquiescence, for 'it does not lie in the mouth of a stockholder to object to what

6 Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713. See Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310; Hunt v. Hanser M. Co., 90 Minn. 282, 96 N. W. 85; Alexander v. Relfe, 74 Mo. 495; Strickland v. National Salt Co., 79 N. J. Eq. 182, 223, 81 Atl. 828, 832.

the company has done, if the action which he complains of was taken with his knowledge and consent. He can not be heard to complain that he has been injured by the doing of something which he knew of at the time, and expressly consented to, or, by long silence, acquiesced in.' Allen v. Wilson (C. C.), 28 Fed. 677, 2 Thompson 1981."

To uphold the above classification as accurate for the purposes for which it was made, it must be understood that the second class refers to cases in which the situation is like that described in the quotation; that is to cases in which the receiver, on behalf of creditors, seeks to set aside a transaction of the company that was *ultra vires* in character, but because of equitable reasons was binding upon the company and the stockholders.[7] In regard to the third class, the expression "supplemental to execution" must be understood as broader than the purely statutory "supplemental proceedings" and to include such proceedings, except as far as cases coming under the first class are concerned, and, as well, actions to set aside fraudulent conveyances and to recover equitable or canceled assets.[8] The property, or assets, referred to in the fourth class must be such as at one time belonged to the company but the legal title to which has been lost through some wrongful act on the part of the company, such that its detrimental effect could be avoided as far as creditors are concerned. Moreover, to make a distinction between the last two classes the receivers referred to in the last must be understood as corporation receivers alone.

7 See Gay v. Hudson River, etc., Co., 187 Fed. 12, 109 C. C. A. 66.

8 See Chapter XII, supra.

§ 354. Actions on Behalf of Creditors to Recover Corporate Property from Strangers Where Corporation Itself Estopped.

Actions which the receiver may institute in his so-called capacity as representative of creditors and as acting only for their benefit may be directed against (a) strangers to the corporation, (b) directors of the corporation, or (c) stockholders of the corporation.

As to strangers to the corporation it may be stated that, in general, the receiver may pursue what was formerly the property of the company when it has passed into the hands of others through some wrongful or fraudulent act of the corporation, detrimental to the interests of creditors, wherever he may find it, subject only to the defense of purchase for a valuable consideration by one innocent of and without knowledge of the infirmity in the chain of title. In this respect his powers are analogous to and as extensive as those of a trustee in bankruptcy or the receiver of an individual appointed under any of the principles referred to in Chapter XII, supra.[1]

The receiver may set aside, or have annulled, a fraudulent conveyance or assignment of corporate property.[2] He may set aside or successfully resist enforcement of a chattel mortgage or other lien void as to creditors because not executed or recorded in accordance with statutory provisions.[3] A receiver may sue a pledgee of the

1 Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310; Bradley v. United Wireless Tel. Co., 79 N. J. Eq. 458, 81 Atl. 1107; Powers v. C. H. Hamilton Paper Co., 60 Wis. 23, 18 N. W. 20.

2 Whitman v. United Surety Co. (Dorsey), 110 Md. 421, 72 Atl. 1042; Bradley v. United Wireless Telegraph Co., 79 N. J. Eq. 458, 81 Atl. 1107; Nevitt v. First Nat. Bank, 91 Hun 43, 36 N. Y. Supp. 294.

3 Bell v. New York Safety Steam Power Co., 183 Fed. 274; American Can. Co. v. Erie Preserving Co., 171 Fed. 540; Franklin National Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302, 39 L. R. A. 725, 49 N. E. 592; Fidelity Trust Co. v. Staten Island Clay Co., 70 N. J. Eq. 550, 67 Atl. 1078; Mutual Investment Co. v. Walton Mach. Co., 91 Wash. 298, 157, Pac. 682.

With the permission of the

corporation for conversion of the pledged property, and, where there had been a previous judgment, binding on the company but not on the receiver, the recovery will be limited to the benefit of creditors.[4] A receiver may raise the defense of usury where the company might not be able to do so.[5] The receiver may institute an action to have declared void bonds issued by the corporation.[6] A

court creditors whose claims have been allowed may intervene and exercise this same right. Equitable Trust Co. v. Great Shoshone, etc., Co., 245 Fed. 697, 158 C. C. A. 99. (Petition for Writ of Certiorari pending.)

4 Lynn v. McCue, 94 Kan. 761, 147 Pac. 808. The judgment referred to in the text was obtained in an action pending against the company at the time of the appointment of the receiver and prosecuted to judgment thereafter without the receiver's being made a party. On the principle that all equities are to be determined as of the time when the receiver was appointed (see § 23 this chapter, supra) it was held that the judgment was not binding upon the receiver.

5 James Bradford Co. v. United Leather Co. (Del. Ch.), 95 Atl. 308. In this case it was said: "It is the right and duty of a receiver or other fiduciary to raise the question as to the validity of the agreement, for he acts for all who have interests against the borrowing company and is therefore in a different position in this court in this proceeding from a borrower who seeks the aid of a court of equity against the lender on the ground of usury." The receiver had sued to recover certain assets that had been assigned as security for a debt and claimed that the contract was invalid because usurious. See Lynn v. McCue, 94 Kan. 761, 147 Pac. 808; Curtis v. Leavitt, 15 N. Y. 9.

The receiver of an insolvent corporation may question a transaction whereby the corporation borrowed money, paying an alleged usurious rate of interest. James Bradford Co. v. United Leather Co. (Del. Ch.), 95 Atl. 308.

6 See v. Heffenheimer, 55 N. J. Eq. 240, 36 Atl. 966.

With the consent of the receivership court, a creditor may, in the receivership proceedings, contest the validity of bonds issued by the company. On the cancellation of the bonds bona fide holders thereof will be protected by having the lien of the mortgage preserved for their benefit; but, in this connection, unsecured creditors will be protected by judgments against the transferrers of the bonds in favor of the estate. Where bonds were issued as bonus to stockholders for the purpose of protecting minority stockholders the agreement of the stockholders among themselves will be carried out as far as possible by giving the minority preference in such surplus as may be left after creditors

wrong against creditors which receivers are frequently called upon to remedy, is that accomplished by the transfer of the assets of one corporation to another on the agreement that the purchasing company will issue its stock to the stockholders of the selling company in lieu of the old stock and will assume the debts of the seller. Such a substitution of one debtor for another is a fraud upon creditors and the receiver may recover the assets or their value from the purchasing company.[7]

are fully paid. Williamson v. Collins, 243 Fed. 835, 156 C. C. A. 347.

7 McIver v. Young Hardware Co., 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; Dalsheimer v. Graphic Arts Co., 86 N. J. Eq. 49, 97 Atl. 497; Alexander v. Relfe, 74 Mo. 495. This was practically a case of the transfer of assets of one company to another, although the object was accomplished in a more round-about way than the simple one mentioned in the text. The action took the form of one for damages against a corporation that through ownership of stock in the receivership corporation and control of its directors accomplished the transfer and the denuding of the latter company of all of its property. In the opinion it is said: "Though the proof may not establish that defendant . . . committed an actual fraud in doing the wrong for which redress is asked, yet it is clearly shown that the wrong committed was a constructive fraud because done in contravention of that public policy of this state which forbids the assets of corporations to be wasted, canceled, or in any manner withdrawn from the reach of creditors. Fraud of this description—constructive fraud—though not originating in any actual evil design, having for its purpose the perpetration of injury on others, is yet equally prohibited by law as within the same reason and mischief as acts and contracts done malo animo. . . . 'On the part of fraud,' therefore, equity can afford relief asked in the name of the receiver as well as upon the ground of avoiding a multiplicity of suits which would have to be brought if each creditor were compelled to seek a several redress for his own injury."

There may be mentioned here, as illustrating the principle that, where several ways of proceeding to remedy a wrong are open, equity will travel the surest and shortest way. Gillett v. Chicago Title & T. Co., 230 Ill. 373, 375, 82 N. E. 891. In this case, which sought to remedy the wrong mentioned in the text, the stockholders were held liable for the value of their stock in the new company, it being held that they had not paid anything for the new stock since the transfer of the assets from one company to the other was in reality not a sale at all.

§ 355. Actions on Behalf of Creditors Against Directors and Officers in Cases Where Corporation Itself Is Estopped.

It was stated in a preceding section that many of the actions which receivers find it necessary to institute against directors, or other similar officers, of the corporation, as such, are founded upon the directors' misfeasance, malfeasance, or negligence. It often happens that the right of stockholders to complain of transactions giving rise to charges of this character against directors is barred by their active participation or silent acquiescence therein. The right of even a dissenting stockholder may be lost by laches.[1] The right of creditors to complain and to seek a remedy may, however, remain and pass to the receiver. "The general creditors have as much right as the stockholders or the bondholders to be protected against the fraud and negligence of the directors and they have a right, through the receiver, to compel the directors to make good any loss which resulted from the purchase by the company of valueless parcels of real estate if it appears that the loss was occasioned either by the fraud or the negligence of the defendants."[2] Under this principle receivers may hold directors liable for misfeasance, malfeasance, or negligence in selling stock for property at an exaggerated value or for any like wrongful disposition of corporate assets.[3]

There is quite commonly created by statute, on behalf of creditors, a joint and several liability of directors for dividends illegally paid from the capital fund. Although this liability did not exist at the common law, and although it is usually created only for the benefit of those

1 See, Dalsheimer v. Graphic Arts Co., 86 N. J. Eq. 49, 97 Atl. 497.

2 Howland v. Caru, 232 Fed. 35, 146 C. C. A. 227; Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567.

3 Coddington v. Canaday, supra. See also Waterhouse v. Jamieson, 2 Paters (Scotch) 1812, L. R. 2 H. L. (Sc.) 29; Williamson v. Collins, 243 Fed. 835, 156 C. C. A. 347.

who were creditors at the time, it is very generally held that the receiver may enforce the liability on behalf of the class of creditors for whose benefit it is created. The rule that permits such an action on the part of the receiver has been very fully stated as follows:[4] "Our court, in the recent case of Ventress et al. v. D. H. Wal-

[4] Metzger v. Joseph, 111 Miss. 385, 71 So. 645; Stoltz v. Scott, 23 Idaho 104, 129 Pac. 340; Holcombe v. Ames, 87 N. J. Eq. 486, 100 Atl. 609; Brenaman v. Whitehouse, 85 Wash. 355, 148 Pac. 24. In this case the law is thus stated:

"It is undoubtedly true, as appellants say, that 'the purpose of such statutes is to enable inquiring creditors to look to the public record as to the amount of the capital stock of a corporation, and to extend credit upon the faith that it has not impaired its capital by any unlawful means.' But a transaction on the part of a stock company, whereby it retires its own stock, adding nothing of permanent value as assets in the place of it, certainly falls within the prohibition of the statute. The effect of the transactions in this stock was that, whereas the stock should have been outstanding and its value in the treasury or in the assets of the company, it was not outstanding but was in the treasury of the company, and its proceeds were divided among the three stockholders as dividends.

"Beginning with Tait v. Pigott, 32 Wash. 344, 73 Pac. 364, and reaffirmed on the second appeal of that case in 38 Wash. 59, 80 Pac. 172, down to Kom v. Cody Detective Agency, 76 Wash. 540, 50 L. R. A. (N. S.) 1073, 136 Pac. 1155, this court has consistently held that a corporation in this state can not traffic in its own stock; that the capital stock of the corporation is a trust fund for the payment of its debts, upon the faith of which the law presumes credit was given unless other security was taken at the time by the creditor; and that it is immaterial, since the thing which was unlawfully taken reduced the available resources of a now insolvent company, that the company was solvent at the time the transaction occurred. Appellants seem to think that the case of Northern Bank & Trust Co. v. Day, 83 Wash. 296, 145 Pac. 182, arrives at a different result. But that was a case where the capital stock of the corporation was increased to represent the net accrued profits to stockholders, and there was no reduction and extinction of any of the capital stock.

"Appellants contend that 'the evidence in this case shows that there was no time between the declaration of a dividend and the incurring of an indebtedness of any of the creditors represented by this receiver when the assets of the corporation were below $5,000.' As before shown, this is immaterial. However, it was shown that it was in debt to one of the appellants in a substantial sum, and that the indebtedness was not paid. In the Kom Case, supra, it

lace, Receiver, 71 South. 636, is committed to the holding that equity has original jurisdiction of a suit on the part of a receiver against directors of a bank for gross negligence in the discharge of their official duties. We fail to appreciate why equity should not be a proper forum for this action, instituted by the receiver of an insolvent banking establishment to recover a dividend disbursed in violation of the express provisions of the statute, and when the fund to be recovered should equitably be prorated amongst that class of creditors whose debts existed at the time the dividend was declared, and whose interests are in a large measure now represented by the receiver. This court is committed to the holding that the receiver, to a large extent, represents creditors as well as the defunct corporation, whose estate is being administered upon by him under the direction of the court. Payne Hardware Co. v. International Harvester Co., 70 South. 892. The liability sought to be recovered is expressly imposed by section 923 of the present code. It provides that the directors who declared and paid such dividend 'shall be jointly and severally liable to creditors whose debts then existed, to the extent of such withdrawal or dividend and interest.' It is true that the right of action is given to creditors, but the liability is limited to the amount of the dividend declared and paid, and this constitutes a single fund in which many of the creditors have an equity, and should in equity be prorated among the several creditors beneficially interested. This can best be accomplished in a court of equity. One payment of this dividend by the directors would discharge once and

was admitted that the company, at the time of the transaction and at the time of the action, was solvent and had no creditors, and urged that therefore the statute could have no bearing on the case. This court held to the contrary, saying, per Chadwick, J.:

"'The statute contemplates transactions that may arise in faith of the capital stock, and is broad enough to protect future creditors and also stockholders who are not parties to a prohibited contract.'"

for all time the liability. The declaration of a dividend when a corporation is totally insolvent impairs the capital stock, and 'such a distribution of the assets of a corporation is in the nature of a fraud upon its creditors, and is remediable in equity.' . . . 10 Cyc. 883. Many of the courts hold that the personal liability of directors for declaring dividends in excess of the net profits or surplus can not be enforced in a court of law, but that equity is the proper and exclusive forum.

"'Equity has jurisdiction where the effect of the statute is to create a common fund for the security of creditors, although there may be a concurrent remedy at law.' Thompson on Corporations (2nd ed.) vol. 4, par. 5078."

It may be said, however, that in regard to such statutory liabilities as the one here referred to, liabilities in excess of and of a character different from those known to the common law and recognized in equity, some courts are inclined to the view that they can not be enforced by the receiver unless the statute expressly confers upon him the power to do so.[5] It may be said, in regard to the so-called "trust fund" theory concerning corporate assets mentioned in some of our quotations just used, as was said at the close of a preceding section, that it is not held to be strictly applicable to the matter of corporate rights and duties under all circumstances. For instance, when a receiver sued the president of a corporation for an accounting and return of assets disbursed by him because, in a manner to create preferences, he had, just prior to the receivership and at a time when the company was insolvent, distributed its assets, the proceeds of a fire insurance policy, among its creditors, it was held that the receiver had no cause of action. The corporation, it was held, had a right to prefer one cred-

[5] Kinter v. Connolly, 233 Pa. St. 5, 81 Atl. 905; Childs v. Adams, 43 Pa. Super. Ct. 239.

itor to another, even though it was insolvent. The assets of an insolvent corporation, was the ruling, do not become a trust fund to be administered primarily in the interest of creditors until a court of equity by some proper process acquires jurisdiction so to administer them.[6]

§ 356. Actions to Recover Illegal Transfers of Property or Dividends Paid to Stockholders.

In addition to the right to recover from the directors dividends illegally declared from capital instead of surplus earnings, as shown in the last section, the receiver is generally empowered to recover such payments for the benefit of creditors from such stockholders who have wrongfully received them on the ground that such transactions are constructively fraudulent in respect to creditors and thus recovery is necessary to create a fund for the payment of creditors.[1] The recovery of such dividends by the receiver on the ground of impairment of capital is generally regulated as to its details by statutory provisions.[2] A distinction under some forms of statutes regulating the matter exists in that under some statutes the right of action to recover such illegal dividends is vested in the creditors alone and not in the corporation. Under such statutes if the right is not given by the statute to the receiver authorizing him to recover for the benefit of the creditors, the right of action is not an asset of the corporation and accordingly suit can not be maintained by him for such recovery. If, however, he is made

6 Wheeler v. Matthews, 70 Fla. 317, 70 So. 416.

1 Rance's Case—L. R. 6 Ch. 104. In re National Funds Assurance Co., 10 Ch. Div. 118; Hayden v. Thompson, 71 Fed. 60, 17 C. C. A. 592.

2 Detroit Trust Co. v. Goodrich, 175 Mich. 168, Ann. Cas. 1915A, 821, 141 N. W. 882; Kretschmar v. Stone, 90 Miss. 375, 43 So. 177; Strickland v. National Salt Co., 79 N. J. Eq. 182, 81 Atl. 828, affirming 77 N. J. Eq. 328, 76 Atl. 1048; Strickland v. National Salt Co., 79 N. J. Eq. 182, 81 Atl. 828, affirming 79 N. J. Eq. 223, 81 Atl. 832.

a quasi-assignee of the creditors for that purpose he may maintain the action in their behalf.[3]

Where individual members of the corporation have wrongfully benefited by receiving corporate property, the receiver generally has the right to recover the same from them.[4]

[3] Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310, was an action by one who had purchased at a receiver's sale all of the assets of the receivership company against a stockholder for dividends wrongfully received. It was held that the dividends were not assets of the corporation, and therefore not included in the property sold. For the purpose of reaching this conclusion it was shown that the right of action against the stockholder was an asset of creditors only and passed to the receiver. It was said: "The receiver has, in substance, the same powers as an assignee in bankruptcy, or a receiver upon a creditor's bill or proceedings supplemental to execution, and he succeeds to the rights of the creditors as well as the insolvent corporation, and has the power to enforce the rights which the creditors, but for the proceedings, might have enforced in their own behalf. . . . Among the rights which pass to the receiver as the representative of the creditors is the right to recover property conveyed by the corporation in fraud of its creditors, or capital withdrawn and refunded to the stockholders without provision for full payment of the corporation debts. This right of the receiver does not depend upon any express statute granting it, but rests upon the general equitable doctrine that the capital of a corporation is a trust fund for the benefit of its creditors and those to whom it has been refunded are trustees for their benefit. Everything becomes assets in his hands . . . which were assets as to creditors as well as what was assets as to the corporation."

[4] Gillet v. Moody, 3 N. Y. 479. (The company, while insolvent, had purchased from a director some of his stock in the company, paying, therefore, a bond owned by the company. The receiver sued to recover the bond. It does not clearly appear from the report, from the point of view as to whether or not stockholders were in a position to complain of this transaction, whether it properly belongs in this section or in the previous one. It is, however, frequently cited as supporting the doctrine of this section.) Voorhees v. Malott, 73 N. J. Eq. 673, 69 Atl. 643, affirming Voorhees v. Nixon, 72 N. J. Eq. 791, 66 Atl. 192. (The promoter of a corporation sold property to the corporation at an exaggerated price, receiving some stock on account of the purchase price and a mortgage for the balance. The receiver was allowed a credit on the mortgage equal to the difference between the price paid by the mortgagee and the priced charged the com-

§ 357. Actions on Behalf of Creditors Respecting Unpaid Stock, Bonus Stock, and Statutory Liabilities in Cases Where the Corporation Is Estopped.

We will now consider receivers' actions against stockholders to recover for bonus or underpaid stock issued as fully paid, or for stock subscriptions canceled by the company where the liability therefor is claimed to have accrued under such circumstances that stockholders are estopped to complain and only creditors, or receivers on behalf of creditors, may seek redress. It is sometimes said that there is a divergence of opinion, or a lack of harmony, among courts as to the right of receivers to sue under such circumstances. A decision quite commonly relied upon to support the view that a receiver may not sue is one from Illinois, a case to which we have before referred. We will discuss this case in a note appended hereto.[1]

pany. In actions such as these under discussion the receiver can not recover if the creditor can not. To give a valid cause of action in favor of creditors or of the receiver on behalf of creditors the transaction complained of must be not only wrongful, but also harmful. Creditors must suffer some injury therefrom. If the transaction serves a legitimate purpose, but is somewhat irregular in form, it may not be assailed. If, for instance, when stockholders are legitimately entitled to dividends and without the formal declaration of dividends the corporation pays out its funds for the benefit of stockholders to amounts not in excess of what might have been disbursed as dividends, such payments can not be recovered by a receiver from the stockholders if the corporation thereafter becomes insolvent. Little v. Garabrant, 90 Hun 404, 35 N. Y. Supp. 689. See also Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074.

1 Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 12 L. R. A. 328, 25 N. E. 680.

The above case, which is often relied upon in discussions of the subject, cited numbers of cases. We will in this note discuss those cases.

In Curtis v. Leavitt, 15 N. Y. 9, the court said:

"The appellant as receiver has no interest in or power over the property affected by the trusts in question, except such as he derives under the statutes which have been mentioned. It has been said in this case, as in other cases, that he represents the creditors and the stockholders, but for all the purposes of inquiry into his

It is to be remembered that we are here considering an exception to a general rule concerning a corporation

title he really represents the corporation. He is by law vested with the estate of the corporate body and takes his title under and through it. It is true indeed that he is declared to be a trustee for creditors and stockholders, but this only proves that they are the beneficiaries of the fund in his hands, without indicating the sources of his title or the extent of his powers. If, then, in a controversy between the receiver and third parties in respect to the corporate estate, it is possible to form a conception of rights, legal or equitable, belonging to the shareholders as individuals, which the corporation itself could not assert in its own name, the receiver does not represent those rights. So far as shareholders are concerned, he can litigate respecting the fund upon precisely the grounds which would be available to the corporation if it were still in existence, solvent, and no receivership had been constituted. In regard to creditors, I should certainly incline to take the same view of his rights and powers under the statutes referred to."

In Alexander v. Relfe, 74 Mo. 495, discussing this question the court said:

"He (the receiver) can not, it is true, overthrow any valid act of the corporation which he represents, but when acts have been done in fraud of the rights of creditors he may litigate for their benefit, though the act in question be valid as to the corporation itself; in which case he holds adversely to the corporation." The Illinois court says this statement was not necessary to the decision. The action was one brought by the receiver to recover damages from a corporation which, through ownership of stock in the receivership corporation, controlled its board of directors and had brought about the transfer to itself of all of the assets of the controlled company. The plan had been initiated by the purchase by the defendant corporation of practically all of the stock of the receivership corporation so that, at the time of the transaction complained of, its only stockholders were the defendant and a few others who actively participated in the scheme. The trial court gave judgment for the receiver. The court of appeals reversed this decision on the express ground that "the receiver was restricted to such actions as the corporation could have maintained had it been in existence." The Supreme Court, however, upheld the trial court. Not only did it use the language quoted in the Illinois opinion, but also that quoted by us in a previous note. Clearly both statements were necessary to the decision.

The case of Hyde v. Lynde, 4 N. Y. 387, was also cited. This was a receiver's action against a policy holder in a fire insurance company on a canceled deposit note. Under the statute when insured property was sold the policy became void and the insured could get back his deposit note on paying his pro rata share of existing

receiver's power to sue. The general rule is that a receiver has only such choses in action as were assets of

liabilities. In this case the policy holder had received back his note without paying anything on the understanding that there were no debts for which he was liable. The receiver sued on the ground that it afterwards appeared that a mistake had been made and that there were existing obligations of which the policy holder should have paid a part. The majority of the court ruled that there had been no fraud or equitable mistake warranting a change in the arrangement made at the time the note was surrendered, and that the arrangement as made was binding.

There is no statement here of any distinction between the rights of the company and the stockholders on the one hand and of the creditors on the other. After having decided the case in this way the court then supposes a case. "If" the transaction, though lawful in itself, had been done for a fraudulent purpose and the surrender of the note had been with intent to defraud creditors, then the creditors might seek their own remedy, but the receiver could not act for them. This part of the opinion is quoted by the Illinois court. It is, however, immediately followed by the statement: "It is not necessary, however, to decide that question in this case for there is no proof that the settlement was made with intent to defraud any one." This statement the Illinois court fails to mention, an omission all the more noticeable in view of its insistence that certain expressions in the Missouri case above referred to were unnecessary to the decision. There is a dissenting opinion to the effect that the mere surrender of the deposit note had nothing to do with the policy holder's liability to share in the company's debts, and that the company, or the receiver for the company could enforce that liability, regardless of the change in the possession of the note.

Farnsworth v. Wood, 91 N. Y. 308. This was a receiver's action on the statutory, or so-called "added," liability of stockholders that is a liability for the debts of the company in an amount, fixed by statute, over and above the par or subscription price of the stock. It was held that this liability could not be enforced by the receiver, and could be enforced only by creditors on their own behalf. But it is admitted, with practical unanimity, that the added liability of stockholders stands on an entirely different footing from their liability for bonus, underpaid, or canceled stock.

Coope v. Bowles, 42 Barb. (N. Y.) 87. This was an action by the receiver of a copartnership to set aside an assignment for the benefit of creditors on the ground of fraud and defect in the execution of the instrument. The decision was based entirely on a defect in the pleading in the complaint, of plaintiff's standing as a receiver. The portion of the opinion quoted in the Illinois case was stated in this connection and is as follows: "A receiver in general is not clothed with any right to maintain

the corporation and that when he sues he must be prepared to meet such defenses as might have been inter-

an action which the parties or the estate which he represents could not maintain." The receiver was one appointed in statutory proceedings supplemental to execution and the court, discussing certain points in the case on their merits for guidance in a new trial, clearly indicated its opinion to be that, on an amended complaint, the receiver would prevail, or, at least, could maintain the action.

Piscataqua Fire, etc., Ins. Co. v. Hill, 60 Me. 178. This was an action by statutory trustees on voluntary dissolution against the treasurer for misappropriation of funds. It was held that they could not maintain the action. The portion of the opinion which the Illinois court uses is as follows: "They [the trustees] represent the corporation alone and not its creditors or stockholders. The creditors or stockholders can have no legal interest in the property involved in this suit. A receiver may increase the general fund for the payment of debts or distribution but the property if recovered is still that of the corporation, legally as well as equitably. The claims of the creditors and of the stockholders, if they have any, are in the first instance against the corporation and they have no other except as provided by law. If the conduct of the corporation, its officers, or stockholders, has been such as to give other remedies to the creditors such may properly be pursued in their own names. So far as their rights are in question they must be vindicated by themselves and not by others in their behalf. The same is true of the stockholders." The last sentence is supported by cases that set forth the general principle of corporation law that a stockholder can not sue to vindicate a corporate right without showing that he has received permission to do so or that the company has refused to act. Without questioning the propriety of the decision or its applicability to any question concerning the powers of a corporation receiver, it is sufficient here to say that for the purpose for which it was used by the Illinois court, it "proves too much." It wipes out not only the exception we are discussing, but also the right of the receiver under the general rule concerning his power to litigate to maintain actions which the shareholder may maintain if he can avoid the limitations under which he labors because of, under the company's régime, the right of the company to proceed in the first instance, and, pending the receivership, the receiver's priority.

Waterhouse v. Johnson, 2 Paters (Scotch) 1812, L. R. 2 H. L. Sc. 29. This was a receiver's—or, as called in England, liquidator's—proceeding to have a stockholder held liable for the value of his stock because, although it was issued as being fully paid, it, in fact, had not been. The company had issued statements to the effect that, of the par value of its capital stock, all had been paid with the exception of a small percent-

posed against the company itself. The exception is, that the receiver, as representing the creditors, and in a legal

age thereof, for which alone the stock was subject to call, and the company records showed the same situation. As a matter of fact the amount stated to have been paid had not been paid. In the receiver's proceedings the defendant set up the defense that he had purchased his stock on the open market and had paid calls up to the full limit of the delinquency stated to exist and was entirely ignorant of the fraud on the part of the company. In expressing their opinions to the House of Lords, the Law Peers held that the defense was good. Two of them used expressions to the effect that the receiver had no greater rights than the company would have had and was under the disability of meeting the same defenses that could be interposed against the company. These statements are what the Illinois case uses; but it is clear that too inclusive a meaning is given to them. If the company had sued on the same liability the same defense would have been good. In addition, the stockholder might have successfully claimed that the company was barred by its own fraud from enforcing any liability. It is to be remembered also that, if the company had sued, it would have had to admit that it could use any money recovered for any purpose and could not claim, as the receiver would be compelled to show, that the money was needed and would be used simply to pay creditors. The facts that both defenses would have been good against the company and that the first was good against the receiver have no bearing at all on the question as to whether or not the second defense would have been good against the receiver's claim for creditors.

Singularly enough the Illinois case overlooked the following statement, found in the opinion of the Lord Chancellor: "I apprehend . . . that it is unnecessary to come to any precise determination upon that point here, but if the Joint Stock Company Acts be thoroughly sifted there will no doubt be considerable ground for coming to the conclusion when the proper time comes . . . that the official liquidator, who, in that capacity, is bound to collect all the assets of the company and distribute them by the direction of the court among creditors, is in a position in which he may assert rights as against the corporation and assume a position as against the members of the company which the company itself possibly might not be in a position to assert."

In re British, etc., Cork, Co. (Leifchild's Case) L. R. 1, Eq. 231. This was likewise a receiver's proceeding to have a stockholder enrolled as liable for an unpaid portion of the value of his stock on the ground that, though issued as fully paid, it was in truth not fully paid. Defendant was a transferee. The stock had originally been issued in return for certain patent rights but the certificate, or deed of transfer, recited on its

capacity adversary to the corporation, may disaffirm

face that the purchase price was a certain amount, inconsiderable and much below par value. The stockholders contended that the expressed selling price was merely nominal and claimed the right to go behind the writing and show the true consideration. The receiver contended that the stockholder was bound by the deed. The court ruled in favor of the stockholder, and, considering the original transaction, ruled that it had been entirely fair and untainted by fraud. The Illinois court makes use of certain expressions found in the opinion, but it is evident that, taking the expressions out of their context, it is made to appear that they have a more inclusive significance than would be given to them when read where they were originally used, and than, in fact, they were there intended to have. As far as its bearing upon the argument that the Illinois court was making is concerned, this case has a value identical with that possessed by the other British case just above reviewed. It may be here remarked that the defense employed in the Leifchild's Case is always recognized as being available to a stockholder in a receiver's suit. In practically all cases in which the receiver sues on a charge that property received by the company in exchange for stock was, in the transaction, fraudulently given a grossly exaggerated value, the receiver, because the statutes make the decision of the directors conclusive, except on a showing of fraud or gross negligence, is compelled and is permitted to go behind the record to show the truth. Likewise a stockholder may, for the purpose of establishing a defense, be permitted to show that the truth is at variance with the apparent purport of the record as far as any inference of fraud to be drawn therefrom is concerned. There is nothing in this principle inimical to the existence of the power of a receiver to sue on behalf of creditors and, in a manner, adversely to the company and the shareholders.

In regard to the Leifchild's case it is further said, in the Illinois case, that: "It was further held that it was not necessary to inquire whether the creditors could obtain any relief by bill in chancery." This statement was made with reference not to an action instituted by the creditors against the same defendant, on the same claim, and on the same ground, but with reference to an action based on an entirely different ground, namely, fraud in the organization of the company and necessarily against different defendants. There is no implication in the statement, as made, that the creditors might sue though the receiver could not. The reason for the reference to chancery was that under the English statute, the pending matter was in the receivership proceedings before the receivership court, whereas the suggested action would have to be an independent suit. The reason why it was not necessary to make the inquiry was because "no such case has been presented."

Following its analysis of the

such of its acts as were illegal or fraudulent, and detrimental to the interests of creditors.

foregoing cases the Illinois court, as showing the character of all of the cases cited by appellants, who were contending for the receiver's right to sue, gives the classification that we set forth in a previous section. This is supposed to be a classification of all of the cases which a receiver has a right to maintain in his special capacity as representative of creditors. "With the law of these cases," says the court, "we have no fault to find." Then follows the conclusion: "We think the decided weight of authority sustains the rule in respect to the powers of receivers, where there has been no enlargement of their powers by legislative enactment, that they have such rights of action only as were possessed by the persons or corporations upon whose estates they administer." We are unable to see any consistency between the court's conclusion and its remark that it had no quarrel with the law of the cases classified, if any validity is to be given to the classification.

This case has been adversely commented upon by other courts. In a receiver's action against a stockholder on a stock subscription that had been wrongfully canceled by the company, the Supreme Court of Alabama, Hundley v. Hewitt, 195 Ala. 647, 71 So. 419, refused to accept it as giving a correct exposition of the law. The Supreme Court of Indiana in Marion Trust Co. v. Blish, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 84 N. E. 814, 85 N. E. 344, referred to it "because of its clear discussion of the character of a receiver's title under general statutes," but considered that "the conclusion there reached that a receiver does not represent creditors . . . appears to be out of line with other authorities" although "it should be said in explanation of it that the court was dealing with a particularly narrow statute." This same explanation, that the opinion was based upon the special provisions of the statute under which the receiver had been appointed, was advanced in Cole v. Satsop Co., 9 Wash. 494, 43 Am. St. Rep. 858, 37 Pac. 700. In the latter case, however, the court, calling attention to the classification of cases in the Illinois case and the court's remark that it had no fault to find with the law of those cases, ruled that the case before it came under the third class. The action was based upon a stock subscription. The defense was that not all of the stock of the company had been subscribed and the company was not authorized to commence business. Since the stockholder knew of the existing situation at the time he accepted stock, the court held that, though the defense might have been good if the company had been suing, it was not good against the receiver suing in behalf of creditors. The court said: "It is needless to call attention to the fact that the case before us is of the class mentioned [Class Three]." There was no apparent reason why

This subject was necessarily involved in the discussion

the creditors themselves might not have proceeded against the stockholders because there was no specific property to be seized. The common method, however, is to proceed through the intermediate aid of a receiver.

We think the decision in the Illinois case may have been right, but the opinion, on the point above reviewed, is certainly poorly considered. We think the trouble with it is that the court did not say what it meant. Certainly what it said was not necessary to the decision, if the decision was right. At the very outset of its discussion the court says: "If the order directing proceedings against the stockholders who had transferred their unpaid stock to the corporation was valid and was not erroneous it seems it must necessarily be so either because the assignment made by the company to the receiver invested the latter with such title, right, or power as would enable him to maintain such suit; or because a receiver has authority under the rule which prevails in chancery courts to avoid the voluntary and lawful acts of the person or corporation whose estate he represents or may be clothed with such power by the court of chancery which appointed him; or because the statute for the dissolution of insurance companies makes the receiver appointed in conformity with its provisions the representative of the creditors of the company that is restrained from further prosecution of its business." There is nothing in the doctrine that a receiver may, for the benefit of creditors, disaffirm a transaction by which the receivership corporation is itself bound to the effect that the receiver may "avoid the voluntary and lawful acts" of the corporation. The very foundation of his right in this respect is that the act is unlawful. When a receiver sues a stockholder, or, for that matter, a director or a stranger to the corporation, on the ground that the defendant has wrongfully profited through some unlawful act of the corporation, he must always be prepared to meet the defense that the act complained of was a "valid and lawful" transaction, and a successful maintenance of such a defense will prove a bar to the receiver's recovery in the action. Such was the situation in the Leifchild's case, cited by the Illinois case, and, without any distortion of its meaning, the decision in the former was a perfect precedent for the decision in the latter, when placed on proper grounds.

For it is evident that the Illinois court considered the transaction complained of in the case before it to be a perfectly valid exercise of corporate authority. The corporation had permitted subscribers to stock, who had paid less than twenty per cent of their subscriptions, to surrender their subscriptions and receive fully paid stock for the money they had already paid in. Such a transaction might be perfectly valid as far as the corporation was concerned. See, Enright v. Heckscher, 240 Fed. 863, 153 C. C. A. 549; Noyes v. Wood, 247 Fed. 72, 159 C. C. A.

290; Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074.

It is evident that, in the light of all of the circumstances, which do not fully appear in the report of the case, it was so considered in the case under review. From this point of view, the opinion in Leifchild's case might have been adopted in principle in support of the decision in the Illinois case. But the former is certainly not authority for the proposition that there is no exception to the general rule that a receiver has no rights of action except such as the receivership corporation had; nor can the latter be properly said to amount to authority to that effect, although on the surface it appears to support such a proposition. With its view of the facts of the case before it, the Illinois court might have done just as the New York court did in Curtis v. Leavitt, supra, assumed without deciding that the exception in favor of creditors did exist, and still have reached the same conclusion as to the merits of the action. The doctrine that there is such an exception and that it enables a receiver to sue stockholders for the value of stock issued as fully paid when in fact nothing was paid for it, although the company itself could not have maintained such an action, prevails in Illinois, in spite of the case just reviewed.

Gillett v. Chicago Title & T. Co., 230 Ill. 373, 375, 82 N. E. 891. In this case it is said: "If, as between themselves and the corporation, they [subscribers to stock] had the right to decline to take certificates of stock for which they had paid nothing they had no such right as to creditors. When they became the owners of the stock, though they acquired it without paying anything therefor, they incurred a contingent liability to creditors which was not to be avoided by refusing to receive the certificates."

The force and meaning of the exception is somewhat emphasized by the fact that the court cites in support of its exposition of the law the case of Sprague v. National Bank of America, 172 Ill. 149, 64 Am. St. Rep. 17, 42 L. R. A. 606, 50 N. E. 19, a suit by creditors to vindicate their own rights.

It may also be noticed that in this case it was also held that a transferee of stock, innocent and ignorant of the fraud in the chain of title, could not be held liable for its value, which, as pointed out above, is in line with the holding in Waterhouse v. Jamieson, 2 Paters (Scotch) 1812, L. R. 2 H. L. Sc. 29. See also Cohen v. Toy, etc., Co., 172 Ill. App. 330.

It may be stated here, in passing, that it is a somewhat common practice on the part of courts, even of courts that have frequently sustained the exception to the general rule, unnecessarily to remark when ruling that a transaction complained of by the receiver is valid and not open to criticism, or sustaining some other defense raised against a receiver, such as the bona fide purchase of bonus or underpaid stock. See Waterhouse v. Jamieson, 2 Paters (Scotch) 1812, L. R. 2 H. L. Sc. 29, that a receiver has only such rights as the corporation had, and even to say that if the rights of creditors have been invaded they must pursue the remedy in their own persons. See Bostwick v. Young, 118

in previous sections[2] setting forth the character of the liability of stockholders respecting unpaid stock and the confusion arising from variant statutes respecting the method of collection. In respect to the question of whether the corporation itself could be estopped from suing the stockholders, it naturally is dependent upon the particular view held by the courts of the jurisdiction involved in regard to the extent to which a corporation is allowed to go in selling its stock for less than par and whether its contracts in that respect are valid as against its creditors.

In a comparatively recent case in New Jersey,[3] it was said: "The doctrine that corporate stock issued, outstanding, and unpaid for is a trust fund for the benefit of creditors, is a hard and fast rule imbedded in the decisions of the courts of this and other states, and is never relaxed. In this state, however, the stockholder's liability to creditors no longer depends alone upon the trust fund theory, but is held to be statutory." And in another case from that same state[4] it was stated: "But in this state the stockholders' liability to creditors does not depend alone or chiefly upon the theory of 'holding out.' It depends upon the stockholders' voluntary acceptance for considerations touching his own interest of a statutory scheme to which watered stock, under whatever device issued, is absolutely a lien, and which requires stock subscriptions to be made good for the benefit of creditors of insolvent companies, without distinction between prior and subsequent creditors, or between creditors who had

App. Div. 490, 103 N. Y. Supp. 607; Little v. Garabrant, 90 Hun 404, 35 N. Y. Supp. 689. This practice is probably responsible for some of the seeming confusion among the cases and the assertion that there is a variance among the decisions.

2 See §§ 350, et seq.

3 Holcombe v. Trenton White, etc., Co., 80 N. J. Eq. 122, 132, 82 Atl. 618. (Promotion stock.)

4 Easton Nat. Bank v. American Brick, etc., Co., 70 N. J. Eq. 732, 10 Ann. Cas. 84, 8 L. R. A. (N. S.) 271, 64 Atl. 917. (Alleged fraudulent valuation given to patent rights accepted in payment for stock.)

notice and those who had none." The statute referred to in the above two quotations is one generally found in many jurisdictions, either in constitutional or statutory enactment, or in the provisions of corporation charters, forbidding the issuance of stock for any consideration other than money, or labor performed or property equal in value to the par value of the stock; it was not a statute expressly conferring upon receivers the right to sue on behalf of creditors. Both of the cases cited upheld the right of a corporation receiver to sue stockholders who had received stock for less than par.[5] "The power to maintain a suit of this character need not be expressly conferred by statute upon the receiver, but if it can be fairly implied, either from the general scope and purpose of the statute or as an incident to a power expressly given, there is sufficient warrant for its exercise." This statement was made in support of a receiver's right to maintain an action, for the benefit of creditors, to avoid the company's wrongful cancellation of a stockholder's subscription.[6] "The demand of the statutes, as well as the logic of the cases, is, that the working capital of a corporation is the amount named in its articles, and is, in theory, paid in full, either in cash or by the promise of a subscriber to whom the law will attach the presumption of solvency. Publication of the amount of the capital stock is, and must be, a continued holding out to all the world, creditors present as well as prospective, that the capital is paid or subscribed." This statement is made in a case in which appellate court, reversing a judgment of the trial court, ordered judgment to be entered in favor of the receiver against a stockholder on a subscription canceled by the company without consideration.[7] This character of the liability of a stockholder upon his statutory liability as

5 Rosoff v. Gilbert Transp. Co., 221 Fed. 972.

6 Hundley v. Hewitt, 195 Ala. 647, 71 So. 419.

7 Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074.

a stockholder was set forth in an important Delaware case[8] as follows: "A Delaware corporation can not make a subscription contract which will free the subscriber from the statutory liability, for that statute is notice to all who make such contracts and is read into and becomes a part of every stock subscription contract. The fundamental principle is that shares of stock in a corporation are a substitute for the personal liability of partners, and the liability to pay for stock taken up to the par value thereof is a fund for the benefit of creditors of the company, and whoever takes shares of stock of a Delaware corporation assumes that liability for the benefit of creditors in case of insolvency of the company.

"Upon holders of preferred stock, who took the shares pursuant to a subscription contract, and upon those who acquired shares of common stock without a formal subscription, the statutory liability is of course imposed. However acquired the constitutional and statutory provisions as to what constitutes payment for stock are part of the contract, express or implied, respecting both kinds of stock. As to creditors, there is no difference between the liability of holders of stock and subscribers to stock, for both are liable.

" 'In equity and as against creditors, the acceptance of stock without paying for it places the acceptor in the position of a subscriber.' See v. Heppenheimer, 69 N. J. Eq. 36, 78, 61 Atl. 843, 860 (1905)."

The foregoing quotation is from a decision in which it was held that the holders of common stock issued ostensibly as promotion stock—for labor performed before the incorporation and not afterwards—but in reality

[8] John W. Cooney Co. v. Arlington Hotel Co. (Del. Ch.), 101 Atl. 879.

The above case was affirmed with modifications by the Supreme Court under the title of Du Pont v. Ball (Del.), 106 Atl. 39. The modifications did not, however, affect the point to which it is here cited.

to be used as a bonus to subscribers of preferred stock—were liable to the receiver for such proportion of its par value as was necessary to pay the debts of the corporation.[9] The subquotation is also from a receiver's case. A corporation may, unless by statute expressly prohibited from doing so, sell its stock for less than par. A creditor who actually knew of the terms on which stock was sold could not complain of it on the score that he had extended credit to the corporation under the belief that its stock had been sold for par, nor could one who extended credit to the company before a stockholder became a member of the company require him to pay more for his stock than his agreement with the company called for. If creditors have not been injured by transactions had under this principle then there are no rights of creditors in connection therewith to be remedied by the receiver and the receiver has no cause of action against the stockholders.[10] The same rule holds as to "treasury stock"—that is stock which was validly sold but returned to the company either by gift or valid purchase—and, generally, as to increase stock. The company may sell such treasury or increase stock at such price as it may be able to obtain, unless it is prohibited from doing so or makes contrary public statements, without invading the rights of creditors and laying foundation for claims against stockholders on the part of creditors or the receiver.[11] Such stock is presumably fully

9 John W. Cooney Co. v. Arlington Hotel Co., supra. But see affirmance with modification under title of Du Pont v. Ball (Del.), 106 Atl. 39.

10 Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968; First Nat. Bank v. Gustin Minerva, etc., Min. Co., 42 Minn. 327, 18 Am. St. Rep. 510, 6 L. R. A. 676, 44 N. W. 198 (creditor's action); Hospes v. Northwestern Mfg., etc., Co., 48 Minn. 174, 31 Am. St. Rep. 637, 15 L. R. A. 470, 50 N. W. 1117.

11 Handley v. Stutz, 139 U. S. 417, 35 L. Ed. 227, 11 Sup. Ct. 530; Coit v. North Carolina Gold, etc., Co., 14 Fed. 12; affirmed, 119 U. S. 343, 30 L. Ed. 420, 7. Sup. Ct. 231. See Easton Nat. Bank v. American Brick, etc., Co. (N. J. Eq.), supra.

paid when first issued from the treasury. Moreover, if there is some defect or invalidity in the issuance of stock that appears on the face of the corporate record—such as the issuance of stock beyond the amount allowed by its charter, that is, over-issued stock, or acceptance of a secured promissory note in payment of stock in a jurisdiction where such a consideration is prohibited—the creditor is held to have notice of the infirmity and not to have been misled to his injury by the transaction and there has been no wrong for the receiver to remedy.[12]

If we take into account the various conditions above mentioned—the widely prevalent statutory requirement that stock shall not be disposed of at less than its par value; that, unless prohibited in some way, including by its own voluntary purpose as stated to the public, a corporation may lawfully sell its stock below par; that the record may, by exhibiting some infirmity in the issue of stock, warn those dealing with the company not to rely on it as a basis for giving credit; that courts frequently make statements concerning the powers of receivers which, when taken out of their context, may seem to have a meaning much more general than it was intended they should have where used, it may be said that there is no real variance of decision as to the right of a receiver to remedy any injury that may have been done to the corporation creditors through wrongful issuance of stock, even though the corporation and the stockholders may be barred from complaining. We have not observed any well considered case that holds that, when a corporation has issued its stock at a price lower than par when creditors, either because of statutory or charter provision or for some other reason binding on the company,

12 Scoville v. Thayer, supra (over-issued stock); Mitchell v. Porter (Tex. Civ. App.), 194 S. W. 981. See also Laredo Imp. Co. v. Stevenson, 66 Fed. 633, 13 C. C. A. 661; Enright v. Heckscher, 240 Fed. 863, 153 C. C. A. 549. With reference to this case see note 47, this section. The first case cited is an assignee in bankruptcy case

have a right to presume that it was issued for par, and the transaction was conducted under such circumstances as to make it binding upon the corporation and all the shareholders, the receiver may not recover from the implicated stockholders, excluding those who are insolvent, an amount, up to the full difference between the amount they paid and the amount they were presumed to pay, sufficient to liquidate all of the liabilities of the company, including those due to creditors who knew the actual fact as well as those who did not, and those due to prior as well as subsequent creditors, plus the expenses of the receivership, including the cost of collecting from the stockholders; and there is no case that holds that, when a corporation, under circumstances binding upon the company and all of the stockholders, cancels an unpaid valid stock subscription, or obligation, without substituting therefor an equally valuable asset for the benefit of creditors, the receiver may not recover from the stockholder so much of the amount from the payment of which he was relieved as may be necessary for similar purposes. The well considered cases all rule the other way.[13]

13 Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616; Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189; Rosoff v. Gilbert Transp. Co., 221 Fed. 972; Hundley v. Hewitt, 195 Ala. 647, 71 So. 419; Fell v. Securities Co. of N. A. (Del. Ch.), 100 Atl. 788; Meholin v. Carlson, 17 Ida. 742, 134 Am. St. Rep. 286, 107 Pac. 755; Gillett v. Chicago Title & T. Co., 230 Ill. 373, 375, 82 N. E. 891; Cohen v. Toy Gun, etc., Co., 172 Ill. App. 330; Haskell v. Gardner (Ind. App.), 93 N. E. 458; Preston v. Jeffers, 179 Ky. 384, 200 S. W. 654; Webre v. Christ, 130 La. 450, 58 So. 145; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; Holcombe v. Trenton White, etc., Co., 80 N. J. Eq. 122, 82 Atl. 618; Easton Nat. Bank v. American Brick, etc., Co., 70 N. J. Eq. 732, 10 Ann. Cas. 84, 8 L. R. A. (N. S.) 271, 64 Atl. 917; Murphy v. Panton, 96 Wash. 637, 165 Pac. 1074; Cole v. Satsop R. Co., 9 Wash. 487, 494, 43 Am. St. Rep. 858, 37 Pac. 700; Gordon v. Cummings, 78 Wash. 515, 139 Pac. 489.

Pell's Case, L. R., 8 Eq. 222.

It is frequently stated that in respect to the matter here discussed the rights of corporation receivers are analagous to, if not identical with, those of trustees in bankruptcy. Hundley v. Hewitt,

195 Ala. 647, 71 So. 419; Herf & F. Chemical Co. v. Brewster, 54 Tex. Civ. 217, 117 S. W. 880. It seems not improper, therefore, to call attention here to a case which, though a bankruptcy case, discusses the matter we are here interested in and in a way that shows that the court considered that its exposition of the law would be equally applicable to a receivership case. The case is Enright v. Heckscher, 240 Fed. 863, 153 C. C. A. 549. It may be said, however, that the corporation involved was a New Jersey corporation and the decision, as to the various points involved was, to some extent at least, based upon statutes and decisions of that state. The case was an action by the trustee in bankruptcy against stockholders who had been sold increase stock for 50 per cent of its par value through a manipulation intended to give the transaction the appearance of a sale of "treasury stock," but decided by the court to be a pretense and fraudulent as to creditors. Among the rulings made in the case are (1) that stock—even increase stock—issued below par is, under the New Jersey statute, illegally issued and the purchaser is liable to creditors for the difference; (2) that when property is accepted by a corporation in exchange for its stock any overvaluation of the property allowed by the company, either with fraudulent intent or, even in the absence of fraud, through culpable negligence, renders the issue illegal and makes the purchaser liable for the difference between the real value of the consideration as of the time of the deal and the par value of the stock; (3) that a transferee of stock illegally issued is liable in the same way and to the same extent as the transferrer if he has binding notice of the illegality; (4) that an assessment levied upon stockholders by the bankruptcy court is binding upon the stockholders as to the amount of the liabilities of the bankrupt company, the value of its assets, and the amount of the necessary assessment (see, in re Newfoundland Syndicate, 196 Fed. 443, 201 Fed. 917, 120 C. C. A. 255); (5) that interest may be charged against a stockholder on such a liability from the time he received his stock; (6) that a corporation can not, after the rights of creditors have intervened, relieve a stockholder of his contingent liability under such circumstances by receiving back the stock and issuing him an amount equal at par to the consideration actually paid. In considering this last mentioned point the court said: "But neither a board of directors nor the stockholders themselves can accept a surrender of shares and a release of a shareholder from liability thereon, when to do so would prejudice the rights of creditors. It could not be done if a single stockholder objected. Cartwright v. Dickinson, 88 Tenn. 476, 17 Am. St. Rep. 910, 7 L. R. A. 706, 12 S. W. 1030; Wills v. Nehalem Coal Co., 52 Ore. 70, 96 Pac. 528; Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435. If all the stockholders agreed, it could not avail, if debts had been incurred which there were no means to pay, except out of the capital stock which was released. For as against creditors capital stock and the liability attaching to it can not

§ 358. General Defenses to Actions by Receiver on Behalf of Corporate Creditors.

In cases coming under the above rule—or exception to the general rule concerning the receiver's powers—various points incidentally arise. Where the consideration for stock is labor or property, and not money, the question of the good faith of the company in accepting the property as equal in value to the stock arises. The decision of the company is presumed to be correct and fair and the burden of showing the contrary is on the receiver attacking the transaction. It is not necessary, however, to show actual fraud; it is sufficient to show culpable negligence, as for instance, failure to make any investigation or appraisement of the property or accepting merely the word of an interested party.[1] If the decision is against the stockholder he may nevertheless and as a general rule be allowed a credit equal to what the court determines to be the real value of the labor or property as of the time when the stock was issued.[2]

be squandered or surrendered. Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Potts v. Wallace, 146 U. S. 689, 36 L. Ed. 1135, 13 Sup. Ct. 196. And where a stockholder claims, as against a creditor or a trustee in bankruptcy, that he surrendered his stock, or the number of his shares was reduced at a time and under circumstances which permitted it to be done, it would be incumbent on him to show that the time and circumstances were such that it could lawfully be done. Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74. The defendant has shown nothing of the kind in this case."

An allegation in a receiver's complaint that stock had been issued and unpaid for "plainly states a cause of action on contract and that is the nature of the obligation which a subscriber to stock in a corporation assumes to the company." Mere general allegations of fraud in such a complaint will be disregarded as surplusage. Under such a complaint it is not permissible to the receiver to prove that the stock was illegally issued as promotion stock. Lamphere v. Lang, 213 N. Y. 585, 108 N. E. 82. Per contra, see Cohen v. Toy Gun Mfg. Co., 172 Ill. App. 330. See also Hundley v. Hewitt, 195 Ala. 647, 71 So. 419.

1 Holcombe v. Trenton White, etc., Co., 80 N. J. Eq. 122, 82 Atl. 618. See Honeyman v. Haughey (N. J. Ch.), 66 Atl. 582.

2 Pell's Case, L. R., 8 Eq. 222; Enright v. Heckscher, supra; See

The question of the liability of a transferee of the stock is another that may incidentally arise in such an action. The rule is that there is open to him the defense of being an innocent purchaser for value. If he successfully maintains such a defense he escapes liability; but if he takes the stock with knowledge—not necessarily actual, but legal knowledge—of the fraud or illegality connected with its original issuance he is liable.[3]

Such defenses as that the stock was "treasury" stock or increase stock and subject to be sold at less than par are determined in accordance with principles of general corporation law, just as they would be if the action had been brought by a creditor in person.

Under the common law a stockholder in a corporation was deemed not to be a party to any contract made by the company and was therefore held not to be liable for its debts beyond the amount of his subscription to its stock.[4] In many jurisdictions, however, he is by constitutional and statutory provisions made liable to a greater amount. This added liability of the stockholder is commonly designated as "statutory," to distinguish it from his liability on his subscription. In some instances the amount of this liability is made equal to the par value of the stock and is spoken of as double liability; in others it is made proportionate to the amount of the stock holdings as compared with the total amount of the company's stock issued and is spoken of as proportionate liability. In all instances the statutory liability is created for the benefit of creditors. It is, however, in a certain sense different from the liability to creditors that we have just been discussing. The latter was in the first instance an asset of the company. The company, however, by some contract with the stockholder, waived, or surrendered, this

v. Heppenheimer, supra; Easton Nat. Bank v. American Brick, etc., Co., supra.

3 Waterhouse v. Jamieson, supra.

4 See Hicks v. Burns, 38 N. H. 141, 145.

asset as far as it, the company, was concerned, and was thereafter estopped from claiming any further liability on the part of the stockholder.[5] However, the estoppel as to the company is not effective against creditors and the liability of the stockholder remains an asset in the receiver's hands which he can enforce on behalf of creditors. The statutory liability of the stockholder, however, is not generally an asset of the company and rarely, if ever, can be enforced by it. It generally is made by the statutes an asset of the individual creditors to be enforced by each one according to his own interests. Under some statutes, the receiver is vested with the right of action on behalf of the creditors as a sort of trustee. This is the equitable view of the matter; and since, in equity, a corporation receiver takes his title through and under the corporation, it is the rule in equity that the receiver does not acquire this liability as an asset which he can enforce for the benefit of the estate which he is administering; nor does he, in the absence of express statutory provisions, acquire it for the benefit of any set of creditors of the estate. "It would seem to be quite clear that if this added liability of stockholders is an asset of the corporation, the receiver of such corporation, when insolvent, should be authorized to enforce the liability. If on the contrary, the added liability of stockholders is a provision for the benefit of creditors and not to be considered an asset of the corporation, the creditors only would have the right of action and be entitled to enforce the so-called added liability. . . . The liability by our statute is expressly declared to be for all debts contracted, and is obviously for the benefit of the creditor, and can not be deemed an asset of the corporation. The corporation, therefore, not being entitled to invoke the statutory right we can not see by

5 Lum v. American Wheel & Vehicle Co., 165 Cal. 657, Ann. Cas. 1915A, 816, 133 Pac. 303.

what construction the receiver could claim to be entitled to claim a right or remedy not existing in the corporation itself.''[6] It is commonly said that this statutory liability is in the nature of collateral security for the creditors and that because of it the stockholders stand as *pro tanto* sureties for the debts of the corporation;[7] and the view above expressed, to the effect that it is not to be enforced by the receiver, is held even where the statutes expressly vest all the estate and assets of the company in the receiver.[8]

When the receiver is viewed as the representative of all of the creditors, and when it is considered that the benefits of the statutes imposing added liability upon a stockholder are generally limited to creditors whose claims accrued during the period that he owned stock, there is no gainsaying the logic of these decisions. If the receiver recovered the statutory amounts for which stockholders were liable and placed the money in the general funds of the estate for the benefit of all creditors, a certain inequality would follow respecting creditors, and thus the rule that imposes upon the receiver an attitude of impartiality toward all parties interested in the estate would be violated.[9] Besides it being a fundamental rule of corporation receiverships that equality is equity, such a receivership is imposed upon a corporate estate to prevent a promiscuous scramble for their rights among its creditors, with resultant inequalities due to a host of circumstances of which some creditors could take advantage one against the other, and to gather the estate under the administration of a court for equitable

6 Clapp v. Smith, 22 N. M. 153, 159 Pac. 523.

7 In re British, etc., Cork Co. (Leifchild's Case), L. R. 1, Eq. 231; Waterhouse v. Jamieson, 2 Paters (Scotch) 1812, L. R., 2 H. L. (Sc.) 29; Jacobson v. Allen, 12 Fed. 454, 20 Blatchf. 525; Brown v. Allebach, 166 Fed. 488.

8 Colton v. Mayer, 90 Md. 711, 714, 78 Am. St. Rep. 456, 47 L. R. A. 617, 45 Atl. 874.

9 See Marion Trust Co. v. Blish, 170 Ind. 686, 18 L. R. A. (N. S.) 347, 84 N. E. 814, 85 N. E. 344.

distribution among the various classes of interested parties and equal distribution within each class. This situation would be remedied somewhat if the receiver were permitted to marshal the added liability of all the stockholders into a special fund to be apportioned among creditors entitled thereto according to their respective rights, and creditors who participated therein were permitted to share in the general fund of the estate according to the balances of their claims remaining unpaid. But obviously this can not be done under statutes which give the right of action in such matters solely to the creditors as a personal right of action. That the receivership court has the requisite machinery for permitting such a marshalling and distribution is indicated, to some extent, by the following language used in connection with the matter of the collection of stock subscriptions by a trustee in bankruptcy: "The cause of action is for the unpaid subscription. To the creditors it makes no difference whether the failure to pay was the result of an express contract or the result of fraud. If there could be difference in the rights of the trustee, it would seem that he ought to be more bound by a contract than by fraud. And if the contract to receive less in money than the face of the stock will not defeat his right to recover, neither should it be defeated by a fraudulent agreement to receive less in property. Compare 1 Cook on Stockholders, § 47, with Elyton Land Co. v. Birmingham Co., 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 79, 9 South. 129. For it has long been held in this state that capital stock is a trust fund for the payment of debts. Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412. The liability on the part of the stockholder to pay his subscription in money or in money's worth arises out of his relation to that trust fund, and is imposed by law. . . . This liability can be enforced by the trustee in bankruptcy. For while he represents the corporation in

a sense he also represents the creditors. Inasmuch as all the subscribers who have not paid in full can be joined as defendants in one suit (Dalton Co. v. McDaniel, 56 Ga. 195 [1]; Moore v. Ripley, 106 Ga. 556, 32 S. E. 647 [1]; 1 Cook Corp. § 206), it is manifestly to their interest, to that of the creditors, and to that of the estate, that the trustee should be permitted to be the plaintiff in that action. It avoids a multiplicity of suits. Civil Code, § 3989 [4586]; compare §§ 4842, 4846 [5415, 5419]. It permits the court to pass upon the rights of the several creditors, and to determine whether any are precluded from the right to share in the fund when realized. It also enables the court in one action to have an accounting, to determine the varying rights of each creditor, whether any of the subscribers are insolvent, to mold a decree accordingly, and to do complete equity in one proceeding."[10] That certain creditors having a special equity in a particular fund might proceed in the receivership court to collect it was suggested as a possibility in the Indiana case that we have just cited, in which it was held that the receiver, as representative of all of the creditors, could not enforce payment.[11] There is authority for the proposition that a receiver may en-

10 Allen v. Grant, 122 Ga. 552, 50 S. E. 494. See Note 13, supra.

11 Marion Trust Co. v. Blish, supra. In this case the receiver sought to collect an unpaid stock subscription. The stockholder interposed the defense of false representations used by the company to induce his subscription. To this defense the receiver replied that, on the principle that innocent parties should not be allowed to suffer, this defense could not be held good against those who had become creditors subsequently to the making of the subscription and, presumably, in reliance upon it. It was in answer to this contention of the receiver that the court made the ruling stated in the text and, in connection therewith, offered the suggestion mentioned.

It may be said here that not enough details are given in the report of the case to enable one to determine whether or not, if the receiver had responded to the stockholder's defense by a charge of laches, the decision might have been different. See Reel v. Brammer, 56 Ind. App. 180, 101 N. E. 1043.

force, for the benefit of the particular creditors interested, statutory liability placed upon directors for the payment of illegal dividends.[12] This is, of course, upon the theory that such dividends so paid were and are funds belonging to the corporation. We have seen also that a group of creditors, willing to bear the burden of the costs, may be permitted to contest, for their own benefit and to the exclusion of creditors not joining, the validity of a mortgage.[13] In view of these considerations we think it may be said that the argument that the statutory liability of a stockholder is merely collateral security and is not and never was an asset of the company to be passed over to the receiver is simply based on the general form of the statutes imposing the liability, not merely the "rule of convenience," which operates at many stages of the receivership proceedings.[14] However all this may be, the general rule is that, unless permission to enforce this liability is expressly bestowed upon the receiver by statute, he has no authority to do so.[15] In some jurisdictions the right is expressly granted to the receiver by statute.

12 Metzger v. Joseph, 111 Miss. 385, 71 So. 645.

13 Equitable Trust Co. v. Great Shoshone, etc., W. P. Co., 245 Fed. 697, 158 C. C. A. 99.

(A writ of certiorari in the above case is pending in United States Supreme Court.)

14 Fell v. Securities Co. (Del. Ch.), 100 Atl. 788; Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187.

15 Republic Iron & Steel Co. v. Carlton, 189 Fed. 126; Jacobson v. Allen, 12 Fed. 454, 20 Blatchf. 525; Tiger Shoe Mfg. Co.'s Trustee v. Shanklin, 125 Ky. 715, 102 S. W. 295; Colton v. Mayer, 90 Md. 711, 714, 78 Am. St. Rep. 456, 47 L. R. A. 617, 45 Atl. 874; Hancock Nat. Bank v. Ellis, 172 Mass. 39, 70 Am. St. Rep. 322, 42 L. R. A. 396, 51 N. E. 207; Clapp v. Smith, 22 N. M. 153, 159 Pac. 523.

A receiver's action based on stockholder's statutory liability can not be justified on the theory that it is an action by one of a class in favor of all. Hammond v. Cline, 170 Ind. 452, 84 N. E. 827. Such an action can not be justified as being based on an order of court levying an assessment against stockholders on such liability, since the court, being without jurisdiction of the subject matter, had no authority to make the order. Idem.

Where a receiver can not enforce a stockholder's statutory lia-

Several states, Minnesota, Ohio, and Kansas among others, have statutes expressly relating to the enforcement of the stockholder's statutory liability and providing for the appointment of a receiver to collect the amounts due. It may be said, as generally applicable to the statutes, that they provide for a liability that is secondary and contingent while the corporation is a going concern but which become primary and enforceable upon the insolvency of the corporation. The proceedings under the statutes have a two-fold purpose, (1) the levying of an assessment upon the stockholders; that is, the issuing of a decree declaring the amount which each stockholder is liable to pay; and (2) the enforcement of payment under the assessment. The first purpose is accomplished in a proceeding commenced in the home jurisdiction of the company; and, in so far as the court, before which this proceeding is had, is able, under the general principles of law relating to the jurisdiction of a court to render a money judgment against a defendant not personally served with process and not voluntarily appearing and submitting to the court's jurisdiction, to obtain the necessary jurisdiction, the second purpose is also accomplished in this same proceeding. For the purpose of enforcing the collection of the assessment against stockholders who can not lawfully be made amenable to a money judgment rendered by the home court in the proceeding mentioned a receiver is appointed. The questions that usually arise in actions brought by such a receiver are: (1) The capacity of the receiver to sue, especially in a foreign jurisdiction; (2) the extent to which the stockholder, as being represented in the

bility a creditor may enforce his own right thereto pending the receivership proceedings.

On a theory similar to that that applies to a stockholder's statutory liability, a statutory liability imposed upon organizers of a corporation for conducting business in the name of the corporation before sufficient stock has been sold to warrant its engaging in business can not be collected by the receiver. Wells v. Du Bose, 140 Ga. 187, 78 S. E. 715.

parent proceedings by the corporation itself, is bound by the assessment decree therein made; and (3) the bearing of the statutes of limitation. Naturally enough, these statutes are widely variant as found in the different jurisdictions, and in any particular jurisdiction are subject to frequent amendment. Decisions under them are therefore not of general application and must be read in the light of the particular statutes which they interpret. Much confusion has arisen in respect to this phase of the subject as applied to receiver by reason of the failure of the court to note the fact in its opinion that a particular decision was rendered under the particular phraseology of a statute on this subject. And a like confusion has undoubtedly been caused by arguments of counsel based on reasoning found in decisions based on statutory construction without giving due consideration to the phraseology of the statute which was involved in the case. Cases are cited, however, sufficient in number and sufficiently varied in character, we believe, to enable the practitioner to get a good view of the general principles applicable to the subject and to enable him to form an accurate opinion as to the proper conclusion under a given statute in any particular case.[16]

16 Irvine v. Elliott, 203 Fed. 82; Mottinger v. Hendricks, 208 Fed. 824; Irvine v. Baker, 225 Fed. 834; Irvine v. Putnam, 190 Fed. 321, 167 Fed. 174; Goss v. Carter, 156 Fed. 746, 84 C. C. A. 402; French v. Busch, 189 Fed. 480; Walters v. Porter, 3 Ga. App. 73, 59 S. E. 452; Hamilton v. Eisendrath, 185 Ill. App. 502; Elson v. Wright, 134 Iowa 634, 112 N. W. 105; Converse v. Ayer, 197 Mass. 443, 84 N. E. 98; Olson v. Warroad Mercantile Co., 136 Minn. 310, 161 N. W. 713; Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85.

Where under the express provisions of the statute the authority to maintain an action to enforce a liability of stockholders respecting debts of the corporation is given to a receiver, he becomes a quasi assignee and representative of the creditors for that purpose, and may sue for that purpose in a foreign jurisdiction. Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163, 27 Sup. Ct. 755; Drey v. Converse, 206 U. S. 516, 51 L. Ed. 1163, 27 Sup. Ct. 755; Converse v. Hamilton, 224 U. S. 243, Ann. Cas. 1913D, 1292, 56 L. Ed. 749, 32 Sup. Ct. 415; Selig v. Hamilton, 234

D. Duty of Receiver Toward Contracts of Corporation and of Himself.

§ 359. Litigation Concerning the Receiver's Own Transactions.

After the receiver assumes control of the corporate property and the management of the business, he occupies toward the property and the business, as far as third

U. S. 652, Ann. Cas. 1917A, 104, 58 L. Ed. 1518, 34 Sup. Ct. 926.

A receiver of an insolvent corporation was entitled to set off the amount due from a stockholder on his statutory liability for debt of the corporation against the claim of the stockholder's estate for money due from the corporation. Coyle v. Taunton Safe Deposit & Trust Co., 216 Mass. 156, 103 N. E. 288.

The statutory liability of a stockholder does not include liability for the expenses of the receivership. Idem.

An order of court levying an assessment for statutory liability against stockholders of a corporation belonging to a class of corporations whose stockholders are by statute expressly exempt from such liability is void and can not serve as a valid foundation for a receiver's action against stockholders; the charter is determinative of the character of the corporate business for this purpose. Marin v. Augedahl, 32 N. D. 536, 156 N. W. 101.

A judgment creditor on a lost claim is entitled to the benefit of the stockholder's liability to be collected by the receiver. Henley v. Myers, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173.

The statutes of limitation on a receiver's claim against a stockholder for his statutory liability begin to run from the time of the entry of a decree making an assessment. Irvine v. Putnam, 167 Fed. 174. See Shipman v. Treadwell, 208 N. Y. 404, 102 N. E. 634; 209 N. Y. 545, 102 N. E. 1113; Irvine v. Bankard, 181 Fed. 206. It is to be remembered in connection with these actions that, since receivers authorized to enforce the statutory liability are, as a rule, vested by statute, with the legal title to assets which they are authorized to claim, and may, therefore, sue in their own name in any jurisdiction, the statute under consideration in any case may be a statute of jurisdiction different from that in which the action is pending. See Irvine v. Elliott, 203 Fed. 82. As to whether or not a statute amending the law so as to make this liability enforceable only by a receiver instead of by each creditor in his own behalf is obnoxious to the constitutional inhibition against the impairment of contracts as to the stockholder. See Henley v. Myers, 76 Kan. 723, 17 L. R. A. (N. S.) 779, 93 Pac. 168, 173; as to creditors, see Harrison v. Remington P. Co., 140 Fed. 385, 5 Ann. Cas. 314, 3 L. R. A. (N. S.) 954, 72 C. C. A. 405.

The citizenship of the receiver, and not of the creditor, determines the jurisdiction of a federal court. Irvine v. Bankard, 181 Fed. 206.

parties are concerned, a position similar to that of any private owner. He protects the property of the estate from interference with or injury by the acts of others and if his rights in these matters are violated he has the same remedies as any owner would have. On the other hand it is incumbent upon him to use and manage the property with due regard to the rights of others; he must exercise the same degree of care toward others in this regard as any owner is required to exercise, and if others are injured through negligence in the performance of his duties in this regard he is liable as an owner would be. The same thing is true of his transactions in the operation of the business of the corporation. Those who deal with him do so as they would with any private business person, subject to the limitation that they are presumed to know that he has authority to act only within the lines prescribed by the court. He may enforce his own contracts and they may be enforced against him just as if he were acting in his own behalf. Since in these matters he is acting for the court, and in reality it is the court that is acting through its officer, or servant, or agent, the receiver may sue or be sued concerning them without previous permission of the court, and the receiver sues or is sued in his own name.[1]

1 See Butterworth v. Degnon C. Co., 214 Fed. 772, 744, 131 C. C. A. 184; Ames v. American Telephone & Telegraph Co., 166 Fed. 820; Breed v. American Tel. & Tel. Co., 166 Fed. 825; Wason v. Frank, 7 Colo. App. 541, 44 Pac. 378; Pouder v. Catterson, 127 Ind. 434, 26 N. E. 66; Maxwell v. Missouri Valley Ice, etc., Co., 181 Iowa 108, 164 N. W. 329; Wilson v. Welch, 157 Mass. 77, 31 N. E. 712; Robinson v. Mills, 25 Mont. 391, 65 Pac. 114; Farnsworth v. Western Union Tel. Co., 53 Hun 636, 6 N. Y. Supp. 735; Singerly v. Fox, 75 Pa. 112; Guimarin & Co. v. Southern, etc., Trust Co., 100 S. C. 12, 84 S. E. 298.

When the receiver sues an assignee for the benefit of creditors to recover property in the latter's possession he is not subject to the limitations placed upon a creditor suing a similar defendant with reference to the necessity of making a previous demand, proving a claim, etc. American Bonding Co. v. Williams, 62 Tex. Civ. App. 319, 131 S. W. 652.

It may be said that in all actions in which a receiver is a party, those relating either to his own transactions or the transactions of the receivership company, apart from such details as are affected by the fact that a receiver is a party, all issues raised and all questions relating to matters of procedure and the like are governed by the same rules, or principles, of law or equity as would control in litigation between parties associated with the action in a purely private, or individual capacity.[2]

[2] Allen v. Roydhouse, 232 Fed. 1010 (standard of duty of a corporation director; instructions to jury). Wright v. Ankeny, 217 Fed. 985. (Where several stockholders are sued in one action on their subscriptions to stock the action against each is regarded as a several and independent action so far as the right to move the suit from a state to a federal court is concerned.) Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616 (right of corporation to increase its stock; presumption as to payment of tax on increase stock). Hollander v. Heaslip, 222 Fed. 808, 137 C. C. A. 1 (effect of condition in a contract). Pittsburgh, etc., Co. v. Duncan, 232 Fed. 584, 146 C. C. A. 542 (relation of one corporation to another as determined by ownership of stock in one by the other). Howland v. Corn, 232 Fed. 35, 146 C. C. A. 227 (standard of duty of a director when selling his own property to the company; difference between charge of conspiracy in a civil and a criminal action). Wright v. Ankeny, supra (right to sue non-resident for a money judgment). Brown v. Allebach, 166 Fed. 488 (sufficiency of notice to meet statutory requirement). French v. Busch, 189 Fed. 480 (sufficiency of pleading the giving of statutory notice; necessity for pleading place of payment). Schofield v. Baker, 242 Fed. 657 (filing cost bill). Lusk v. Batkin, 240 U. S. 236, 60 L. Ed. 621, 36 Sup. Ct. 263 (validity of state tax on foreign corporation). Vallery v. Denver, etc., R. Co., 236 Fed. 176, 149 C. C. A. 366 (standard of duty of a corporation owning control of stock in, and controlling directors of another). Noyes v. Wood, 247 Fed. 72, 159 C. C. A. 290 (standard of duty of directors in dealing with company concerning their own interests). James Bradford Co. v. United, etc., Co. (Del. Ch.), 95 Atl. 308 (whether contract usurious or not). Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187 (effect of plea of general issue in suit on unconditional contract in writing). Lynn v. McCue, 94 Kan. 761, 147 Pac. 808 (whether or not contract is usurious; whether sale of pledged property amounted to conversion; necessity for tendering payment of debt in action for conversion of pledged property). Hopper v. Brodie, 130 Md. 443, 100 Atl. 644 (venue where several defendants). Olson v. Warroad M. Co., 136 Minn. 310, 161 N. W. 713 (authority of agent to bind company;

§ 359a. Duty of Receiver Respecting Executory Contracts.

We have just been considering one exception to the general rule that the receiver, deriving his title under and through the company, takes the estate as he finds it, acquiring all the company's rights and assets, and being subject to all of its obligations and liabilities. This exception is to the effect that the receiver may, under certain circumstances, disaffirm the acts of the corporation and recover, for the benefit of creditors, assets that, once belonging to the company, had been lost to it before the initiation of the receivership. This exception tended to benefit the creditors by increasing the assets of the estate. We have now to consider another exception to the general rule concerning the receiver's title: an exception that tends to benefit those interested in the estate by reducing its liabilities.

This exception has to do with executory contracts of the corporation in force at the time of the appointment of the receiver. The general duty of a receiver respecting executory contracts has been previously discussed and the general rules therein set forth are applicable to corporation receivers.[1] That appointment and the passing over of the entire control of the corporate business to an officer of the court, puts it out of the power of the company to perform its end of any such contract. There results, therefore, a breach of the contract, as far as the company is concerned, giving a cause of action for dam-

ratification of agent's acts). Metzger v. Joseph, 111 Miss. 385, 71 So. 645 (whether statute penal or not as affecting period of limitation of action). Clapp v. Smith, 22 N. M. 153, 159 Pac. 523 (effect of amendment of remedial statute on pending suit). Holcombe v. Ames, 87 N. J. Eq. 486, 100 Atl. 609 (removal of action from state to federal court where there are several defendants). Underhill v. Rutland R. Co., 90 Vt. 462, 98 Atl. 1017 (authority of agent to bind company; ratification of agent's acts). Rea v. Eslick, 87 Wash. 125, 151 Pac. 256 (whether contract community obligation or that of individual spouse).

1 See §§ 34 et seq., supra. And in respect to public utilities, see chapter devoted to that topic.

ages to the other party if he is ready, willing and able to perform. If the matter stopped there, and the receiver had nothing further to do than to receive a claim for damages and see that it was properly recognized on distribution, then the course of proceeding would be in accordance with the general rule. But such is not the course allowed by equity. The receiver is given the right to determine whether or not the contract was a prudent one for the company to enter into. If the receiver were compelled to carry out the contract, transactions under it would be in his own name and any liabilities accruing therefrom would be expenses of the receivership itself, and under the general rule of priorities on distribution would be entitled to be paid ahead of the claims of general creditors of the company. Since, in many instances, the condition of the company's affairs that warrants the creation of a receivership is due to the assumption by the company of improvident and ruinous contracts, through inefficiency or carelessness, or, perhaps, even fraud on the part of its managers, and since the other party to the contract is presumed to have known of its real character and value, it is considered inequitable to place upon the general creditors, whose contracts have been completed and whose claims will probably not be paid in full, any further burdens from the continuance of the contract; and the receiver is given the right to reject, or disaffirm, it, if he decides that such would be the outcome of his operating under it. He is appointed, rather to protect and preserve the property placed in his charge than to execute contracts made by its owner. On the other hand, if the contract turns out to be a meritorious one in the hands of the receiver and one whose continuance would work to the benefit of the general creditors, it is not considered inequitable to give him the right to adopt it and compel the other party to do for him what it had con-

tracted to do for the company.[2] The rule in this respect has been stated as follows:[3] "The general rule laid down is that a receiver is not liable upon the covenants and contracts of the person or corporation for whose property he is appointed receiver, unless he adopts the contracts as his own. The general rule is that no executory contract is binding upon the receiver until adopted by him. It is, however, his duty to refuse to be bound by any contract which would prove burdensome, or imperil the fund intrusted to his care as receiver."

It is his duty to investigate for the purpose of determining what election to make, and he is entitled to reasonable time for this purpose. Speaking of an instance in which the receiver, for the purpose of determining what course to pursue, had performed a portion of the part of the contract remaining unfilled at the time of his appointment, the court said:[4] "It seems to us that he pursued the proper course. On taking possession as receiver, he found a contract which might develop into an exceedingly valuable asset. Had he repudiated it, without investigation, he would have been guilty of a clear dereliction of duty. He was in duty bound to proceed with the contract if it were beneficial to the estate administered by him and to abandon it if not beneficial. He had a reasonable time to investigate before deciding this problem.

2 Curtis v. Walpole, etc., Co., 227 Fed. 698; Maxwell v. Missouri Valley Ice, etc., Co., 181 Iowa 108, 164 N. W. 329; Brown v. Warner, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032; Scott v. Rainier P., etc., Co., 13 Wash. 108, 42 Pac. 531.

3 Maxwell v. Missouri Valley Ice, etc., Co., 181 Iowa 108, 164 N. W. 329.

4 Butterworth v. Degnon Contracting Co., 214 Fed. 772, 131 C. C. A. 184; Curtis v. Walpole, etc., Co., 227 Fed. 698; Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 81 Atl. 1089; Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250; Fountain v. Stickney, 145 Iowa 167, 139 Am. St. Rep. 410, 123 N. W. 947; Brown v. Warner, supra; Scott v. Rainier, etc., Co., supra.

The rule stated above is not obviated by the fact that the company may appear to be solvent. Empire Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415.

. . . He had no right to go on with a contract which was certain to subject the creditors, whose interest he was bound to protect, to additional loss."

As stated above, an executory contract is not binding upon the receiver until he adopts it; it is not one that is binding upon him until he disaffirms it. Parties to the corporate contracts are supposed to know this rule. A party to a contract may at any time, especially when occasion for some performance under it arises, call upon the receiver to announce his election or may call upon the court to make any equitable order to protect his rights pending the receiver's decision.[5] But, in the absence of such an order, or an express understanding with the receiver, or conduct on the part of the receiver amounting to and binding as an adoption of the contract, any performance by the receiver is not to be understood as being under the contract, and any liability accruing in favor of the receiver from such performance is to be adjusted on a *quantum meruit* basis since the services due were rendered by the receiver as a receiver and not by the corporation.[6] If a contract is indivisible a receiver may not adopt part and reject the rest; he must adopt or reject it as a whole;[7] neither may a receiver, without an order of court, make a binding agreement as to any material modification of the terms of an executory contract.[8]

If the receiver rejects the contract, then it is considered that there has been a breach thereof as of the time of the appointment of the receiver. Since the company is held responsible for the fact of the receivership, and on the theory that the receivership was caused by the company's

5 See Hanna v. Florence Iron Co., 222 N. Y. 290, 118 N. E. 629; Guimarin & Co. v. Southern. etc., Trust Co., 100 S. C. 12, 84 S. E. 298.

6 Butterworth v. Degnon Contracting Co., 214 Fed. 772, 131 C. C. A. 184.

7 Hanna v. Florence Iron Co., 222 N. Y. 290, 118 N. E. 629.

8 St. Joseph Gas Co. v. Barker, 243 Fed. 206.

own acts, the other party is entitled to damages for the breach, to be measured as they would be measured between the company and the other party, irrespective of the fact that a receivership has intervened. If the damages can be measured by any method of computation generally recognized in such cases, as, for instance, the breach of a contract to purchase merchandise, where expected profits would be the measure of damages, a claim therefor may be presented against the estate in the same manner as any other claim is presented. The claim ranks as that of a general creditor.[9]

If, pursuant to the terms of the contract, and prior to the receivership, steps have been taken to claim a breach on account of failure of the company to comply with its provisions, the receiver is bound thereby, and he must remedy the situation within the required time or a breach will be established.[10]

§ 360. Position of Receiver Toward Leases of the Corporation.

Leases stand upon the same footing as other executory contracts. The receiver has a reasonable time in which to determine whether or not the lease shall be continued. If he abandons the lease the landlord has a claim for damages, the measure thereof being the same as in any

9 Curtis v. Walpole Tire, etc., Co., 227 Fed. 698; Malcomson v. Wappoo Mills, 88 Fed. 680; Pennsylvania Steel Co. v. New York C. Ry. Co., 198 Fed. 721, 117 C. C. A. 503; Wells v. Hartford, etc., Co., 76 Conn. 27, 55 Atl. 599; Maxwell v. Missouri Valley Ice, etc., Co., 181 Iowa 108, 164 N. W. 329.

A different rule may prevail where, the receiver being appointed in a case conducted by the state and looking toward the dissolution of the corporation, the breach is viewed as produced by operation of law. People v. Globe, etc., Ins. Co., 91 N. Y. 174. See, In re Inman & Co., 175 Fed. 312.

A previous demand upon the officers of the receivership company to perform the contract is not essential to the institution of an action against the receiver for a breach. Chas. E. & W. F. Peck v. Southwestern Lumber & Exporting Co., 131 La. 177, 59 So. 113.

10 In re Ross & Son, 10 Del. Ch. 434, 95 Atl. 311; Kuebler v. Haines, 229 Pa. 274, 78 Atl. 141.

case of a breach of a covenant to lease by a lessee.[1] For the period that he occupies the property, or retains possession of it under the lease, the receiver pays only reasonable rental; the claim for this rental ranks as an expense of the receivership.[2] If the landlord has a statutory, or other lien, for his rent, this survives the appointment of a receiver.[3] If the receiver adopts the lease he pays the covenanted rental and the charge is an expense of the receivership.[4] The general rules applicable to leases held by one over whom a receiver is appointed were discussed in the subdivision devoted particularly to leases.[5]

E. Management of the Property as a Going Concern.

§ 361. Conducting Property or Business as a Going Concern.

The propriety of the receiver conducting the business of the receivership as a going concern, where it consists of a mercantile or other commercial business, is not now seriously questioned and courts as a matter of course authorize receivers to so conduct the business of receiverships with the view to preserving the business as a going concern pending the litigation, if a sale of the receivership property is not contemplated, and if such a sale is contemplated as the ultimate end of the receivership for the purpose of selling the property to the best advantage.[1] In the earlier cases, the courts were undoubtedly

1 In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134; Woodland v. Wise, 112 Md. 35, 190, 76 Atl. 502.

2 Atkinson & Co. v. Aldrich C. Co., 248 Fed. 134.

3 C. T. Patterson Co. v. Port Barre Lumber Co., 136 La. 60, 66 So. 418.

4 If the court desire the receiver to continue as lessee but there are not funds on hand to pay the rental as it accrues, it has been held that the court may compel the landlord to leave the receiver in undisturbed possession and rely upon a sale of the corporation assets for his compensation. Parr v. Blue Ridge Coal Co., 72 W. Va. 174, 77 S. E. 894.

5 See § 235, supra.

1 Guaranty Trust Co. v. International Steam Pump Co., 231 Fed. 594, 145 C. C. A. 480; American

reluctant to operate a business through a receiver, but where the duration of the receivership was apparently temporary and the necessity of operation was apparent in order to preserve the good will, which was often the greatest element of value of a business, they very naturally authorized the receiver to conduct operations until it could be determined what final disposition of the receivership property would be necessary.

Where a receivership is created in a suit which does not involve the dissolution of the corporation, it is generally expected that the receivership property will be restored to the corporation when the issues in the case have been decided, and naturally the preservation of the property, if it be a business property, necessarily involves the continuation of the business by the receiver pending the receivership so as to prevent loss and continue it as a going business.

When, however, the purpose of the action in which the receiver has been appointed is the dissolution of the corporation, then a question is naturally presented as to whether it is for the best interests of the receivership to continue the business with a view to selling it as a going business or to close up its affairs with the least possible delay. Where the dissolution of the corporation is because of its insolvent condition, a court naturally will not desire to run a business which the persons most interested have been unable to run successfully. If, however,

Pig Iron, etc., Co. v. German, 126 Ala. 194, 85 Am. St. Rep. 21, 28 So. 603; Craver v. Greer, 107 Tex. 356, 179 S. W. 862.

Todd v. Lippincott, 258 Fed. 205, is an instance of a very successfully conducted receivership.

In Michel v. William Necker, Inc. (N. J. Ch.), 106 Atl. 449, the receiver continued in operation an undertaking business.

In Henderson v. Tillamook Hotel Co., 87 Ore. 74, 169, Pac. 519, receiver operated a hotel under order of court.

In Jacob v. Uncle Sam Planting & Mfg. Co. (La.), 81 So. 604, a receiver was placed in charge of a corporation conducting a plantation and was directed to borrow money to pay taxes and proceed with its operation. The corporation, though embarrassed, was not insolvent.

the failure of the business has been because of insufficient capital or temporary financial embarrassments and the creditors and the corporation itself through its officers desire to continue the business as a going concern, it is within the discretion of the court to allow its receiver to do so, and it may allow funds to be obtained through the sale of receiver's certificates.[2] A distinction, however, exists as to the conducting of operations as between strictly private corporations and public utilities as far as such operations may be dependent upon the issuance of receiver's certificates for that purpose. In a private corporation receivership the court will not as against the objection of creditors issue receiver's certificates for operating funds and make such certificates a prior lien to other existing heirs. Whereas a broader rule obtains in respect to public utilities on account of the interest of the public in having the service furnished and the fact that every public utility receivership has in it the germ of a sale of the property as a going concern or of a reorganization for the purpose of continuing the service.[3] Of course, where the business of the corporation is in such a condition that it is a going concern at the time of the

2 International Trust Co. v. Decker Bros., 152 Fed. 78, 11 L. R. A. (N. S.) 152, 81 C. C. A. 302; Pusey & Jones v. Pennsylvania Paper Mills, 173 Fed. 634; Haines v. Buckeye Wheel Co., 224 Fed. 289, 139 C. C. A. 525; Horton v. Thomas McNally Co., 168 App. Div. 248, 153 N. Y. Supp. 429; Karn v. Rorer Iron Co., 86 Va. 754, 11 S. E. 431; Lockport Felt Co. v. United Box Board & Paper Co., 74 N. J. Eq. 686, 70 Atl. 980; Lewis v. Linden Steel Co., 183 Pa. St. 248, 38 Atl. 606.

3 Title Ins., etc., Co. v. California Development Co., 171 Cal. 227, 152 Pac. 564; Central Trust & Sav. Co. v. Chester County Electric Co., 9 Del. Ch. 247, 80 Atl. 801; Cronan v. District Court, 15 Idaho 184, 96 Pac. 768; International Trust Co. v. Decker Bros., 152 Fed. 78, 11 L. R. A. (N. S.) 152, 81 C. C. A. 302; Nowell v. International Trust Co., 169 Fed. 497, 505, 94 C. C. A. 589.

In some instances the issuance of receivers' certificates for purposes of preserving the property have been denied in the cases ot private corporations. Hooper v. Central Trust Co., 81 Md. 559, 29 L. R. A. 262, 32 Atl. 505; Perrin, etc., Printing Co. v. Cook Hotel, etc., Co., 118 Mo. App. 44, 93 S. W. 337.

receivership and the income appears to be such as to warrant continuing the business in operation, the court is only then concerned with the question whether the preservation of the business requires its operation. If the financial needs of the corporation are merely such as may be procured from a resort to its income capacity or excess of assets over liabilities, money may be obtained for operation expenses without the necessity of issuing receiver's certificates, which displace prior liens. This is the situation in most of the cases where the court authorizes the receiver to continue operations of the business. The court merely authorizes him to continue it as a going business.

When a business which is being conducted by a receiver is being dissipated by the expenses of operation, the receiver should apply to the court for permission to sell the property.[4]

A receiver should obtain an order of the court authorizing him to operate the business, since without such an order from the receivership court he is personally liable for losses resulting from such operations.[5]

§ 362. Duty of Receiver Regarding Pending Contracts of Employment.

Contracts for personal employment stand, in general, on the same basis as other executory contracts. If the receiver does not continue the contract, the question as to whether or not the employee is entitled to damages is determined, practically, according to general principles of law. If the contract was one terminable at will, there could, of course, be no question of damages; if it was the employment of an elective officer under provisions of

4 State Cent. Sav. Bank v. Fanning, etc., Chain Co., 118 Iowa 698, 92 N. W. 712.

5 State Cent. Sav. Bank v. Fanning, etc., Chain Co., 118 Iowa 698, 92 N. W. 712; Villere v. New Orleans, etc., Milk Co., 122 La. 717, 48 So. 162.

A receiver should not turn over a milling property to another person to operate. Shadewold v. White, 74 Minn. 208, 77 N. W. 42.

the charter or by-laws, or an employment of some other servant, for a stated period or on condition that notice of intention to terminate it should be given by the company, but carrying wages payable periodically in an amount fixed for the period, damages are not allowed, on the theory that the intervention of a receivership was an event that might well have been in the minds of the parties at the time the contract was made as one liable to occur and prevent the company's further fulfillment of the contract, and on somewhat the same principles that apply in the case of the death of an employer;[1] if, how-

[1] McElheney v. Jasper Trading Co., 12 Ga. App. 790, 78 S. E. 727; Law v. Waldron, 230 Pa. 458, Ann. Cas. 1912A, 467, 79 Atl. 647.

An executive officer of a corporation is not entitled to a salary allowance for salary accruing under his contract for services, after the appointment of a receiver. Williamson County Bkg. & T. Co. v. Roberts-Buford Dry Goods Co., 118 Tenn. 340, 12 Ann. Cas. 579, 9 L. R. A. (N. S.) 644, 101 S. W. 421.

On a receivership of an insolvent corporation, the termination of an existing contract for the services of a general manager by the receiver does not entitle the manager to damages since the possibility of such a termination is implied. Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 81 Atl. 1089.

A corporation receivership terminates a contract previously made by the corporation employing a general counsel at a yearly salary, which was terminable at will, and no action or notice by its officers or directors was necessary to effect such termination since their powers are suspended. Burton v. Bay State Gas Co. of Delaware, 188 Fed. 161, 110 C. C. A. 197.

In the case of an uncompleted employment contract, the receivership of the employer's property and business has been regarded as preventing completion by operation of law, leaving neither party further bound by it, and leaving the employee no allowable claim for damages. People v. Globe Ins Co., 91 N. Y. 174.

In Commonwealth v. Eagle Fire Ins. Co., 14 Allen 344, it was held that inasmuch as the exercise of the functions of the president of a corporation were suspended during the receivership, he was not entitled to salary. But where the contract between the corporation is not so much one of personal service as one of an agency, such as that of an advertising agent of a newspaper publishing company the receiver may refuse to adopt the contract and thus leave the party to his remedy of damages for breach of the contract by the corporation. Commercial Pub. Co. v. Beckwith, 167 N. Y. 329, 60 N. E. 642.

ever, the employment was for a stated period with wages fixed at a certain amount for the period, though, possibly, to be paid in installments during its course, the contract is regarded as indivisible and damages are allowed.[2]

§ 363. Right of Receiver to Employ and Discharge Employees Connected With the Receivership.

Most of the controversies which have arisen with respect to employments by receivers have occurred in connection with railroad employment, and will be discussed under the chapter devoted to Public Utilities, since there are phases in connection with the topic, and especially in so far as the right to strike is concerned, which are affected to some extent by the fact of the public's interest in the continued operation of a public utility by whomsoever may be in possession thereof.

In respect to private corporations, the receiver in employing servants and agents to aid him in operating the receivership property is in no better nor worse condition than private employers, with the exception that in the case of a conspiracy to interfere unlawfully with the

2 Miller v. Cosmic Cement, Tile & Stone Co., 109 Md. 11, 71 Atl. 91.

Judgment, Rosenbaum v. United States Credit-System Co. (Sup. 1897), 60 N. J. Law 294, 37 Atl. 595, reversed; Rosenbaum v. United States Credit-System Co., 61 N. J. L. 543, 40 Atl. 591.

Baker v. D. Appleton & Co., 187 N. Y. 548, 80 N. E. 1104, affirming 107 App. Div. 358, 95 N. Y. Supp. 125; Lenoir v. Linville Improvement Co., 117 N. C. 471, 23 S. E. 442, 51 L. R. A. 146.

In Isaac McLean Sons Co. v. William S. Butler & Co., 227 Fed. 325, damages were allowed, based on the agreed salary for the contract period, less what was earned under other employment after dismissal, on the theory that the receivership was the equivalent of disablement at completing the contract.

In Spader v. Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378, contracts existed with certain employees for a term of years for service as salesmen and foremen. Before the expiration of the agreement the corporation employing them became insolvent and a receiver was appointed over it. It was held that the employees were entitled to damages for breach of the contract, which claim for damages should be determined like other claims of that character and presented in the receivership like other claims.

operation of the receivership property, the employees or other persons aiding in the conspiracy would be guilty of contempt of court, whereas they would not be so guilty in the case of a private employer unless protected by some injunctional order.[1]

Where the provisions of a Workmen's Compensation Act are not made exclusive, a receiver may elect whether to operate under its provisions or not.[2]

§ 364. Rights of Employees in Case of Grievances.

The receiver is the arm of the court. He is the agent of the court in respect to the business affairs of the receivership and the property covered by it. In his relation to employees the receiver should, undoubtedly, take the same position which the court is presumed to take. It is the duty, of course, of the court to do justice to every employee connected with the receivership, and prevent, by its orders, oppression, injustice, or wrongs toward any of its employees.[1] In the case of grievances on the part of employees of the receivership, they undoubtedly have a right to petition the court to be heard in regard to the matter and the court will investigate the matter so presented to it.[2]

§ 365. Right of Employees of Receiver to Belong to Trade-Unions.

The right of employees to belong to trade-unions has been recognized in connection with railroad receiverships.[1] But it has been held that although the receiver

1 Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803; Re Doolittle, 23 Fed. 544; United States v. Kane, 23 Fed. 748; Re Higgins, 27 Fed. 443. See full discussion of the subject under Public Utilities.

2 Devine v. Delano, 272 Del. 166, Ann. Cas. 1918A, 689, 111 N. E. 742.

1 Farmers Loan & Trust Co. v. Central, etc., Banking Co., 166 Fed. 333 (a railroad receivership case).

2 Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 59 Fed. 514 (a railroad receivership case).

1 Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. 803 (opinion by Judge Taft).

may deal with a trade-union regarding the terms and conditions of the employment that the same schedules must apply to all employees regardless of whether they are members of the union or not.[2] This is on the ground that the court will not discriminate between employees.

The equity courts are the means by which the rules of law are kept abreast of the complex industrial changes and current methods of commercial life. They adapt their remedies to the new conditions with which business affairs are confronted with a view to doing full and complete justice to all parties concerned, and it is not doubted that the equity courts will be able to properly meet and dispose of all phases of employment on the part of its receivers regardless of whether the situation has ever arisen before or not. This idea is well illustrated by the remarks of the court in one of the earlier cases,[3] where the court said: "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief."

The extent to which the employees of a receiver may enforce their demands by means of a strike are set forth under that heading in the chapter on Public Utilities.

§ 366. Payment of Wages to Persons Employed by the Receiver.

The persons employed by the receiver in administering the estate are naturally paid by the receiver from receivership funds in his hands as part of the necessary costs of administration, and the general rules in regard to

2 Waterhouse v. Comer, 55 Fed. 149, 19 L. R. A. 403 (a railroad receivership case).

3 Toledo, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 746, 751, 19 L. R. A. 395.

employments and the rights arising thereunder apply.[1] And where the statute provides for the payment and the manner in which it should be paid and funds to which it attaches, the matter is governed by the specific terms of the statute[2] as to whether they create a mere priority or a lien upon the receivership property.

§ 367. Payment of Wages Earned Immediately Prior to the Receivership.

The same general rules respecting the giving of a preference which are applicable to public utility corporations are applicable to a private corporation respecting a preference of claims for wages prior to the appointment of the receiver. The basic foundation of this rule is a diversion of income to bondholders or betterments instead of payment of the operating expenses of the concern.[1]

1 Brown v. A. B. C. Fence Co., 52 Hun 151, 5 N. Y. Supp. 95; Grabbe v. Moffit, 133 Iowa 54, 110 N. W. 142; Hilliard v. Sterlingworth Ry. Supply Co., 236 Pa. St. 82, Ann. Cas. 1913D, 1115, 84 Atl. 680.

Under the rule that net earnings, while property is in the possession of a receiver appointed by a court, may be applied to the payment of claims having superior equities to that of the bondholders; held, that if a balance of salary due the president of the road was a prior claim, he had waived it by the published annual report as such president, in which he had put his salary each year among the paid items. If his salary was not in fact paid he was only a general creditor. Addison v. Lewis, 75 Va. 701.

A claim of contractors for building an extension of the road did not come within the rule. Addison v. Lewis, 75 Va. 701.

2 In re Pleasant Hill Lumber Co., 126 La. 743, 52 So. 1010.

1 In Le Hote v. Boyet, 85 Miss. 636, 3 Ann. Cas. 705, 38 So. 1, the court allowed a preference in payment of claims for wages for services performed for the corporation before the appointment of a receiver upon a showing that such services were necessary to continue the business and preserve the property. See, also, Drennen v. Mercantile Trust, etc., Co., 115 Ala. 592, 67 Am. St. Rep. 72, 39 L. R. A. 623, 23 So. 164; Dickinson v. Saunders, 129 Fed. 16, 63 C. C. A. 666 (but under statutory provisions); Jones v. Arena Pub. Co., 171 Mass. 22, 50 N. E. 15.

The leading case in the federal courts allowing a preference for wages claimed for services prior to

The matter of whether wages earned within a short period prior to the receivership have a certain priority of payment or constitute a lien upon the corpus of the receivership property is one which is generally regulated by the statutes of the various states, and resort must be had to such statutes, which are often variant as to form, to ascertain the exact status of such claims in respect to the receivership property.[2] Claims for services ren-

the receivership is Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339.

In Wood v. Guarantee Trust, etc., Co., 128 U. S. 416, 32 L. Ed. 472, 9 Sup. Ct. 131, the court pointed out that the doctrine of Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, had never been applied to any but railroad cases, and called attention to the peculiar property of a railroad company and its functions as compared to a mere private corporation.

In this connection see, also, Calhoun v. St. Louis, etc., R. Co., 14 Fed. 9, 9 Biss. 330; Blair v. St. Louis, etc., R. Co., 22 Fed. 471; American Loan & T. Co. v. East, etc., R. Co., 46 Fed. 101; Finance Co. v. Charleston, etc., R. Co., 52 Fed. 524; Central Trust Co. v. Chattanooga Southern R. Co., 69 Fed. 295; Douglas v. Cline, 12 Bush (Ky.) 608; McIlhenny v. Binz, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655; Litzuberger v. Jarvis-Conklin Trust Co., 8 Utah 15, 28 Pac. 871.

2 Geppelt v. Middle West Stone Co., 90 Kan. 539, 135 Pac. 573.

Under Rev. St. 1908, §§ 6998-7000, making claims for wages in case of suspension of business or receivership preferred claims, claims of employees for labor are in a preferred class, to be paid in preference to other simple contract creditors, but do not create an express statutory lien superior to all other liens without reference to priority, though the proviso that the act shall not be construed to extend to creditors holding mortgages for debts actually existing before the labor was performed is disregarded. Central Sav. Bank v. Newton, 59 Colo. 150, 147 Pac. 690.

Wages which are part due may be made a claim prior to a mortgage under a statute giving mechanics and laborers employed in mills a lien on goods manufactured by their labor. Security Trust Co. v. Bank of Bernice, 239 Fed. 665, 152 C. C. A. 499.

Under a New York statute giving preference to the wages of an "employee" of a corporation and defining such an employee, and under the state court's interpretation of a similar statute, it was held by the federal court that an attorney employed by a public utility corporation to procure options on certain properties at a fixed wage per day and certain expenses, was not an employee under the statute. Gay v. Hudson, etc., Power Co., 178 Fed. 499.

Laborers in the employment of a corporation whose property is put into the hands of a receiver

dered the corporation prior to the receivership must be proved in the same manner in respect to facts concerning them as would be required in the absence of receivership proceedings.[3] Statutes giving preferences to salaries and wages due employees of a corporation over other creditors in case of the insolvency or receivership of the corporation create a personal privilege which does not, ordinarily, pass with an assignment of the debt.[4]

The preference accorded to railroad employees was denied in the case of a navigation company upon the theory that a navigation company was in a different position from that of a railroad company in that the sovereign power had not contributed to its construction in a way in which the sovereign power contributes to railroad companies.[5]

who takes immediate possession thereof, with whom they properly file their claims, are not required to file claims with a sheriff who had levied upon all such property four days before the appointment of the receiver, under Iowa Acts. 23d Gen. Assem., chap. 48, giving a preference to the laborers of a corporation whose property is seized or put into the hands of a receiver, and requiring them to file such claim with the officer seizing the property or with the receiver. St. Paul Title Ins. & T. Co. v. Diagonal Coal Co., 95 Iowa 551, 64 N. W. 606.

Under some statutes of this character it is held that the preference given to labor claims is only priority of payment over other simple contract creditors, and that it does not create an express statutory lien superior to all other liens without reference to priority. Seymour v. Berg, 227 Ill. 411, 10 Ann. Cas. 340, 81 N. E. 339; McDaniel v. Osborn, 166 Ind. 1, 117 Am. St. Rep. 354, 2 L. R. A. (N. S.) 615, 75 N. E. 647.

3 Mizell v. Elmore & Hamilton Contracting Co., 219 Fed. 528, 135 C. C. A. 278.

4 Southern Ry. Co. v. Bretz, 181 Ind. 504, 104 N. E. 19; Riverside Contracting Co. v. City of New York, 218 N. Y. 596, Ann. Cas. 1918C, 1075, 113 N. E. 564; Richeson v. National Bank of Mena, 96 Ark. 556, 132 S. W. 912.

5 Bound v. South Carolina R. Co., 50 Fed. 312, 313 (refusing a preference for arrears of salary of a general frieght and passenger agent of a navigation company).

F. Rights of Receivers in Foreign Jurisdictions Respecting Property of the Corporations.

§ 368. Assets Located in a Jurisdiction Other than that of the Domicile of the Corporation.

The preceding sections concerning the administration of the estate of a corporation that has passed under a receivership have dealt primarily with reference to the marshaling of the corporate assets located within the domiciliary jurisdiction of the corporation by a receiver appointed by a court having authority therein. However, with the great modern increase in the practice of casting business ownerships or managements into corporate form, it seldom happens that a corporation confines its enterprises to its domiciliary locality, and practically every large corporation extends its business beyond that locality and acquires assets and assumes liabilities in many other judicial jurisdictions. When a corporation receivership extends to the closing up of its affairs and the distribution of all of its assets equitably among all of its creditors and stockholders, not only must the home assets and liabilities be taken care of, but there must, as well, be a marshaling of the foreign assets and a provision for the foreign debts. These foreign affairs are administered through one of three agencies: (1) The receiver appointed by the court of its own domicile; (2) a receiver appointed, for the special purpose of aiding and completing the administration of the former, by a court having authority within a foreign jurisdiction, within which the corporation has assets;[1] (3) an independent receiver appointed within such foreign jurisdiction.[2] These agencies may, for convenience, be respectively spoken of as a domiciliary receiver, an ancillary receiver, and a foreign independent receiver.[3]

1 See § 337 et seq., supra.

2 See § 328, supra.

3 It is to be remembered in reading any judicial decision or opinion that courts usually use the term "foreign receivers" to designate receivers other than those appointed within their own juris-

In the administration of such corporate foreign estates there are two underlying and controlling principles: (a) Each state, or jurisdiction, has the right to protect its own resident, or citizen, creditors of the corporation; and (b) in accordance with the provisions of the constitution of the United States [Article IV, § 2: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"] all creditors of the corporation, both home and foreign, are entitled to share equally, according to their equitable rank, in all of the assets of the estate.

§ 369. Right of Foreign Jurisdiction to Protect Its Resident Creditors.

An important corollary of the former of these two principles is that the question as to whether or not the domiciliary receiver may enforce the collection of assets located in a foreign jurisdiction by the aid of the courts of that jurisdiction is a matter of comity between the jurisdictions to be determined by the laws and the policy and the practice of the courts of the foreign jurisdiction. Under this principle, the general rule is that a mere chancery receiver, including not only a receiver appointed by a court of equity by virtue of its inherent powers but also a receiver appointed under a statute that is virtually only declaratory of the equity rule, or law, has not the privilege of suing in a foreign jurisdiction and may not be empowered to do so merely by an order of the appointing court directing him to do so. This rule was applied in Booth v. Clark, a comparatively early decision of the United States Supreme Court, considered as a leading case on the subject.[1] After a very careful historical review of the matter, the court said: "Our industry has

diction, even though the receivers referred to may be domiciliary in the sense in which we have above used the term.

1 Booth v. Clark (1854), 58 U. S. 322, 15 L. Ed. 164.

been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal; orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the last. We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, after the manner of such nations as practice it, in respect to the judgments and decrees of foreign tribunals, for all of them do not permit it in the same manner and to the same extent, to make such comity international or a part of the laws of nations. . . . In those countries of Europe in which foreign judgments are regarded as a foundation for an action, whether it be allowed by treaty stipulations or by comity, it has not as yet been extended to a receiver in chancery. In the United States, where the same rule prevails between the states as to judgments and decrees, aided as it is by the first section of the fourth article of the constitution and by the Act of Congress of May 26, 1790, by which full faith and credit are to be given in all of the courts of the United States to the judicial sentences of the different states, a receiver under a creditor's bill has not as yet been an actor as such in a suit out of the state in which he was appointed. . . . We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court hav-

ing any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as a receiver."

It is true that in the case just referred to, the receiver was not a corporation receiver. He was one appointed by a New York state court, under a statute, to proceed, in the interest of a judgment creditor, against equitable assets of the debtor.[2] However, the principle as laid down, is of general application, and is so regarded by the courts. Accordingly, we find it said by the United States Circuit Court of Appeals for the Sixth Circuit, in a recent case, in which a corporation receiver of an Alabama corporation, appointed by an Alabama state court under a state statute, commenced suit in a federal court in Ohio, that: "It is the settled rule that a mere chancery receiver is but an officer of the court appointing him, and that in the absence of some conveyance or statute vesting in him title to the debtor's property he can not sue in the courts of a foreign jurisdiction for its recovery upon the mere order of the appointing court, or without other authority than that arising from his appointment as receiver; and that in the absence of actual conveyance . . . the question whether the receiver has title is governed by the statutes of the state by whose court the appointment was made." The conclusion in the case was that under the statute, as inter-

[2] See Booth v. Clark, supra.

preted by the Alabama courts, the receiver had no right to sue except as authorized to do so by the appointing court and that he could not under the instant statute be authorized to sue in a foreign jurisdiction.[3]

In the case of Booth v. Clark, the action was laid in the federal court of the District of Columbia and the contest was between the receiver appointed by the New York state court and a trustee appointed in voluntary bankruptcy proceedings in New Hampshire. At the outset of its argument the court stated the question of the case to be: "As an officer of a court of chancery, for a particular purpose, will he [the receiver] be recognized as such by a foreign judicial tribunal, and be allowed to take from the latter a fund belonging to the debtor for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues contesting his right to do so?" While it thus appears that there was not involved in the case any necessity of a court's protecting creditors who were residents, or citizens, of its own jurisdiction, there is, in the argument, as shown by the above quotations, at least an implication that the reason usually given for not permitting a chancery receiver to sue outside of the appointing

3 Sterrett v. Second Nat. Bank, etc., 246 Fed. 753, 754, 159 C. C. A. 55. See Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380, 23 Sup Ct. 244; Great Western Min., etc., Co. v. Harris, 198 U. S. 561, 49 L. Ed. 1163, 25 Sup. Ct. 770; Keatley v. Furey, 226 U. S. 399, 57 L. Ed. 273, 33 Sup. Ct. 121; Southern Bldg. & L. Assn. v. Price, 88 Md. 155, 42 L. R. A. 206, 41 Atl. 53; Homer v. Barr P. E. Co., 180 Mass. 163, 91 Am. St. Rep. 269, 61 N. E. 883; Leman v. MacLennan, 75 Ohio St. 643, 80 N. E. 1129; Frink v. National M. F. Ins. Co., 90 S. C. 544, Ann. Cas. 1913D, 221, 74 S. E. 33; Howard v. Chesapeake & O. Ry. Co., 11 App. Cas. (D. C.) 300.

An action against a foreign corporation, having an agency in the state, is not prevented from proceeding to judgment by a subsequent decree dissolving the corporation and appointing receivers to wind up its affairs, made in the state of its creation, unless it is shown that the corporation is utterly extinct. Hunt v. Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592.

jurisdiction is the court's duty to protect such creditors. In the case cited from the Sixth Circuit there was no question of creditors other than those represented by the receiver and the decision was rested on another ground, as follows: "A disposition by this court of the appeal without determination of the merits is unfortunate. . . . But lack of title in plaintiff is not a mere 'technicality' in the ordinary meaning of that term, for there is always, theoretically at least, a possibility that defendant may be subjected to further suit by the owner of the title and right of action."

This reason, however, had not appealed to the trial court; and while, as thus appears, other reasons for not permitting a chancery receiver to sue in a foreign jurisdiction may be sometimes assigned, as a practical proposition the right of local creditors to be protected is the one usually given. In a South Carolina case, in which a North Carolina corporation and its receiver, appointed by a federal court in North Carolina, were sued on a claim against the receiver himself and one not accruing under the corporation management, the plaintiff having attached corporate funds in South Carolina, the court said: "It appears in the record that [the appointing court] had directed the application for an ancillary receiver in the federal court of South Carolina; yet this had not been done, but, in case the ancillary receiver should thereafter be appointed, it was the purpose of the receiver to take the fund out of the jurisdiction of the courts for South Carolina, both federal and state, and require the domestic creditor to go into the foreign jurisdiction to recover his claim. It further appeared that it was the intention of the receiver to distribute between the creditors of the bankrupt and the creditors of the receiver 'equitably.' Equitably may mean equally. If this is not his intention it ought to appear. The creditors of the bankrupt and the creditors of the receiver are not in the same class. The creditors of the receiver in the

administration of the bankrupt estate must be paid in full before there is anything to be distributed equitably between the creditors of the bankrupt estate. . . . There is no showing in the record that there is any other creditor who is in the same class with the respondents." The appeal was by the receiver from an order of the lower court denying the receiver's motion to vacate the attachment, and the order was affirmed.[4]

[4] Guimarin & Co. v. Southern L. & T. Co., 100 S. C. 12, 84 S. E. 298.

On the same principle a state may protect its own resident, or citizen, debtors of a corporation against an action instituted under such circumstances as to be obnoxious to the views or policy of the state as to what constitutes due process of law. Under a statute of New York the state superintendent of banks was empowered to take possession, under certain circumstances, of a bank, and, if he deemed it necessary, levy an assessment against stockholders upon their statutory added liability, without any judicial proceeding, or the appearance of the stockholders or of the corporation. Having done so in a certain case, the superintendent and certain Tennessee stockholders appeared in the courts of that state to enforce collection of the assessment. In affirming an order of the trial court dismissing the action, the state Supreme Court said:

"The statutory rule quoted could be applied here only through comity. Should comity, a favor, be extended here, in support of the arbitrary non-judicial action of the superintendent of banks of the state of New York, which would cast upon our own citizens the burden of either going to New York in person, or by agents, and at great expenditure of time and money investigating all of the assets and liabilities of a great banking institution in that state? The unreasonableness of such a course is manifest on its mere statement. Cases may be easily imagined where the initial expense of such an investigation would be much more than the liability sought to be enforced. In such instances the mere demand by suit would be equivalent to a compulsion to pay, and so the party would be deprived of his day in court. If the rule could so operate in any case it ought not to be enforced in this jurisdiction at all. So the question recurs: Shall we enforce a liability bond solely on the arbitrary action of the superintendent of banks of the state of New York? We decline to do so. . . . But we should add in this connection that the question is not whether the New York act is valid. That is an inquiry for the New York courts, under the constitution of that state, and we do not express an opinion on it. We do say, however, that it is against the policy of this state to vest such powers in a mere ministerial officer, powers which we regard as of a highly judicial nature, to be

That the protection of domestic creditors has been a dominant reason for restricting the chancery receiver's right to sue is shown by the fact that, at least in more recent years, the restriction has not been enforced in the absence of a showing that there were domestic creditors or a positive law or policy of the jurisdiction against doing so.[5] In other words, the fact of a receivership in the domicile state of a corporation will not in the absence

exercised only by courts after due notice and the appearance of parties in person or by representation." Van Tuyl v. Carpenter, 135 Tenn. 629, 188 S. W. 234.

[5] The rule that a receiver has no extra-territorial jurisdiction is subject to a well established exception which allows him to sue extra-territorially where there are no domestic creditors and where it is not against the public policy of the state in which the suit is brought. Rogers v. Riley, 80 Fed. 759.

The limitations under which a foreign receiver may enforce a claim to the property of the non-resident debtor are those prescribed by the law and policy of the state wherein the property is situated. Zacher v. Fidelity Trust, etc., Co., 106 Fed. 593, 45 C. C. A. 480.

See Pollock v. Carolina Interstate Building & Loan Assn., 48 S. C. 65, 59 Am. St. Rep. 695, 25 S. E. 977; Patterson v. Lynde, 112 Ill. 196, 207; Chicago, etc., Ry. Co. v. Keokuk, etc., Packet Co., 108 Ill. 317, 48 Am. Rep. 557; Waters-Pierce Oil Co. v. Bell, 71 Mo. App. 653; Van Tuyl v. Carpenter, 135 Tenn. 629, 188 S. W. 234; Hardee v. Wilson, 129 Tenn. 511, 167 S. W. 475.

A receiver of a foreign corporation appointed by the court of the state of its domicile and considered as a common-law receiver is not vested with the legal title to real estate of the corporation situated in South Dakota, where the corporation has not voluntarily, or otherwise, conveyed the property to the receiver. Joy v. Midland State Bank, 26 S. D. 244, 128 N. W. 147.

"Our law prefers the claims of the domestic attaching creditors to those of foreign creditors, or claimants, and this policy will be upheld against indirect as well as against direct attacks." Clark v. Supreme Council of Order of Chosen Friends, 146 Cal. 598, 80 Pac. 931.

Every remedy to gather in the assets is afforded unless it would interfere with the policy of the state or impair the rights of its own citizens. A state that does not discriminate between its own citizens and those of a foreign state discharges all the obligations required by the rule of courtesy. Mubon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

of ancillary receivership prevent a foreign creditor from asserting his rights.[6]

§ 370. Effect of Having Ancillary Receivers Appointed.

One method of overcoming the above noticed restriction upon the right of a domiciliary receiver to sue for assets in a foreign jurisdiction is to have ancillary receivers appointed in the foreign jurisdictions in which assets are located. Such receivers may be given all the powers and rights as to the local assets of the corporation as the domiciliary receiver may have in the home jurisdiction or such as they might have in the jurisdictions in which they are appointed if they were there domiciliary receivers.[1] Such receivers, however, are under the control and direction of the courts appointing

6 Choctaw, etc., R. Co. v. Williams, etc., Co., 75 Ark. 365, 87 S. W. 632; Hunt v. Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Taylor v. Columbian Ins. Co., 96 Mass. (14 Allen) 353; Osgood v. Maguire, 61 N. Y. 524; Woerishoffer v. North River Const. Co., 99 N. Y. 398, 2 N. E. 47; Kruger v. Bank of Commerce, 123 N. C. 16, 31 S. E. 270.

1 On the application for an ancillary receiver in a federal jurisdiction, while a stockholder may intervene to contest the appointment, he may not attack the appointment of the domiciliary receiver in the home federal district. McGraw v. Mott, 179 Fed. 646, 103 C. C. A. 204.

An ancillary receiver, appointed by a federal court in Massachusetts, with all the powers granted to the domiciliary receiver, may use, in a Massachusetts court, to recover from one who had acted as trustee of the corporation, profits wrongfully made by him in the execution of his trust, when the order of original appointment authorized the receiver to sue in any court to recover assets of the corporation. Bay State Gas Co. v. Rogers, 147 Fed. 557.

Title to the local personal assets of a corporation vests in an ancillary receiver appointed in New York where the order of appointment of the domiciliary receiver vested title to the corporate assets in that official. Smith v. Eighth Ward Bank, 31 App. Div. 6, 52 N. Y. Supp. 290.

Where an action had been commenced in New York by a foreign corporation to recover unpaid assessments on capital stock it was proper for an ancillary receiver appointed in that state to continue the action in the company's name, under the New York statute relating to the effect of a transfer of interest upon a pending action. Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194.

them and not under the control of the domiciliary court; and the former courts, before permitting the assets collected in their jurisdictions to be sent to the domiciliary court for distribution will provide, in such ways as may be necessary, for the due protection of local creditors.[2]

[2] Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 N. E. 355; Brunner v. York B. Co., 78 W. Va. 702, 90 S. E. 233.

The New York statutes relating to the duties of a receiver of an insolvent corporation do not apply to an ancillary receiver; and while such a receiver is amenable to the orders of the court appointing him and may seek instructions from such court as to his proper course in the details of his administration, his accounts will not be surcharged, if they have been submitted to and approved by the domiciliary court, simply because he has failed to seek the counsel of the local court if his conduct otherwise has been proper and due regard to the rights of local creditors has been shown. Strauss v. Casey Machine, etc., Co., 68 Misc. Rep. 474, 124 N. Y. Supp. 32.

When a domiciliary receiver, having been appointed ancillary receiver, attacks as invalid an attachment levied upon assets in the ancillary jurisdiction subsequent to the domiciliary but prior to the ancillary appointment, on the ground that the corporation was dissolved at the time of the levy, the attack is derogatory to the receiver's own ancillary title, and a motion to vacate the attachment on that ground will be denied. Hammond v. National Life Assn., 58 App. Div. 453, 69 N. Y. Supp. 585; appeal dismissed, 168 N. Y. 262, 61 N. E. 244.

A foreign receiver of a corporation having been appointed and having collected the local assets, and having turned them over to an ancillary bankruptcy receiver, after the latter had been appointed trustee by the primary bankruptcy court, the ancillary proceedings having been made necessary by the fact that the assets were in the possession, not of the bankrupt, but of the state court at the time of the adjudication, and notwithstanding that the trustee, under the bankruptcy law, was vested with title, it was the duty of the ancillary court to hold the local fund subject to statutory preferred claims of local creditors. "The object of bestowing ancillary jurisdiction would naturally be to invest the tribunal, whose aid is once invoked, with power itself to control the agencies coming within its territorial jurisdiction, and likewise the property found and sought to be recovered therein on behalf of the bankrupt's estate. It would be an anomalous proceeding which would suffer an ancillary receiver or a trustee in bankruptcy at his option to withdraw property recovered through the aid of the ancillary tribunal and regardless alike of the tribunal itself and resident suitors there appearing and claiming priorities or liens against the property. This would be to make the ancillary tribunal a mere instrument of the official instituting

§ 371. Effect of Various Statutes Making Receiver an Assignee or Quasi-Assignee of Estate.

Legislatures have devised another method for overcoming the territorial limitations attaching to a chancery receiver's powers to marshal the assets of a receivership corporation. Statutes have been enacted giving courts power to appoint receivers in whom, upon their appointment, shall vest the title to all of the corporate assets wherever they may be situated. At least as far as personal property is concerned, such property being generally considered as having no situs of its own and as following the person of its owner, such statutory provision effectually bars any objection to the receiver's being accorded the privilege of suing extra-territorially on the score of danger to the defendant from liability to a second suit, and we find it frequently stated to be the general rule that such a statutory receiver may sue in any juris-

the action, since it would deny to the tribunal power to pass upon the rights of adverse claimants and even of a person found in possession of the property. Such a proceeding would hardly square with due process of law; it would savor rather of violence. . . . Ancillary jurisdiction, it is true, signifies power to aid primary jurisdiction. But the power in an ancillary tribunal to take possession of property at all is founded on the interest therein of the person or estate in whose right the proceeding is maintained; and this interest can not, in the nature of things, be ascertained without passing upon such adverse interests as may be claimed by others in the property. When, therefore, an ancillary tribunal takes possession, whether with or without opposition, such possession draws to that tribunal power, indeed, imposes a duty, to determine all questions of priorities and liens affecting the property. This applies with especial force to the rights of resident adverse claimants." Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239.

In New York it has been held that an ancillary receiver is a final receiver as to property of a foreign corporation in the state, and thus within its general statute. Mubon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

Creditors residing outside of the jurisdiction of the court appointing an ancillary receiver are not allowed to intervene in its proceedings and present their claims since their remedy is participation. Sands v. E. S. Greeley & Co., 80 Fed. 195.

diction.[1] It is not necessary that the statute should declare the corporate title to be vested in the receiver; it is sufficient if the statute provides that the receiver may

[1] Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163, 27 Sup. Ct. 755; Converse v. Hamilton, 224 U. S. 243, Ann. Cas. 1913D, 1292, 56 L. Ed. 749, 32 Sup. Ct. 415; Goss v. Carter, 156 Fed. 746, 84 C. C. A. 402; Mottinger v. Hendricks, 208 Fed. 824; Ballard v. Audubon, etc., Bank, 222 Fed. 57, 137 C. C. A. 595; Strout v. United Shoe M. Co., 195 Fed. 313; Lyon v. Russell, 41 App. Cas. (D. C.) 554; Howarth v. Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; Wamsley v. H. L. Horton & Co., 153 N. Y. 687, 48 N. E. 1107, affirming 42 N. Y. Supp. 767, 12 App. Div. 312; Royal Trust Co. v. Harding, 155 App. Div. 104, 140 N. Y. Supp. 9, affirming order, 78 Misc. Rep. 309, 137 N. Y. Supp. 1101; In re People's Surety Co. of New York, 82 Misc. Rep. 518, 144 N. Y. Supp. 131; Van Tuyl v. Carpenter, 135 Tenn. 629, 188 S. W. 234; Hardee v. Wilson, 129 Tenn. 511, 167 S. W. 475; Gilman v. Ketcham, 84 Wis. 60, 36 Am. St. Rep. 899, 23 L. R. A. 52, 54 N. W. 395; Parker v. Stoughton Mill Co., 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751.

A statute of Missouri provided that the State Superintendent of Insurance might institute proceedings looking toward the dissolution of an insurance company and that, if a decree of dissolution was made, all of the corporate assets should vest "in fee-simple and absolutely" in the superintendent to be disposed of for the benefit of all interested persons. A judgment for a very large sum having been rendered in Missouri against a Missouri insurance corporation, the insurance superintendent instituted proceedings under the statute and a temporary receiver was appointed. Thereupon certain policyholders in Louisiana commenced an action in a Louisiana state court against the company, the temporary receiver, the local agent holding certain local assets, and others, "the object of which was to have the assets in Louisiana declared a trust fund and applied to the payment of the claims of Louisiana policyholders and creditors in preference to others," and a receiver of the local assets was appointed. The company having been subsequently dissolved, the state superintendent was, on his own motion, made a party to the Louisiana action, and filed a petition to have the case transferred to the federal circuit court for the district of Louisiana on the ground of diversity of citizenship. The state receiver moved to have the case remanded to the state court on the ground that the Missouri superintendent, being simply an officer of that state, was without capacity to sue in Louisiana. From an order granting this motion an appeal was taken to the United States Supreme Court. In the course of its opinion the Supreme Court argued as follows:

"The entire controversy is between the appellees, representing the Louisiana creditors and policyholders on the one side, and . . . the statutory representative of the

sue or may be authorized to sue extra-territorially.[2] The question as to the receiver's right to sue is determined by the interpretation placed upon the statute by the courts of the state in which it was enacted.[3] The right

corporation and its property on the other, as to their respective rights to what the appellees claim are Louisiana assets belonging primarily to Louisiana creditors. The superintendent is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that state. . . . We are aware that, except by virtue of some statutory authority, an administrator appointed in one state can not generally sue in another, and that a receiver appointed by a state court has no extra-territorial power; but a corporation is the creature of legislation and may be endowed with such powers as its creator sees fit to give it. Necessarily it must act through agents, and the state which creates it may say who those agents shall be. One may be its representative when in active operation and in full possession of all its powers, and another if it has forfeited its charter and has no lawful existence, except to wind up its affairs. . . . [The superintendent], therefore, became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana." The order remanding was reversed. Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337.

2 Irvine v. Baker, 225 Fed. 834.

3 Sterrett v. Second Nat. Bank, 246 Fed. 753, 159 C. C. A. 55. See Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257.

In Kelly v. Dolan, 218 Fed. 966, the court in drawing attention to the distinction between the powers of chancery and statutory receiver in this respect, said:

"The sound principle would seem to be that it is denied only the right to do the things which the court of its appointment has prohibited it from doing. If that court sanctions the exercise of the right, it would further seem that the court of another jurisdiction should permit it to do (if no other reason exists for refusal) what the court of its appointment would permit to be done there. This view, although in conflict with Harper v. News Co. (C. C.), 128 Fed 979, would seems to be in accord with Porter v. Sabin, 149 U. S. 479, 37 L. Ed. 815, 13 Sup. Ct. 1008. Harper v. News Co., moreover, was the case of a chancery receivership, and the present case is being considered as one of a statutory receiver, upon whom has devolved the title to the chose in action. Such a receiver, because he has the legal title, may assert his right of action anywhere, on the principle that title under the law of the situs is a good title everywhere. As the title is thus in the receiver, and in him alone, it would logically follow that no one else, and therefore no stockholder, could maintain the action.

of the receiver to sue extra-territorially must be alleged and proved.[4]

However, such recognition of this statutory, or involuntary, transfer of title to the receiver is only a matter of comity among the jurisdictions and is not accorded in opposition to any law or policy of a jurisdiction designed to protect its own residents, or citizens. This proposition was pointed out in the case of Booth v. Clark, above referred to. It was there pointed out that, although England, contrary to an earlier policy, and some other nations of Europe had adopted a policy of recognizing

"If this were an action at law, this result would surely follow. Inasmuch, however, as it is a proceeding in equity, it may be that it can be sustained as a proceeding for the redress of an injury to the corporation to which the receiver is a necessary party, because he has succeeded to the rights of the corporation, and to which the stockholder is also a party, because required to be one in order to meet the terms of the permission to sue granted by the court of the receiver's appointment, and in order that the stockholder may be made answerable for the costs. This would further appear to accord with the requirements of the real situation. If injury has been done to the corporation, the wrong should be redressed. Whether the injury has been done can only be determined by an action. The action might be brought by the receiver. The court could require its receiver to bring the action. Permitting it to be brought for the benefit of the corporation and of the receiver by a stockholder would seem to be in effect the same thing. As it is clear the corporation could not maintain an action, application to it would be futile. The other objections to a stockholder being ordinarily permitted to maintain an action do not apply, when the action can be brought only when it has the sanction of the court. As the question here involved will remain in the case until final decree, it is not necessary for us now to go further than to decline to dismiss the bill at this time on this ground."

[4] Royal Trust Co. v. Harding, affirming 78 Misc. Rep. 309, 137 N. Y. Supp. 1101; order affirmed 155 App. Div. 104, 140 N. Y. Supp. 9.

Where a domiciliary receiver sues extra-territorially, the full faith and credit clause of the United States constitution does not preclude inquiry by the foreign court as to whether or not the appointing court had jurisdiction of the subject-matter and the parties. The presumption in favor of the domiciliary court, as a court of general jurisdiction, is disputable, especially where it acts by virtue of statutory authority and not in the exercise of its inherent power. Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747.

the title placed in bankruptcy trustees by the statutes of other countries, such policy had not yet been adopted by the federal courts and some of the state courts of the United States.[5] The domiciliary receiver may not be permitted to dispossess a foreign receiver who had been appointed and taken possession of the local assets before the domiciliary receiver had taken any steps to reduce them to possession; although he may be permitted to intervene in the local proceedings, which may thereafter be considered of an ancillary character, or given such other recognition as may not be inconsistent with a due regard to the rights of local creditors.[6] Liens obtained upon the local assets may, under the local laws and policy, be valid against any claim of the domiciliary receiver, though acquired after his appointment. In a New York case[7] this proposition was stated as follows:

5 Booth v. Clark, 58 U. S. 322, 15 L. Ed. 164.

In this connection the court said: "In New York, 'the ubiquity of the operation of the bankrupt law, as respects personal property,' was denied in Abraham v. Plestoro, 3 Wend. (N. Y.) 538, 20 Am. Dec. 738. Chancellor Kent considers it to be a settled part of the jurisprudence of the United States, that a prior assignment under a foreign law will not be permitted to prevail against a subsequent attachment of the bankrupt's effects found in the United States. The courts of the United States will not subject their citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control. We think that it would prejudice the rights of the citizens of the states to admit a contrary rule. The rule, as it is well affords an admitted exception to the universality of the rule that personal property has no locality and follows the domicile of the owner. This court, in Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606, disclaimed the English doctrine upon this subject; and in Harrison v. Sterry, 5 Cranch (U. S.), 289, 3 L. Ed. 104, this court declared that the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States."

6 Barley v. Gittings, 15 App. Cas. (D. C.) 427; State ex rel. American Bankers' Assur. Co. v. McQuillin, 260 Mo. 164, 168 S. W. 924; American & B. Mfg. Co. v. International P. Co., 173 App. Div. 319, 159 N. Y. Supp. 582; People v. Granite State Provident Assn., 161 N. Y. 492, 55 N. E. 1053, affirming 41 App. Div. 257, 58 N. Y. Supp. 510; Irwin v. Granite State Provident Assn., 56 N. J. Eq. 244, 38 Atl. 680.

7 McNelus v. Stillman, 172 App. Div. 307, 158 N. Y. Supp. 428. The

"So far as it was competent for the Legislature of New Jersey to transfer the property of the corporation to the receiver, owing to the insolvent condition of the company,

quotation in the text is from an opinion in proceedings had to enforce an attachment. An assignee of a foreign creditor of a New Jersey corporation commenced an action against the corporation in New York and attached, or garnished, an unpaid stock subscription of a resident stockholder. A domiciliary receiver had been appointed before the action was commenced, but, although the domiciliary court levied an assessment upon stockholders on their unpaid subscriptions, it does not appear that the domiciliary receiver had ever taken any steps in New York. After judgment against the corporation had been obtained, proceedings to enforce the attachment were had. The defense was interposed that only the receiver had a right to collect the subscriptions.

See Choctaw Coal & Mining Co. v. Williams-Echols Dry Goods Co., 75 Ark. 365, 87 S. W. 632; Humphreys v. Hopkins, 81 Cal. 553, 15 Am. St. Rep. 76, 6 L. R. A. 792, 22 Pac. 892; Stockbridge v. Beckwith, 6 Del. Ch. 72, 33 Atl. 620; Corn Exchange Bank v. Rockwell, 58 Ill. App. 506; Holbrook v. Ford, 153 Ill. 633, 46 Am. St. Rep. 917, 27 L. R. A. 324, 39 N. E. 1091; Gray v. Covert, 25 Ind. App. 561, 81 Am. St. Rep. 117, 58 N. E. 731; Shloss v. Metropolitan Surety Co., 149 Iowa 382, 128 N. W. 384; Zacher v. Fidelity Trust, etc., Co., 109 Ky. 441, 59 S. W. 493; Buswell v. Supreme Sitting, etc., 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065; Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315; Tompkins v. Blakey, 70 N. H. 584, 49 Atl. 111; Petersen v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298; Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489, affirming 39 App. Div. 151, 57 N. Y. Supp. 187; Filkins v. Nunnemacher, 81 Wis. 91 51 N. W. 79.

A domiciliary receiver having sued to recover certain assets in a foreign jurisdiction, having compromised the claim sued upon, received part of the money due in settlement of the compromise, and having had the money received distributed by the domiciliary court, it was too late for creditors in the foreign jurisdiction to have the compromise set aside in order that they might attach or garnish the asset. Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85.

A domiciliary receiver may move in the courts of New York to vacate an attachment on the ground that it has been unlawfully issued, and that no right has been acquired thereunder by the attaching creditor. Hammond v. National Life Assn., 58 App. Div. 453, 69 N. Y. Supp. 585, affirming 31 Misc. Rep. 182, 65 N. Y. Supp. 407.

A domiciliary receiver appointed by a state court may defend an action instituted in a federal court of a foreign jurisdiction against the receivership corporation. Rust v. United W. Co., 70 Fed. 129, 17 C. C. A. 16.

The comity that is extended by a foreign state court to a domicil-

there can be no doubt but that such is the effect of the New Jersey statute. The cause of action, however, on the stock subscription against a resident of this state, was, for the purposes of our attachment law, a debt due and owing to the corporation here; and by the express provisions of said section 646 of the Code of Civil Procedure, it was subject to levy under an attachment, and with respect to creditors of the corporation pursuing their legal remedies in the courts of this state effect is not given here to the involuntary transfer of the property of the debtor by virtue of foreign statutory law. Hammond v. Nat. Life Ass'n, 58 App. Div. 453, 69 N. Y. Supp. 585, appeal dismissed 168 N. Y. 262, 61 N. E. 244; Hibernia Bank v. Lacombe, 84 N. Y. 367, 384, 38 Am. Rep. 518; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; Nat. Park Bank v. Clark, 92 App. Div. 262, 87 N. Y. Supp. 185. See, also, Mabon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805; and Hallenborg v. Greene, 66 App. Div. 590, 597, 599, 73 N. Y. Supp. 403.

"In the view we take of the case, as herein indicated, it is unnecessary to consider whether, if the contentions made in behalf of the respondents were tenable, they could be effectually interposed now, after the recovery of judgment on the debt owing to appellant by the corpora-

iary receiver is not affected by the fact that he was appointed by a federal court. Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

Where a corporation was dissolved and a receiver appointed at the instance of a very large majority of its stockholders, a conveyance of the corporate assets made to the receiver by the proper corporate officers pursuant to an order of the court will be regarded as a voluntary conveyance and valid against foreign creditors. Ward v. Connecticut P. M. Co., 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706, 41 Atl. 1057.

A corporation having been dissolved and a domiciliary receiver having been appointed, and a conveyance of real estate in a foreign jurisdiction having been made to the receiver, title to the real estate vested in the receiver either by virtue of his appointment or the conveyance. Sayre v. Sage, 47 Colo. 559, 108 Pac. 160.

tion, with the attachment remaining unvacated and that judgment remaining in full force and effect. We express no opinion with respect to the effect the dissolution of the Steel Company might have on plaintiff's judgment against it (see Sinnott v. Hanan, 214 N. Y. 454, 108 N. E. 858; and Rodgers v. Ins. Co., 148 N. Y. 34, 42 N. E. 515), for it does not appear that it has been dissolved, and the point has not been presented.

"We are asked on grounds of comity to remit the creditor of the corporation to the jurisdiction of the courts of New Jersey, where he would be permitted to participate with the other creditors of the corporation in any of its assets; but the question of comity was not overlooked in the decisions above cited, and it has long been the established rule in this state that, where the involuntary transfer has taken place here, the right of creditors, whether domestic or foreign, to pursue legal remedies and acquire by attachment in foreign jurisdictions a lien on the property of the debtor superior to the title previously acquired by the involuntary transfer here, is recognized. Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; Barth v. Backus, supra. These precedents are controlling, and this court is not at liberty to consider the question *de novo*. In Wulff v. Roseville Trust Co., 164 App. Div. 399, 149 N. Y. Supp. 683, we were able to distinguish them, and on motion of the assignee of the assets of a New Jersey trust company, the affairs of which had been liquidated, we vacated an attachment obtained here by the assignee of a depositor with the insolvent trust company; but we so decided on the ground that the deposit was made subject to the laws of New Jersey, by which, in case of insolvency, the assets became a trust fund for the benefit of all creditors. We do not consider that our decision in that case is applicable here, and evidently counsel for respondents does not, for it has not been cited. So far as appears, it is immaterial to respondents to whom they respond on the liability of

their testator, and there can be no doubt but that a recovery and satisfaction in this action will fully protect them."

The policy of refusing to recognize the rights of a statutory domiciliary receiver is usually limited in favor of the citizens of the jurisdiction; it may, however, be extended to residents, even though they are not citizens, but is usually not extended to citizens of the domiciliary jurisdiction.[8] The differences among jurisdictions in respect to their policy in this matter and changes, from time to time, in the policy of a particular jurisdiction will explain many seeming divergences among court decisions respecting the rights of receivers with reference to assets located in jurisdictions other than the appointing jurisdictions. It is to be remembered also that the decisions of federal courts are frequently controlled by the policy of states by whose laws they are guided.

A domiciliary receiver may sue a non-resident debtor of the corporation or a non-resident party claiming adversely to the corporation just as a private person may sue a non-resident, subject to the same limitations as to obtaining a judgment in *personam* against a party who is not personally served with process and who does not voluntarily appear in an action;[9] or he may, if he obtains a domestic judgment against a party, sue, as a judgment

[8] Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691; Heyer v. Alexander, 108 Ill. 385; May v. First Nat. Bank, 122 Ill. 551, 13 N. E. 806; Juillard v. May, 130 Ill. 87, 22 N. E. 477; Townsend v. Coxe, 151 Ill. 62, 37 N. E. 689; Linville v. Hadden, 88 Md. 594, 43 L. R. A. 222, 41 Atl. 1097; Long v. Girdwood, 150 Pa. 413, 23 L. R. A. 33, 24 Atl. 711; Cook v. Van Horn, 81 Wis. 291, 50 N. W. 893.

A foreign creditor may not by assigning his claim to a resident, or citizen, obtain advantages accorded to a resident or citizen creditor. Receivers of State Bank v. First Nat. Bank, 34 N. J. Eq. 450.

[9] State Nat. Bank v. Syndicate Co., 178 Fed. 359; Lanning v. Twining, 71 N. J. Eq. 573, 64 Atl. 466.

creditor, on the judgment in a foreign jurisdiction, just as a private person might.[10]

§ 372. Effect of Conveyance of Property to Receiver by Insolvent Corporation.

In some instances the corporation voluntarily or pursuant to an order of court executes an assignment or conveyance of all of its property to the receiver. Under such circumstances the receiver naturally occupies a different position than that arising from being a mere chancery receiver. If the corporation is solvent the transaction would be considered in the same light as any ordinary transaction.

While the laws of a foreign state have no force as such in the state, still the courts will uphold the title of a foreign receiver or assignee upon the principle of comity. If the title is by virtue of a voluntary conveyance or transfer, it is sustained as against all, including even domestic creditors, but if it depends on a foreign statute or judgment, it is sustained against all except domestic creditors. Subject to their superior rights, the plaintiff can reduce to possession all the property of the defendant in the state and can bring replevin for that purpose, or trover to recover damages for conversion. Notes and accounts may be collected by the usual proceedings in the courts, which regards a foreign receiver as representing the original owner, and open their doors to him as they do to a domestic receiver.[1] In one case where a corporation, pursuant to the direction of the court, after the appointment of a receiver over it made a general assignment to him of its property, it was held that the deed operated as a general voluntary assignment.[2] And in

10 Wilkinson v. Culver, 25 Fed. 639, 23 Blatchf. 416.

1 Mabon v. Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

2 Ward v. Connecticut, etc., Co. 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706, 41 Atl. 1057.

Where, after the appointment of a receiver, the corporation executes a conveyance of all of its

Kentucky, under a similar assignment in another jurisdiction by a corporation which was insolvent, it was held that it would be considered operative only to the extent which the Kentucky courts chose to respect it.[3]

§ 373. Creditor of Foreign State Suing Corporation Under Receivership in Another Foreign State.

A non-resident of a foreign state in which a corporation has property may sue it in such state notwithstanding a receiver has been appointed over it in the state of its domicile. Thus it has been held that a creditor of a Connecticut corporation residing in New York may attach property of the corporation located in Maryland, although a receiver has been appointed for the corporation in Connecticut and notwithstanding that he has filed his claim in the receivership proceeding.[1]

§ 374. Whether Residents of Jurisdiction of Receivership Are Precluded from Suing Elsewhere.

Where a court appointing a receiver for a corporation of its own state enjoins creditors from prosecuting suits against the corporation, a resident of that state can not by a suit and attachment in another state obtain a preference. But in several instances suits by such creditors who are residents of the receivership jurisdiction have been brought and allowed.[1]

property to him in his official capacity, such a conveyance is in effect an assignment for the benefit of creditors, and as such operates only upon property within the state. Huntington v. Chesapeake, etc., Ry. Co., 98 Fed. 459.

[3] In Zacher v. Fidelity Trust, etc., Co., 109 Ky. 441, 59 S. W. 493, it was held that a general conveyance by an insolvent corporation to its receiver would, as far as the Kentucky courts are concerned, be operative only to the extent which they choose to respect it. Zacher v. Fidelity Trust, etc., Co., 106 Fed. 593, 45 C. C. A. 480, followed the decisions on principles of comity.

[1] Linville v. Hadden, 88 Md. 594, 43 L. R. A. 222, 41 Atl. 1097; Gilman v. Ketcham, 84 Wis. 60, 36 Am. St. Rep. 899, 23 L. R. A. 52, 54 N. W. 395; Chicago, etc., Ry. Co. v. Keokuk, etc., Co., 108 Ill. 317, 48 Am. Rep. 557.

[1] Although the courts of Ohio have appointed a receiver of a

§ 375. Whether Foreign Creditor Can Attach Receivership Property Temporarily Brought in His Jurisdiction by Receiver.

Where a receiver has once obtained rightful possession of personal property situated within the jurisdiction of his appointment and which he was directed by the court to take charge of, he will not be deprived of its possession, even though in the performance of his duty he takes it into a foreign jurisdiction. Creditors of the corporation over which he has appointed receiver residing in such foreign jurisdiction can not take it by attachment or otherwise.

Thus where a receiver appointed in New Jersey took possession of the assets of the corporation and for the purpose of completing a bridge which it had contracted to build in Connecticut, purchased iron with funds of the receivership estate and sent it to that state, creditors residing there can not attach it.[1]

§ 376. Independent Foreign Receiver of a Foreign Corporation.

As has been shown in a previous part of this chapter,[1] statutes frequently exist under which a receiver may be appointed over the property of a foreign corporation doing business in the state under various circumstances

corporation organized in its own jurisdiction, it will not prevent a resident of Ohio from attaching property of the corporation in Tennessee. Commercial Nat. Bank v. Motherwell Iron, etc., Co., 95 Tenn. 172, 29 L. R. A. 164, 31 S. W. 1002. The same rule was applied in Cole v. Oil Well Supply Co., 57 Fed. 534, where the receiver was appointed by a federal court.

1 Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668.

Where an Illinois corporation has property in Mexico and a receiver has been appointed over its property there, a citizen of Mexico is not thereby prevented from suing the corporation in Texas for breach of contract. American Well Works v. De Agnayo (Tex. Civ.), 53 S. W. 350.

1 See sections 328 et seq., supra.

But in this connection see Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432, 19 Sup. Ct. 165, as to how far statutes of this character may go. They can not deprive non-resident creditors from participation on equal terms with its own citizens.

tending to the hurt of creditors of the state in which the corporation is doing business Where such a receiver is appointed over a foreign corporation, the receivership is for purposes within the state considered as a primary one with all the rights which flow from such a receivership.[2] And where such a receiver is appointed at the instance of the board of directors of the corporation and the court has thereby acquired jurisdiction over the corporation and its directors, it may compel the transfer to the corporation of real property situated in another state and thereby prevent the corporation from thereafter encumbering it.[3]

An interesting question was determined in the case of McCague v. Dodge,[4] by the Supreme Court of Colorado respecting the rights of a foreign receiver in the domiciliary jurisdiction of the corporation. In that case the domicile of the corporation was in Colorado, while the receiver was appointed by a court of the State of Nebraska. The court of the latter state directed its receiver to collect assessments for unpaid stock in the

2 The receiver of a foreign corporation appointed within the state is custodian of the property within the state, and as such custodian has authority to defend an action to foreclose a mortgage on the corporation property based on an assumed lien under the mortgage. Jenkins v. John Good Cordage & Machine Co., 56 App. Div. 573, 68 N. Y. Supp. 239. Motion to dismiss appeal denied, 167 N. Y. 616, 60 N. E. 1113; and judgment affirmed, 168 N. Y. 679, 61 N. E. 1130.

In Scattergood v. Am. Pipe & Const. Co., 249 Fed. 23, 161 C. C. A. 83, the corporation was a New Jersey one and the receivership was in the federal court for the district of Pennsylvania. "The property of a foreign corporation within this state is subject to the jurisdiction of the courts of the state." The court appointed a receiver of a foreign corporation having property within the state, although no charge of fraud or mismanagement was made. The order of appointment was collaterally attacked as void, but the court held that it had jurisdiction to make the appointment. Hillsborough Grocery Co. v. Ingalls, 60 Fla. 105, 53 So. 930.

3 Roberts v. W. H. Hughes Co., 86 Vt. 76, 83 Atl. 807.

4 McCague v. Dodge, 50 Colo. 205, 114 Pac. 648.

corporation by a suit and rendered a judgment purporting to levy an assessment upon such stock. The defendant stockholders residing in Colorado who were sued were not parties to the Nebraska suit. The defendant stockholders demurred to the complaint, which demurrer was sustained. The Supreme Court, speaking through Mr. Justice Gabbert, in holding that the suit was not maintainable in the Colorado courts by the foreign receiver, said: "The relation between the stockholders and the fence company in this respect can only be determined and established by a court having jurisdiction in Colorado, where it was created, for it is only by the laws of this state that the liability of the stockholders upon their unpaid stock subscriptions can be ascertained. Young v. Farwell, 139 Ill. 326, 28 N. E. 845; Stockley v. Thomas, 89 Md. 663, 43 Atl. 766. So that, under the facts of this case, the judgment of the Nebraska tribunal could extend no further than to affect the tangible property of the fence company in the State of Nebraska. Acken v. Coughlin, 103 App. Div. 1, 92 N. Y. Supp. 700. Consequently the case falls within the rule to the effect that a receiver of a corporation having no other rights or title to the corporation's assets than that derived from the order of the court appointing him, has no power to sue in the courts of a foreign jurisdiction to recover such property or assets of the corporation. Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Great Western M. & M. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; Cavell v. Fowler (C. C.), 144 Fed. 535; Wigton v. Bosler (C. C.), 102 Fed. 70; Hazard v. Durant (C. C.), 19 Fed. 471; Hale v. Hardon (C. C.), 89 Fed. 283.

"The principal contention on the part of counsel for plaintiff is that under the doctrine of comity between states, the receiver appointed by a court of one state may go into another jurisdiction and pursue residents of the latter upon their stock liability, unless the

liability sought to be enforced is against the public policy of the state where the enforcement is sought, or unless local creditors will suffer. This contention is wholly inapplicable to the case at bar, for the reason that the Nebraska court was without authority by its judgment or order only to vest the receiver in the first instance with any control over the assets of a Colorado corporation in the shape of unpaid stock subscriptions, or to levy an assessment thereon. In other words, the doctrine of comity does not apply where the plaintiff fails to state a cause of action.

"The controlling feature of the case under consideration is well illustrated by the last case cited by counsel for plaintiffs—Goss v. Carter, 156 Fed. 746, 84 C. C. A. 402. In that case the receiver of an insolvent Nebraska corporation appointed by the district court of the Fourth District of that state was permitted to maintain an action against a stockholder of the corporation in Texas, but upon the ground that the title to the trust fund to which the stockholder was required to contribute was vested in the receiver by operation of law. For this reason the court distinguishes the case from Booth v. Clark, supra, to which reference was made. Having reached the conclusion that the receiver is without authority to maintain his action, it is unnecessary to discuss the other questions argued by respective counsel."

§ 377. Marshaling of Assets in a Foreign Jurisdiction and Creditor's Right of General Participation.

The foregoing considerations have to do with the marshaling in the first instance of the foreign assets of a receivership corporation under the control of some authority having power to administer the estate. Where this preliminary marshaling is not done directly under the authority of the domiciliary receiver or court, the process, as we have seen, is fundamentally controlled by the principle that each jurisdiction has the right to pro-

tect its domestic creditors in such way and to such extent as it may deem proper. In the United States, however, as affecting the respective rights of creditors residing in, or citizens of, different states, another principle operates after the preliminary marshaling has been done. This principle is based upon and held to be the result of a certain provision of the United States constitution, section 2 of Article IV. That the principle, as applied to the administration of the estate of a receivership corporation, is a logical corollary of the constitutional provision has been declared by the federal Supreme Court.[1] In the case before the court the question involved was the constitutionality of a statute of Tennessee relating to the right of certain classes of foreign corporations to do business within the state and providing that resident creditors should have priority over all non-resident general creditors and mortgage or judgment creditors whose mortgages were recorded or judgments rendered after credit had been extended by residents of the state. The conflict was between general creditors resident of Ohio and domestic general creditors, the former claiming that by the statutory provision they were denied equal immunities and privileges with the latter. The court upheld this contention and ruled that the complainants were entitled to share in the assets of the estate on an equal basis with the domestic creditors. There was a dissenting opinion by two members of the court, including the Chief Justice. Both factions of the court, however, recognized extensive rights in the states to declare the conditions

[1] When the general property and assets of a private corporation lawfully doing business in a state are in course of administration by the courts of said state, creditors who are citizens of other states are entitled, under the federal constitution, to stand upon the same plane with creditors of a like class who are citizens of such state, and can not be denied equality of right simply because they do not reside in that state but are citizens residing in another state. Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432, 19 Sup. Ct. 165; Idem, 176 U. S. 59, 44 L. Ed. 371, 20 Sup. Ct. 307.

People v. Granite State Provident Assn., 161 N. Y. 492, 55 N. E.

under which foreign corporations might do business within their respective boundaries. Both declared that a state might exclude foreign corporations entirely; and also that it was valid state legislation to provide, as a condition precedent to a foreign corporation's doing business in the state, that there should be deposited, under the state control, some definite sum to be available exclusively for domestic creditors in case of a receivership, and to be distributed by a local court rather than the domiciliary court.[2] The difference between the two divisions was in respect to the reasonableness of the particular statute under consideration. The majority held it to be unreasonable because of the extreme inconvenience that it put non-residents to in knowing the conditions under which they were dealing with the corporation; the minority held that, at least as far as persons dealing with the corporation while the statute was in force were concerned, it was not unreasonable and was simply in the nature of a statutory blanket mortgage, covering all the local assets of the company.[3] Taking

1053, 1054; Wilson v. Keels, 54 S. C. 545, 71 Am. St. Rep. 816, 32 S. E. 702.

Resident general creditors of a defunct foreign corporation not having previously obtained liens upon its property are not entitled to any priority or preference over non-resident creditors in the distribution of the funds derived from such assets by the local or ancillary receiver. All creditors of such a corporation of the same class are on principles of equity entitled to share ratably in the distribution of the whole estate of such corporation regardless of their places of residence. Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233.

2 Such legislation has elsewhere been held valid. People v. Granite State, etc., Assn., 41 App. Div. 257, 58 N. Y. Supp. 510; affirmed in 161 N. Y. 492, 55 N. E. 1053; Lewis v. American S. & L. Assn., 98 Wis. 203, 73 N. W. 793.

3 The majority of the court laid great stress upon the word "citizens" as used in the constitutional section under consideration. It held that, since a corporation is not a citizen in the sense in which the word is there used, the state statute was valid as far as non-resident corporation creditors were concerned; and further that, as far as such creditors were concerned, the statute was not obnoxious to the Fourteenth Amendment of the United States constitution.

into account the two opinions in the case, and remembering that whenever a decision turns on the question of the reasonableness or unreasonableness of a particular statutory provision there is likely to occur a difference of opinion among authorities, it may be stated to be the rule that, except when there is in existence at the time credit is extended to a corporation valid statutory provisions establishing a preferential right to local assets in favor of local creditors, all resident citizens of the United States are entitled to share equally in the assets of a corporation domiciled therein.

Since the domiciliary court is the only court qualified and equipped to distribute the estate in accordance with this principle, it is necessary that assets marshaled in a foreign jurisdiction by an ancillary or a foreign independent receiver shall be placed under the jurisdiction of the domiciliary court. Accordingly, it is the general rule for such receivers to turn such assets as come into their possession over to the possession of the domiciliary receiver with or without a bond from the latter for the protection of local creditors, although possession may be retained by the marshaling receiver until local creditors have received their share under a decree of distribution made by the domiciliary court.[4]

On this same principle it was held that where the assets of a New Jersey corporation consisted of the controlling ownership of stock in a New York corporation, the stock should be voted by the domiciliary receiver rather than the receiver appointed in New York, though the latter

[4] People v. Granite State, etc., Assn., 41 App. Div. 257, 58 N. Y. Supp. 510, affirmed 161 N. Y. 492, 55 N. E. 1053; American & B. Mfg. Co. v. International P. Co., 173 App. Div. 319, 159 N. Y. Supp. 582.

Where a receiver of a foreign corporation, after deducting the expenses of administration, has distributed the proceeds collected among all intervening creditors, both resident and non-resident, and a balance remains, it should be directed to be delivered to an intervening foreign receiver. Barley v. Gittings, 15 App. Cas. (D. C.) 427.

was held to have the title and allowed to retain possession of the certificates.[5] The matter was stated as follows:

"In the view that I take of this case it is unnecessary to decide whether the domiciliary receiver, with title to this stock, is entitled as a matter of law to vote the same under section 23 of the General Corporation Law (Consol. Laws, c. 23). The New York receiver can not hold this property for the exclusive benefit of the New York creditors. It will be an unseemly administration of the law in different states if the receivers appointed in those different states were to contend for the possession of the assets for distribution among the creditors existing in their respective states, and, furthermore, the constitution of the United States requires equality in the distribution of the assets. Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; People v. Granite State Provident Association, 161 N. Y. 492, 55 N. E. 1053. Moreover, as these questions have arisen presenting apparent conflict between receivers of the different states, a comity has arisen recognized by the courts, whereby the receiver of the home state, with title to the assets, is given a primary right, and the receivers in states foreign to the home of the corporation are given only such power as may be necessary to secure to the creditors in their respective states a just distribution of the assets of the corporation. See People v. Granite State Provident Association, 41 App. Div. 266, 267, 58 N. Y. Supp. 510, where the respective rights of the domiciliary receiver and the receiver in other states is considered. See, also, Sands v. E. S. Greeley & Co., 88 Fed. 130, 31 C. C. A. 424. Under this rule of comity our courts might well have compelled the New York receiver to transfer to the appellant this stock upon the giving by the appellant of a bond to pay to the New York creditors their just share in the distribution of the assets. On the other hand, as the plaintiff is a domes-

[5] American & B. M. Co. v. International F. Co., supra 377.

tic corporation, the court has deemed it wiser that the possession of the stock should remain in the New York receiver. It was not decided, however, upon the motion to transfer the stock to the appellant, that the New York receiver should have full power to control the corporation, and thus practically to take out of the hands of the domiciliary receiver the closing up of the insolvent corporation. By the rule of comity adopted every power should be given to the domiciliary receiver, subject to instruction from the Chancery Court of that state, except such power as is necessary for the protection of the New York creditors. Within this rule of law the control of the insolvent corporation and of its assets, including its controlling interest in the plaintiff corporation, should vest in the home receiver. . . . If necessary to the protection of New York creditors, a bond could be required, as suggested by Justice Cullen in People v. Granite State Provident Association, 41 App. Div. 257, 58 N. Y. Supp. 510. No facts are here presented, however, which suggest the necessity of such a bond."

Discussing this same principle, the Supreme Court of South Carolina said: "There is no doubt that it is the duty of the courts of this state to protect the interests and rights of domestic creditors concerning assets of a foreign corporation in this state, but there is a vast difference between protecting domestic creditors and sequestrating to them exclusively assets which ought in justice and right be administered for the benefit of all creditors. If so construed as to exclude non-resident citizens, who are creditors, from participating in the assets in this state of a foreign corporation, a grave question as to the constitutionality of the act might be raised. Blake v. McClung, 172 U. S. 239, wherein the Supreme Court of the United States recently decided that while a state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute them and their proceeds among cred-

itors according to their respective rights, yet it can not, under Article IV, section 2, of the constitution of the United States, deny the right of citizens of other states to participate in such distribution on equal terms with its own citizens. Moreover, the act in question was passed after the foreign corporation involved here had ceased to do business, and whose property had already been placed in the hands of a receiver; hence such act is not applicable to this case. It thus appears that plaintiff and the creditors of the said bank in this state have, by their appearance in the jurisdiction of the court of the domicile receiver, already secured the right to participate in the equal distribution of the assets of the foreign corporation, all that they have a right to do. Thus, no interest of domestic creditors intervenes to prevent the exercise of that comity which should induce the courts of this state to recognize the claim of the foreign receiver to collect for equal distribution the particular assets in question. Nor do we know of any established policy or statute in this state which prevents the exercise of such comity."[6]

Since the liability of stockholders on unpaid stock subscriptions is usually enforced in favor of and only to the extent necessary to protect creditors, it is a liability that may not be enforced by a foreign receiver, even in his own jurisdiction, but is enforcible only under the control of the domiciliary court through the domiciliary or an ancillary receiver.[7]

Where a corporation did business in a foreign jurisdiction under a name different from that used in its

6 Wilson v. Keels, 54 S. C. 545, 71 Am. St. Rep. 816, 32 S. E. 702.

7 A receiver of a Colorado corporation appointed in a Nebraska court in a creditor's suit against the corporation is not entitled as a matter of right to sue in Colorado for unpaid stock subscriptions levied by such court. McCague v. Dodge, 50 Colo. 205, 114 Pac. 648.

A receiver appointed to take charge of the assets of a foreign corporation situated within the state can not compel the stockholders residing in that state to pay their unpaid stock subscriptions. Pacific Coast Coal Co. v. Esary, 85 Wash. 448, 148 Pac. 579.

domicile and in receivership proceedings had in the foreign jurisdiction, only creditors doing business with it under the foreign name were allowed to participate in the proceedings, such creditors could not be barred from proceedings in the domicile of the corporation, but they could be barred from such participation unless they first paid into the domiciliary estate the amounts they had received in the foreign jurisdiction.[8]

8 Lake Charles Nat. Bank v. J. I. Campbell Co., 57 Tex. Civ. App. 362, 122 S. W. 601.

In Ward v. Connecticut, etc., Co., 71 Conn. 345, 71 Am. St. Rep. 207, 42 L. R. A. 706, 41 Atl. 1057, a New York creditor of a Connecticut corporation was permitted to receive a dividend from the receivership after deducting the value of certain property in New York which he had attached and sold with knowledge of the receivership, and after a conveyance had been made to the receiver by order of the court. See, also, Zacher v. Fidelity Trust, etc., Co., 106 Fed. 593, 45 C. C. A. 480.

CHAPTER XIV.

RAILROADS AND OTHER PUBLIC UTILITY CORPORATIONS.

1. General Scope of the Subject and Principles Applicable.

§ 378. The Peculiar and Distinguishing Features Pertaining to Such Receiverships.

The reports of the federal courts of the United States have been full, in recent years, of cases involving corporation receiverships of railroads and other public utilities. As far as the underlying equity principles upon which these receiverships were created are concerned we have a very frank statement by District Judge Dickinson in one of the late cases.[1] The matter came before the court on a motion made by minority stockholders to vacate a decree appointing a receiver. The judge said:

"The considerations which lead to the disposition to be made of this motion are of the very broadest and most general character. Every legal controversy of sufficient importance to be taken seriously presents two phases. It has its practical side, involving very practical consequences, and its legal side, involving the formulation of legal principles and their application, and these may be approached through forms of procedure, and raise questions of the appropriateness of the special remedy invoked. These purely professional or legal considerations are also of importance because they directly affect or indirectly influence the development of the science of the law and enter into the building up of our system of laws. In this molding process the legal profession, as well as the courts, cannot avoid having a part and are expected to have a part. The profession can make its

1 Scattergood v. American Pipe & Construction Co., 247 Fed. 712.

influence felt only through the courts, and the courts must stop short of any invasion of the proper domain of the Legislature. Even when the power of the Legislature is not in question, wisdom would dictate that there should be no purely arbitrary interference on its part with the natural growth and development of the remedial side of the law along proper and approved lines. This freedom to grow and develop is one of the many claims to merit which the so-called common-law system possesses. To it we are indebted for many of our most effective and efficient legal and equitable remedies. The possession of this judicial power has led, it is true, to the courts being subjected to general criticism for being overconservative, and in notable specific instances to the charge of usurpation of power. On the whole, however, it has worked to the common good, and as the Legislature has amply adequate defensive power at its command there is little practical danger of permanent harm from judicial action.

"All this seems very academic, but these considerations are really intensely practical, and the practice of the courts in appointing receivers for corporations, which has grown almost literally by leaps and bounds, affords a good illustration of the thought intended to be expressed. If bills under which such receivers have been appointed were listed and analyzed, the growth and development of this branch of remedial law would be disclosed. It would doubtless be found that of all of them, from the beginning, at least 80 per cent resulted in the making of a decree which has nothing more or less than the declaring of a moratorium against creditors, and of the proceedings in late years, 95 per cent of the bills had this more or less veiled end in view. It is difficult for a solicitor devoted to old-established principles of chancery practice to understand how the courts can protect a corporation, which is in financial straits, against suits

by its creditors, when it would not protect an individual under like circumstances, and yet so widespread and general a recognition and acceptance of the assertion of the power has been accorded its assertion that in at least two notable instances in Pennsylvania it was even attempted to be extended, and, until halted by the Supreme Court, actually was extended to individual debtors. We do not need to search far for reasons for this acquiescence. The end reached was a good end and the remedy applied justified itself in practical results. The lawyer who advised his clients, who were interested in such a corporation, that no such remedy could be had through a bill in equity would have found himself supplanted by other counsel who promptly had the needed remedy applied through just such a bill. Such an analysis would disclose two other things. One is that in the earlier cases the solicitor who filed the bill resorted to the subterfuge of formally averring something of no real importance for the sole purpose of presenting technical grounds of equitable jurisdiction; in the later cases such subterfuges are abandoned. The other is that the early cases disclose a reluctance on the part of the courts to appoint receivers, and a refusal in many instances to appoint them; the later cases disclose appointments made evidently almost as a matter of course. It will further be observed that this change came about by gradual approaches. It doubtless had its beginning in the resort to receiverships by corporations having public functions to perform, but the practical need to conserve the assets of other corporations was so real and so urgent that the courts yielded to it to the extent of naming a temporary receiver with leave to move to vacate, and a recognition of this same practical need prevented any such motion being made. Indeed, the history of this very case discloses precisely that condition—not a single creditor has appeared to avail himself of this right, leave to assert which was invited by the decree. . . .

"Our conclusion is that these precedents establish the jurisdiction and power of the court to appoint receivers in proceedings such as the instant one, and that the challenge of such jurisdiction cannot be deemed ground to vacate the decree. Our view being that the jurisdiction having been authoritatively found to exist, we are bound to uphold it. There is no occasion to vindicate the ruling by bringing it into accord with accepted principles of chancery practice. The duty is best left to counsel. If we sought to support it, we might choose different grounds from those selected by counsel. Established precedent is in itself a sufficient ground.

This disposes of the present motion to dismiss, so far as it is based upon absence of jurisdiction."

In another case,[2] on an application for the appointment of a permanent receiver and in reply to a contention on the part of minority stockholders that the suit was collusive between the plaintiff creditor and the directors of the company, the court, having made a finding of fact to the effect that no fraud on the part of the directors had been shown, the court said:

"In order to be ready for emergencies, a bill of complaint, praying for the appointment of receivers, had

2 Intercontinental Rubber Co. v. Boston & M. R. R., 245 Fed. 122.

In Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171, a receiver for the Ocean Shore Ry. Co. was appointed with the consent of the railroad company at the instance of an unsecured creditor in a representative suit.

The Wabash system of railroads was placed under a receivership at the instance of the railroad company itself. Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. 618.

Appointment of a receiver for a railway may be had at the instance of the carrier company where the suit brought by it is of such a character as to be of an equitable character and the receivership is an incident thereto. Brassey v. N. Y. & N. E. Ry., 19 Fed. 663; Quincy, etc., Ry. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787; Wabash, St. L. & P. Ry. v. Central Trust Co., 22 Fed. 138; But contra: See Kimball v. Goodburn, 32 Mich. 10; State ex rel. Merriam v. Ross, 122 Mo. 435, 25 S. W. 947.

been prepared by counsel for the company in conference with Hon. Marcus P. Knowlton, the chairman of the federal trustees, and had lain in the files of the company. In August, 1916, this bill was taken from the files, the figures in it were brought up to date, and it was in other ways perfected and made ready for filing in court. The Intercontinental Rubber Company was requested to become complainant in the bill and to file it. It did so, upon the understanding that it would not be put to substantial expense by reason thereof. The request to the complainant was made with the knowledge and assent of the respondent's counsel, but no vote authorizing it was ever passed by the board of directors. The directors believed that a receivership was unavoidable, and those of them who were familiar with legal matters supposed that it would be brought about by a friendly suit filed in this court by a creditor residing outside of Massachusetts. The course taken was similar to that frequently, if not generally, adopted in receivership proceedings. It accords with the 'silent practice of the court' (Illinois Central R. R. Co. v. Turrill, 110 U. S. 304, 4 Sup. Ct. 5, 28 L. Ed. 154), and was approved in the Metropolitan Railway Receivership Case, 208 U. S. 90, at page 110, 28 Sup. Ct. 219, 52 L. Ed. 403. It is objected to by the parties represented by Mr. French, but I see nothing to criticize in it. The directors of the respondent company unanimously voted that an answer be filed, admitting the allegations in the bill. The Rubber Company is a bona fide creditor of the respondent, as stated in the bill, upon notes held by it since 1913, which were not acquired with any view to their use in proceedings of this character. Upon this bill and answer a temporary receiver was appointed on August 29, 1916." It then appears from the opinion that after the appointment of the temporary receiver the conduct of the directors in the matter was reviewed at a meeting of the stockholders and received the approval of that body by

the vote of an overwhelming majority. The court then further says: "From the foregoing statement it is clear that the receivership proceedings were in reality brought about by the respondent itself. Its representatives, in doing so, acted after careful consideration, in entire good faith, and in the belief that a receivership was the best, if not the only, course open to the respondent in the circumstances in which it was placed; and their action was approved by the stockholders. . . . It is still true that, even if the directors and the majority of the stockholders acted in good faith and, as they believed, for the best interests of the corporation, the court is not absolutely bound to appoint a receiver as prayed for. It might, in the exercise of its discretionary power, refuse to do so, if confident that there was no real necessity for such action, and that the application was improvidently and unwisely made. The facts above stated sufficiently indicate that this is not such a case. Upon the facts as they appear, a receiver for the purposes of the bill ought to be appointed."

While it thus appears that the question of the underlying equitable grounds upon which the jurisdiction to create these corporation receiverships became a matter of secondary consideration to the courts, it is still true that the underlying practical reason for appointing the receivers was always kept prominently in view. In the Scattergood Case,[3] the one from which we made our first quotation, the court, in the portion of the opinion quoted, was answering an argument directed against the jurisdiction of the court in equity to appoint a receiver. The jurisdiction of the court was also attacked on another ground. The action had been instituted in a federal district in Pennsylvania, in which the defendant corporation had had its principal business. It was, however, a New Jersey corporation. It was pointed out

[3] Scattergood v. American Pipe, etc., Co., 247 Fed. 712.

that, because of its insolvency, the corporation, under the law of its home state, was liable to an action, in a court having jurisdiction in that state, looking toward its dissolution and the appointment of a receiver to accomplish that purpose; and it was claimed that inasmuch as the jurisdiction of the court of the corporation's domicile in such an action would be superior to that of the foreign court in the action then before it, it was not advisable to appoint a receiver, who would probably be shortly ousted from possession of the property by an officer of another court. To this argument the court replied, in part, as follows: "The other basis grows out of this state of facts. The defendant is a New Jersey corporation. All its activities are, however, here displayed, and here it admittedly can be and was served with process. In addition to this, it had appeared and voluntarily submitted itself to the jurisdiction of this court, and is in no sense contesting such jurisdiction. So far as jurisdiction is of the parties as distinguished from the subject-matter, it is therefore not denied. The intervening stockholder has, however, moved to dismiss both on the ground of what may be called want of jurisdiction of the subject-matter of the bill, and on the further ground that exclusive jurisdiction of the real subject-matter of the bill is vested in the court in and for the district of New Jersey in which a bill for the appointment of a receiver is now pending. The substantial thought (although counsel doubtless prefer their own mode of expressing it) is that a condition in which the defendant corporation, as disclosed by this bill, is one of insolvency, and calls for the winding up of its affairs, its dissolution, and the distribution of its assets equitably among its creditors, such dissolution, to seize one of these elements of its condition, is to be decreed by a court having power to apply the laws of the state of its creation and is to be affected in conformity with such laws which point out the mode and

manner and by decree of what tribunals it shall be done. The corporation, which is the creature, is bound by the laws of its creation, and can be dissolved only as its creator has decreed. The laws of New Jersey prescribe what shall be the effect of the insolvency of a New Jersey corporation, and provides a remedy and a mode of procedure in all such cases. As this act of Assembly, at least so far as it is a procedure act and gives a remedy, has no extraterritorial force, the proceeding to which resort must be had must be sought where it can be found. It is the same thought upon which is based the like principle of disclaiming jurisdiction to decide controversies over internal management. Abundant support for this position is found in the following rulings, among many others which might be cited: Madden v. Penn. Co., 181 Pa. 617, 37 Atl. 817, 38 L. R. A. 638; McCloskey v. Snowden, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867; Maguire v. Mortgage Co., 203 Fed. 858, 122 C. C. A. 83.

"If the purpose of the bill here pending were such as is predicated in this argument, the convincing power of the argument could not be denied. We do not, however, so view the bill. It has not the purpose, nor does it have in view either the dissolution of the corporation or a winding up of its affairs. Its evident and real, in the sense of its practical, purpose is just the opposite of this. The purpose is to have the business of the corporation continue without interruption and the aid of the court is invoked to prevent such interruption by the act of others."

In the latter part of 1907 one of the most noted of these federal receiverships was instituted. It involved the affairs of a corporation that had been operating practically all of the street car system of the city of New York. A statute of New York provided that when a corporation had continued insolvent for more than a year the Attorney General might institute an action to

have the corporation dissolved and to have its affairs wound up by a receiver. Shortly after the federal receiver was appointed, the Attorney General did commence an action under this statute.[4] In this action it was claimed that the federal receivership had been obtained by a fraudulent collusion between the plaintiff creditor and the defendant corporation. A state receiver was appointed and he was instructed to apply to the federal court for an order directing its receiver to relinquish possession of the company's property to the officer of the state court. In replying to such an application, subsequently made, the federal court clearly set forth the fact that its controlling purpose was, not to dissolve or wind up the affairs of the railway corporation, but to keep the street car system of New York in operation for the benefit of the public. As to the application of the state receiver the ruling was that the proceedings in the state court had not developed sufficiently to show whether or not it was proper or necessary for the federal court to relinquish jurisdiction over the property in favor of the state court and that the decision of the matter should be postponed until events threw more light on the subject.[5]

This receivership met with the approval of the United States Supreme Court in an opinion in which that court mentioned the necessity for continuing the service to the public as one of its reasons for conceding the propriety of the remedy.[6] The administration of this estate occu-

[4] People v. New York City Ry. Co., 57 Misc. Rep. 114, 107 N. Y. Supp. 247.

[5] Pennsylvania Steel Co. v. New York City Ry. Co., 160 Fed. 224.

Where a public utility is performing a service which requires the holding of property in several states, such as the transportation and distribution of natural gas produced in one state and distributed in another, the business will be regarded by the courts in receivership proceedings as an integral indivisible unit. Kansas City Pipe Line Co. v. Fidelity Title & Trust Co., 217 Fed. 187, 133 C. C. A. 181.

[6] In re Reisenberg (Re Metropolitan Ry. Receivership), 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219.

pied the attention of the court for a period of eight or nine years and during that time appeared, in one phase or another, in almost every volume of the Federal Reports. During this history the court frequently reiterated the statement that the underlying purpose of the receivership was to serve the public. "The District Court's primary purpose from the beginning was to preserve the system of transportation as a going concern for the benefit of the public."[7] "The paramount intention, however, to administer the property of these insolvent companies primarily for the benefit of the public by maintaining the operation of the system, and secondarily for preserving the interests of all concerned in accordance with their respective rights and priorities is unmistakable."[8]

It may be remarked that there is contained in such statements as the one just quoted an analogy between these public utility receiverships and those created to preserve and protect the property of other corporations, sometimes distinguishingly spoken of as commercial corporations. It was pointed out in the preceding chapter that one of the situations that commonly give cause for the appointment of a corporation receiver of an ordinary corporation is its insolvency or approaching insolvency; and it was stated that, to warrant the appointment, the situation must be so serious as to threaten the discontinuance of the business of the corporation.[9] So, in the cases now under consideration, the fact is always presented to the court that the public utility company is threatened with a deluge of financial trouble that will inevitably seriously discommode, if not altogether stop, its service to the public. Another analogy between the two classes of receiverships is also sometimes spoken

7 Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 132 C. C. A. 518.

8 Pennsylvania Steel Co. v. New York City Ry. Co., 225 Fed. 734, 735, 141 C. C. A. 6.

9 See §§ 293, 296.

of in the public utility cases. It was pointed out in the former chapter that the distinguishing feature of corporation receiverships is that they are extended to cover all of the assets of the corporation and that the estates are administered for the benefit of all persons interested therein, creditors and stockholders alike.[10] So, in the public utility cases, all of the assets are taken into the receivership and, as far as the distribution is concerned, they are administered for the benefit of all interested persons. We find it stated that: "The present extension of equitable jurisdiction over corporations would be wholly unjustifiable if it were for the benefit of a particular class of creditors."[11]

The problem of stating formally and scientifically a recognized equitable ground, or basis, to warrant the court's assuming the management of the affairs of public utility corporations having disappeared, other problems have arisen to engage the consideration of the court. These problems are connected with the administration of the estates. Of course the estates have themselves, as a rule, been much more extensive than those of commercial corporations, and this fact would have thrown a greater volume of work upon the courts; but this situation alone would not necessarily have made the work of their administration any more difficult nor perplexing in principle than the management of the affairs of other corporations. The presence, however, of the public interest, of what the courts have considered to be the public's necessities, has been the complicating and perplexing element in the public utility cases. The courts

10 See § 293, supra.

By "insolvency" of a railroad company is meant inability to meet its obligations as they mature in the ordinary course of business, and at the same time to carry on its business in proper way, and perform its public duties.—Intercontinental Rubber Co. v. Boston & M. R. R., 245 Fed. 122.

11 Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503.

have assumed the duty not only of furnishing, during the course of the receivership, an uninterrupted continuance of the service to the public to which it had become accustomed and which to it had become a necessity; but also of preserving, as far as possible, the unity and integrity of the great body of the estate, directly connected with the service to the public, so that the service might continue uninterruptedly after the receivership has terminated. The performance of this duty has necessarily created problems that were not present when the court had simply the duty of managing an ordinary estate of a commercial corporation so as to create the largest possible dividends for creditors and stockholders if possible. This latter duty still devolves upon the court. It is only secondary, however, and in important particulars is affected by rules and principles made necessary, in equity, by the proper attention to the court's primary duty in the premises. It is to these rules and principles, connected directly with the management of the property and the distribution of its proceeds to creditors and stockholders, but directly due, also, to the need of properly providing a service to the public that the particular interest, or importance, of public utility corporation receiverships attaches as distinguished from receiverships of other corporations. These are the matters that it is the purpose of this chapter to present.

§ 379. Receiverships for Purposes Common to Individuals and Ordinary Corporations.

It is not to be understood that all of the cases of receivers of property owned by public utility corporations are found among the federal cases above referred to. As was stated to be the case with reference to corporations in general,[1] receivers are appointed over special property of such public utility corporations for special purposes without regard to the fact that they

[1] See § 293, supra.

are public utility corporations, and, for that matter, without regard to the fact that they are corporations or in any wise of a character different from an individual person. Thus, where a public utility, pending an action brought to contest the validity of rates to be collected from the public in accordance with a resolution of a rate-fixing body, is collecting rates higher than those ordered and, under the order of the court, is depositing the excess collections in a bank, to be preserved awaiting the outcome of the action, the bank is, technically, a receiver.[2] The principles that apply to the appointment of receivers over property held by individuals as joint tenants, when disputes arise among them, will apply to public utility corporations under like circumstances—at least a possibility of a receivership may be foreseen if necessary to protect the rights of one whose rights are not recognized.[3] In England, when a creditor holding debentures pledging the tolls and revenues of a public utility as security for a debt sues to foreclose, the action will, if necessary, be aided by the appointment of a receiver of the tolls and revenues.[4] As showing the special position occupied by such a receiver it may be remarked that even while he is receiving the tolls and revenues of a canal company, a writ of elegit may issue in aid of a judgment creditor of the company if it can be so framed to be of any service in view of the provision of the special act creating the company to the effect that the property must be used for no other purpose than that of a canal and that the canal shall always be open to the service of the public.[5]

[2] Spring Valley Water Co. v. City and County of San Francisco, 225 Fed. 728, 140 C. C. A. 209.

[3] Delaware, L. & W. R. R. Co. v. Erie Ry. Co., 21 N. J. Eq. 298. See Midland R. Co. v. Ambergate U. & B. & E. J. R. Co., 10 Hare 359.

[4] Gardner v. London C. & D. Ry. Co., L. R. 2 Ch. Appeal Cases, 201; Potts v. Warwick & B. Canal Co., Kay's Report, 142; Furness v. Caterham Ry. Co., 25 Beavan 614.

[5] Potts v. Warwick & B. Canal Co., Kay's Rep. 142.

See, also, Furness v. The Caterham Ry. Co., supra, where a re-

Ordinary foreclosure receivers may be appointed for public utility corporations just as they are appointed for other corporations or for individual debtors. Not all of the cases of corporation receivers of public utility corporations, even in the federal courts, belong to the class mentioned in the preceding section. Special circumstances, such as the utter inability to re-finance the system, may make it impossible or undesirable to manage the estate according to the rules and principles that control in that class of cases. Public utility corporations may be amenable to state statutes concerning the appointment of receivers of corporations in general or of public utility corporations in particular. Many questions may arise in public utility receivership cases that will be determined in accordance with the rules and principles that control in the ordinary case. It may happen that the appointment of a corporation receiver of a public utility will be refused because not sufficient necessity for the appointment is shown or because some less drastic remedy is available.[6]

ceiver of tolls was appointed to relieve a holder of debentures and judgment creditor from the burden of accounting while holding under a writ of elegit and it was also suggested that, if necessary, the court would find some way to make the land available to the creditor.

[6] In England, in the case of Trip v. Chard R. W. Co., 21 L. & Eq. 53, it was held that in a mortgage foreclosure suit a managing receiver of a railroad company might be appointed, such a receiver being analogous to one appointed to manage a mine owned and operated in common by contending factions; however, on a preliminary hearing a receiver of tolls was appointed, that remedy being considered sufficient at least for the time being.

In Gardner v. London C. & D. Ry. Co., L. R. 2 Ch. App. Cases 201, the lower court appointed a managing receiver, but on appeal the order was modified and a receiver of tolls directed. The action was to foreclose debenture liens and the ruling on appeal was based on the fact that the debentures were secured not by the corpus of the company's property, but by the tolls alone. It is stated in the opinion that a managing receiver of a corporation is appointed simply to sell the property as a unit and as the property of a going concern; and it was held that, since an order of sale could not be made in the case, the

appointment of a managing receiver was improper. There is dictum in the opinion to the effect that a managing receiver of a railroad corporation could never be appointed. In considering corporation receivership cases in England there must be borne in mind the fact that there corporations have for the most part been created by special acts of Parliament and that many of these acts, especially those creating public utility corporations, have specified in quite minute details rules and regulations for controlling the corporate business. Since 1867 the matter of railroad receiverships has been largely governed by statute.

In a suit to foreclose a vendor's lien on railroad property the appointment of a receiver is not proper until after judgment. Latimer v. Aylesbury & B. R. Co., L. R. 9 Ch. Div. 385

The receivership on the foreclosure of a railroad mortgage should be confined to the property covered by the mortgage, and the receiver has no authority to contract for municipal aid in the construction by him, as receiver, of an unfinished portion of a branch road. Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637.

Where in a suit to foreclose a railroad mortgage an order is made with the consent of the mortgagor appointing a receiver of all the property whatsoever kind and description belonging to the mortgagor and authorizing him to take possession of the same and institute suits for its protection, the order will not be subject to collateral attack on the ground that the order was not limited to the property covered by the mortgage. Vallery v. Denver & R. G. R. Co., 236 Fed. 176.

The rule that a mortgagee is not entitled to the income of the mortgaged property, even when the mortgage pledges the income, until he takes proper steps in receivership proceedings to have the income empounded for his benefit applies to utility mortgages; under an Idaho statute to the effect that there is but one action, namely, foreclosure, available to a mortgagee, entitle a mortgagee in a foreclosure action to share, on behalf of a deficiency judgment, with general creditors in such part of the income as has not been empounded for his benefit. Westinghouse Electric & M. Co. v. Idaho Ry. L. & P. Co., 228 Fed. 972.

After long negotiations a railroad company agreed to settle a claim for death for a certain sum. On the very eve of payment a general receiver of its affairs was appointed. It was held that, since the court had the right to grant the receivership on terms and since it would, in such a case, have been only equitable to make the condition that the receiver should pay this claim, an order directing the receiver to pay it was proper. It was pointed out that the order was made by the same judge who appointed the receiver; the complaint and the answer were filed and the receiver appointed between the hours of 9 a. m. and 11.15 a. m. on the day on which the money was to have been paid by the company. Harmon v. Blackwell, 232 Fed. 440, 146 C. C. A. 434.

The order appointing the re-

ceiver contained a clause to the effect that "any party in interest may apply to this court for further directions with reference to the property and business aforesaid." This clause in itself was sufficient warrant for ordering the payment of the claim; but independent of this clause "the court was not foreclosed by the order of appointment from considering and determining, equitably, whether there were still further claims or liabilities that should have been provided for in the original order." Citing: Louisville, etc., R. R. Co. v. Wilson, 138 U. S. 501, 34 L. Ed. 1023, 11 Sup. Ct. 405; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809.

The holder of bonds secured by a railroad mortgage and of overdue and unpaid interest coupons may, when the company is in financial straits and unable to complete its road, for the purpose of protecting his security, institute an action whose purpose is "to secure the completion and operation of a railroad line for public use and benefit by means of receiver's certificates to be issued by consent of the bondholders, and to enable it to perform a contract made by it with another company." Jackson v. Parkersburg & O. V. Electric Ry. Co., 233 Fed. 784.

In an action by certain stockholders of a railroad company to recover possession for their company of its road alleged to be wrongfully in possession of the defendant, another railroad company, a claim, on the part of defendant, that it is in possession as receiver of a state court, raises an issue that must be tried just as any other issue. Dwight v. Central Vt. R. R. Co., 9 Fed. 785, 20 Blatchf. 200.

Where circumstances make it necessary a receiver will be authorized to dismantle a road and sell the property independent of the right of way. Royal Trust Co. v. Washburn, B. & I. R. Co., 113 Fed. 531; State v. Jack, 145 Fed. 281, 76 C. C. A. 165.

A receiver will not be appointed for a telegraph company where it has no outstanding debts except that of the plaintiff with a possible claim for advances on the part of a railroad company. Baltimore & O. Tel. Co. v. Interstate Tel. Co., 54 Fed. 50, 4 C. C. A. 184.

The holder of a judgment of $16,000, the lien of which is contested against a railroad company owning 95 miles of road and receiving a revenue of $800,000 a year should enforce payment of the judgment in the usual way and is not entitled to a receiver. Milwaukee & Minn. R. R. Co. v. Soutter, 2 Wall. (U. S.) 510, 17 L. Ed. 900.

In a mortgage foreclosure suit against a public utility corporation over whose property a corporation receiver has been appointed, creditors of the company, who have had their claims established in the receivership proceedings are entitled to intervene and contest the validity of the mortgage. Equitable Trust Co. of N. Y. v. Great Shoshone & Twin Falls Water Power Co., 245 Fed. 697, 158 C. C. A. 99.

In an action to foreclose a railroad mortgage, the receiver operated the road for a time at a loss; then on a showing that the road

had never paid and that it was in a dangerous condition for lack of repairs, operation was discontinued; thereafter the state, on relation of citizens petitioned to have operations renewed, showing the need of the locality for the road, that the necessary repairs could be made at a small cost, and that former failures were due to an unskillful and unsympathetic management; the former receiver was a banker and a non-resident; the court appointed an additional receiver, a railroad man and one acquainted with the territory through which the road ran, and ordered operations to be renewed. Central Bank & Trust Co. v. Greenville & W. R. Co., 248 Fed. 350.

When a water company has been deprived of the right to maintain and operate its plant, a mortgagee is entitled to have a receiver appointed to protect the property against waste and impairment of value, even though there has been no default in payment of interest or principal. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 Fed. 661.

In the foreclosure of a public utility mortgage a receiver will be appointed over the property even though it is in the possession of one claiming the legal title, uncontested by the company, where it appears that the legal title is a tax title obtained by one who held a fiduciary relationship to the company and whose title and possession is allowed to stand through collusion on the part of the company. Appleton Waterworks Co. v. Central Trust Co. of N. Y., 93 Fed. 286, 35 C. C. A. 302.

Heavy default in interest and serious disputes in regard to the management of the company between contending factions furnish ground for the appointment of a receiver in the foreclosure of a railroad mortgage. Mercantile Trust Co. v. Missouri K. & T. R. Co., 36 Fed. 221, 1 L. R. A. 397.

A receiver may be appointed to prevent the lapsing of a land grant. Kennedy v. St. Paul & P. R. Co., 2 Dill 448, Fed. Cas. No. 7706, 5 Dill 519, Fed. Cas. No. 7707.

A receiver may be appointed to insure the supplying of a city with water after the company has been dissolved by judicial decree and pending the winding up of its affairs. Weatherly v. Capital City Water Co., 115 Ala. 156, 22 So. 140.

An unreasonable order of a railroad commission directing a company to run a certain number of its trains over its road will be enjoined; if the company is neglecting its statutory duty to run trains the public interest can be protected in an action brought by the Attorney General to have its charter forfeited and a receiver appointed. Railroad Commission of Arkansas (Rowland) v. Saline River Ry. Co., 119 Ark. 239, 177 S. W. 896.

When a receiver has been improperly appointed over a public utility corporation the expenses of the receivership should be paid by the applicant. West Riverside, etc., Water Co. v. Rogers, 16 Cal. App. 262, 116 Pac. 683.

A receiver of a water company will be appointed on a showing that the company is insolvent, that the payment of interest on bonds leaves no margin of income for repairs and betterment, that

the property is in need of repairs, and that the city is liable to be left without an adequate water supply. Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 330, 82 Atl. 689.

A company was organized to construct an irrigation plant for a certain territory and supply property owners with water; the company contracted with the owners to construct the plant and furnish water; the owners made an initial payment and contracted to pay the balance in installments after the project was completed. The company failed before the work was finished. Holders of these contracts were entitled to have a receiver appointed to collect the installments called for by the contracts and to expend the money on the completion of the plant. Childs v. Neitzel, 26 Ida. 116, 141 Pac. 77.

When an irrigation company is insolvent and unable to comply with its contracts for furnishing water a receiver may be appointed to operate the plant. Idaho Fruit Land Co. v. Great Western Beet Sugar Co., 17 Idaho 273, 105 Pac. 562.

To warrant the appointment of a receiver the complaint must state facts, not conclusions. Wabash Ry. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823.

A showing of a very serious financial embarrassment that had continued for more than three years, coupled with the fact that the company had no rolling stock and did not own its rails, warranted the appointment of a receiver. Chicago & S. E. Ry. Co. v. Kenney, 159 Ind. 72, 62 N. E. 26.

The fact that a road is not sufficiently equipped to be operated does not militate against the appointment of a receiver. Ball v. Maysville, etc., R. R. Co., 102 Ky. 486, 80 Am. St. Rep. 362, 43 S. W. 731.

As against a lessee, a receiver will be appointed at the instance of a creditor who holds a lien superior to the lease. Ball v. Maysville, etc., R. R. Co., supra.

A lessee holding property under a lease made prior to a mortgage can not be ousted by a foreclosure receiver. Louisville & U. R. Co. v. Eakins, 100 Ky. 745, 39 S. W. 416.

In an emergency created by the inability of the lessor and the refusal of the lessee to operate a road, a creditor may have a receiver appointed on an ex parte application. Louisville & N. R. Co. v. Schmidt, 21 Ky. Law Rep. 556, 52 S. W. 835.

When, pending an action for personal injuries, the defendant company sells its property to another company, the purchaser agreeing to pay the judgment, and thereafter the buyer abandons most of the road and allows it to deteriorate, and both companies are insolvent, a receiver will be appointed, under a statute providing that a receiver may be appointed when property is in danger of being lost or materially injured. Ingram v. Cincinnati F. & S. E. R. Co., 32 Ky. Law Rep. 849, 107 S. W. 239.

Under a statute relating to trusteeship, mortgages, foreclosure of mortgages and giving the court jurisdiction, in equity, of disputes concerning them, the court has jurisdiction to appoint a foreclosure receiver. Chalmers v.

Littlefield, 103 Me. 271, 69 Atl. 100.

In order to save the forfeiture of a company's franchise through failure to pay a tax, a mortgagee, who is ready to pay the tax, although not entitled to foreclosure, may have a receiver appointed to preserve the property for the benefit of all interested. Union St. Ry. Co., etc., v. City of Saginaw, 115 Mich. 300, 73 N. W. 243.

In order to administer the entire estate, a receiver of all of the property of a company may be appointed in an action to foreclose a mortgage that does not cover all of the property, when the company has a large floating indebtedness. Rumsey v. People's Ry. Co., 91 Mo. App. 202.

With the consent of the receivership court an independent action to foreclose a mortgage may be instituted. Massey v. Camden & T. Ry. Co., 75 N. J. Eq. 1, 71 Atl. 241.

A railroad company is amenable to a statute providing for an action to dissolve a corporation and to appoint a receiver therein. Knickerbocker T. Co. v. Tarrytown W. P. & M. Ry. Co., 133 App. Div. 285, 117 N. Y. Supp. 871.

That part of an order appointing a foreclosure receiver that authorizes the receiver to take possession of property not covered by the mortgage is void. Joseph v. Nelson (Man v. New York & S. B. Ry. Co.), 63 App. Div. 401, 71 N. Y. Supp. 913.

Where a mortgage covered the property of a company that was subsequently taken into a merger company, the properties of all the companies being united and operated as a single system, and the mortgage contract provided specific methods for its enforcement, an order directing the receiver to sell the entire merger system as a whole and thereby depriving the mortgagee of the specific remedies of his contract, impairs the obligations of a contract and is void. Philadelphia Trust Co. v. Northumberland County Traction Co., 258 Pa. St. 152, 101 Atl. 970.

In an action brought by the state to forfeit the charter of a railroad company for violation of state statutes regulating the conduct of railroad business, the state is not interested in the financial condition of the company and can not on the basis of showing a seriously embarrassed financial condition claim the existence of an emergency warranting an ex parte appointment of a receiver. Texas Mexican Ry. Co. v. State (Tex. Civ. App.), 174 S. W. 298.

Bondholders, on a default in payment of interest, and on a showing of insolvency and a wrongful diversion of earnings, may have a foreclosure receiver appointed. United States & Mexican Trust Co. v. Delaware W Const. Co. (Tex. Civ.), 112 S. W. 447.

While a railroad's property is in the hands of a foreclosure receiver, the company may execute encumbrances junior to those for which the property is being administered. United States & Mex. T. Co. v. Delaware W. C. Co. (Tex.), supra.

Though a railroad's property is being administered by a foreclosure receiver, the railroad commission may authorize the company to issue additional bonds and stock.

United States & Mex. T. Co. v. Delaware W. C. Co. (Tex.), supra.

A railroad company may take advantage of a statute authorizing the voluntary dissolution of a corporation. Moore v. Lewisburg, etc., Ry. Co., 80 W. Va. 653, 93 S. E. 762.

See, also, Jack v. Williams, 113 Fed. 823; Fellows v. City of Los Angeles, 151 Cal. 52, 90 Pac. 137; State v. Dodge City, etc., Ry. Co., 53 Kan. 329, 24 L. R. A. 564, 36 Pac. 755; Commonwealth v. Fitchburg Ry. Co., 12 Gray (Mass.) 180; Sherwood v. Atlantic, etc., Ry. Co., 94 Va. 291, 26 S. E. 943.

A sugar central in Porto Rico may be viewed as a public utility from many points of view connected with receivership proceedings. Berwind White, etc., Co. v. Barinquen Sugar Co., 6 Porto Rico Fed. 567.

The case just cited may be noted as one extending the line of what are commonly known as public utilities.

Non-resident directors of a public utility may manage the business efficiently through local agents; the fact that the directors are non-residents and keep the books out of the state does not warrant a receivership. Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84, 77 Atl. 720.

A corporation furnishing water to the inhabitants of a town, and to the town itself for municipal purposes, and occupying the streets of the town with its conduits, though the corporation has not been given the right of eminent domain, or any other right usually accorded to quasi public corporations, is a "corporation for public improvement," within the statute providing that the act authorizing the appointment of a receiver of an insolvent corporation shall not apply to a corporation for public improvement. Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84, 77 Atl. 720.

The use of a large excess of income over operating expenses for the purpose of paying interest on bonds instead of in repair of the plant, is not ground for a receivership in the absence of a showing that the plant is badly in need of repair. Thoroughgood v. Georgetown Water Co. (Del. Ch.), supra.

The appointment of a public utility corporation receiver on an ex parte application is erroneous in the absence of a showing of an emergency requiring such action. Butts v. Davis (Tex. Civ.), 146 S. W. 1015.

A receiver of an irrigation company will not be appointed in the absence of a showing that a receiver would have greater facilities for acquiring funds to operate the plant than the company has. Grandfalls Mut. Irr. Co. v. White, 62 Tex. Civ. App. 182, 131 S. W. 233.

The expenses of a receivership improvidently created should be taxed against the applicant; claims given a statutory preference out of earnings can not be paid out of the corpus when there are no earnings; expenses of running the business pending the receivership have preference over all liens; the mortgagee referred to in a statute giving certain claimants preference over the mortgagee, is a mortgagee at whose instance a receiver is appointed, not one who opposes the appointment. Gulf Pipe Line Co.

§ 380. Receivership in Case of Violation of Anti-Trust Law.

The same general rules which apply to corporations in general apply to public utility corporations respecting violations on its part of anti-trust laws. This subject was considered in its general aspects as applicable to corporations in general in a previous subdivision.[1] The courts, as was shown in our discussion of the subject, are reluctant to appoint a receiver except as a last resort. The leading case upon the subject as far as public utility receiverships are concerned is that of the Union Pacific Railroad Company Case.[2] In that case the court stated that in applying the general rules as to the relief to be afforded, the court must deal with each case as it finds it. The court in rejecting a plan for the distribution of the stock held by the dominating company, said: "So far as is consistent with this purpose a court of equity dealing with such combinations should conserve the property

v. Lasater (Tex. Civ. App.), 193 S. W. 773.

In an action by a creditor against a public utility receiver, a company contract will be held valid if possible; and if a certain contract, construed under the laws of one state is valid, but under the laws of another state is invalid, it will be construed under the former unless it is clearly made to appear that the intention of the parties was to the contrary. Crawford v. Seattle R. & S. Ry. Co., 86 Wash. 628, L. R. A. 1916D, 732.

Where the receiver of a railroad has been operating the road at practically no profit, the issuance of certificates will not be ordered, against the wish of bondholders, for the purpose of raising money to pay interest so as to forestall foreclosure and permit the further operation of the road. Townsend v. Oneonta, C. & R. S. Ry. Co., 88 App. Div. 208, 84 N. Y. Supp. 427.

In United Electric Securities Co. v. Louisiana Electric Light Co., 68 Fed. 673, it is held that a court will not take the management of a corporation out of the hands of its directors on the ground of mismanagement if full relief can be obtained by injunction.

1 See § 320 et seq., supra.

2 United States v. Union Pac. R. Co., 226 U. S. 61, 57 L. Ed. 124, 33 Sup. Ct. 53.

The above case discussed very thoroughly the plan of unmerging employed in the Northern Securities Case, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436, and the Standard Oil Company Case, 221 U. S. 1, Ann. Cas. 1912D, 734, 34 L. R. A. (N. S.) 834, 55 L. Ed. 619, 31 Sup. Ct. 502.

interests involved but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed and no form of dissolution be permitted that in substance or effect amounts to restoring the combination which it was the purpose of this decree to terminate." The court, however, in finally dealing with the case, enjoined a right to vote the stock in the ownership of the dominating corporation while held by it and enjoined the payment of dividends upon such stock while thus held, except to a receiver to be appointed by the lower court to collect and hold such dividends until disposed of by the decree of that court.

And the court directed that plans be presented to the lower court within a certain time to accomplish the purpose of the court and that if plans were not submitted, or if the plans submitted were rejected by the court, the lower court should proceed by receivership and sale, if necessary, to dispose of the stock in such a way as to dissolve the unlawful combination.

The court in discussing the effect of consolidations of railroad systems in violation of the anti-trust law,[3] said:

"The consolidation of two great competing systems of railroads engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates."

It might, however, be noted that the present governmental control of the transportation systems of the country is somewhat different in policy as to the desirability of retaining competition between the different systems as stated by the court in the above quotation. It is not, however, to be expected that the policy of the courts will be different than heretofore shown by the state-

3 United States v. Union Pac. R. Co., supra.

ments in their decisions on this subject in the absence of any changes in the terms of the anti-trust law.

§ 381. Effect of War Time Government Control of Public Utilities.

We have not observed any recorded conflict of authority between receivers and those in control of the operation of the public utilities under what is commonly known as the Federal Control Act. In Dooley v. Pennsylvania Railroad Company,[1] in describing the nature of the control of the public utilities assumed by the government under the act, Judge Booth, said: "It needs no argument to show that it was necessary, in order that these powers be made effective, that the possession, the control, and the utilization of the property should be exclusive, and not subject to interference by private parties."

The status of the governmental operation was also discussed by Judge Ray, as follows:[2] "Neither the United States, nor the President, nor the Director General, is doing this as agent for the railroads or the transportation companies. The United States, through its officers and agents, is doing all this on its own account, and to accomplish its own purposes, including service to and for the general public. The United States is not in partnership with these transportation or railroad systems. The earnings for the time being, and until such time as these properties are turned back to the possession and control of the corporations owning them, belong to the United States. He who steals such earnings steals the money of the United States. The property received by those in

1 Dooley v. Pennsylvania Railroad Co., 250 Fed. 142.

2 United States v. Kambeitz, 256 Fed. 247. The above case related to an express company.

Under the Federal Control Act, giving the government complete possession and control of the railroads, the right to fix both inter and intrastate rates was impliedly included. Northern Pac. Ry. Co. v. State of North Dakota (U. S.), 63 L. Ed., 39 Sup. Ct. 502.

charge of these transportation systems for transportation is received by the United States, to be transported by the United States, and is in the custody and under the protection of the United States as bailee and carrier, and the United States has a property therein."

The courts, as a matter of public information, know that the railroad companies have, under the administration of the Federal Control Act, been entirely excluded from participation in the operation of their properties, and that they have no voice in the employment and discharge of men employed in the upkeep and repair of their roads and rolling stock and the operation of trains, and that the exclusive control of all such matters is placed under the Director General.[3]

The United States Supreme Court, in the very recent case of Northern Pacific v. North Dakota,[4] in holding that complete possession and control was given to the United States of such public utilities under the Federal Control Act, said:

"No elaboration could make clearer than does the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the

[3] Hatcher & Snyder v. Atchison, T. & S. F. Ry. Co., 258 Fed. 952.

[4] Northern Pacific Ry. Co. v. State of North Dakota (U. S.), 39 Sup. Ct. 502.

property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofor existing."

But the Federal Control Act did not give the Director General of Railroads the power to take possession of land or other property belonging to a railroad but not used by it in its business as a carrier. Such non-operative property still remains under the control of the public utility corporation and is subject to its debts.[5]

The carriers do not lose their rights as legal entities, capable of suing or being sued in the courts, because of the Federal Control Act.[6] But judgments may be rendered against the company, while under federal control, although no process may be levied on any property under such federal control.[7]

5 United States R. R. Administration v. Burch, 254 Fed. 140.

The railroad corporations owning the carrier properties were not taken over by the government under the Federal Control Act. They were allowed to continue their functions as corporations in all respects other than in the operation of their carrier systems. Nash v. Southern Pac. Co., 260 Fed. 280.

6 McGregor v. Great Northern Ry. Co. (N. D.), 172 N. W. 841.

The Acts of Aug. 29, 1916, and March 21, 1918, do not give the President the right to make an order extinguishing a right of action already existing or affecting the jurisdiction of the state courts of such actions. Benjamin Moore & Co. v. Atchison, T. & S. F. Ry. Co., 106 Misc. Rep. 58, 174 N. Y. Sup. 60.

Under the Federal Control Act the carriers are subject to all the existing obligations of a common carrier and actions may be brought against them, the substitution of the Director General by way of amendment is permissive only. Johnson v. McAdoo, 257 Fed. 757; Jensen v. Lehigh Valley R. Co., 255 Fed. 795; El Paso & S. W. R. Co. v. Lovick (Tex. Civ.), 210 S. W. 283; Vaughn v. State (Ala. App.), 81 So. 417; Le Clair v. Montpelier & W. R. R. Co. (Vt.), 106 Atl. 587.

7 Postal Telegraph Cable Co. v. Call, 255 Fed. 850; Dahn v. McAdoo, 256 Fed. 549.

In Dickens v. Bransford Realty Co. (Tenn.), 210 S. W. 644, the

Any suit which involves the right of the Director General of Railroads to direct and control the operation of the road is not permitted under the Federal Control Act.[8]

Under the Federal Control Act (40 Stat. 451, c. 25 Comp. St. 1918, § 3115¾a to 3115¾p) it is provided that the President may, through contract with the owners, provide for their just compensation for the use of their operative railroad properties and that any income derived from their operation in excess of such just compensation "shall remain the property of the United States." It also appropriated $500,000,000 as "a revolving fund for the purpose of paying the expenses of the federal control."[9]

court said: "While it is true Public Act No. 107 of the Sixty-fifth Congress above referred to, very broadly authorized suits against such common carriers, still their liability to suit is not greater than that of the various municipal corporations of this state. Such liability, however, should be confined to their own creditors. Since it is the settled policy of this state to hold immune from garnishments all municipalities and other governmental agencies, we think such protection must be accorded to defendant Nashville Terminals, as it is now operated.

"Moreover, section 10 of the Act of Congress above referred to (U. S. Comp. St. 1918, § 3115¾j), expressly provides that "no process, mesne or final, shall be levied against any property under such federal control," and this would doubtless preclude proceedings by attachment and garnishment.

"We have not had occasion to consider in this opinion the effect of General Order No. 43, promulgated by the Director General of Railroads September 5, 1918, which undertook to exempt carriers under federal control from proceedings by garnishment; however, as stated heretofore under our previous decisions, we think such carriers so operated are freed from such process."

[8] Nueces Valley Townsite Co. v. McAdoo, 257 Fed. 143.

The federal control acts do not prohibit state courts from assuming jurisdiction where it otherwise existed. L. N. Dantzler Lumber Co. v. Texas & Pac. Ry. Co. (Miss.), 80 So. 770.

Under the acts authorizing the federal governmental control of the railroads during war, suits against the carriers, during the period of such control, not arising out of the operation as a carrier, may be commenced under the state laws. Friesen v. Chicago, R. I. & P. Ry. Co., 254 Fed. 875.

[9] Nash v. Southern Pac. Co., 260 Fed. 280.

The rights and liabilities arising out of the situation of federal control of public utilities under the war-time act are not at this time fully ascertained and necessarily will give rise to various interpretations based to some extent upon the theory held by the courts as to the analogy of the position of the Director General of Railroads to the public utility operative properties and of the carrier corporation as compared to other managing controls under legislative or judicial sanction.

In one case the position of the Director General was regarded by the court as analagous to that of a receiver of a railway company conducting its carrier operations on the theory that such a receiver has been regarded as a carrier.[10] Undoubtedly there are many points of similarity between the duties of the Director General and that of a receiver but the origin and extent of his powers in respect to the operative property is quite different from that of a receivership. In another case[11] the Director General was regarded as a general in command of the

10 Rutherford v. Union Pac. R. Co., 254 Fed. 880, citing United States v. Nixon, 235 U. S. 231, 234. 59 L. Ed. 207, 35 Sup. Ct. 49; United States v. Ramsey, 197 Fed. 144, 146, 42 L. R. A. (N. S.) 1031, 116 C. C. A. 568, to the effect that such a receiver is a common carrier.

Under the federal control acts the railroads are regarded as agencies or instrumentalities of the federal government. Dickens v. Bransford Realty Co. (Tenn.), 210 S. W. 644.

11 Vaughn v. State (Ala. App.), 81 So. 417.

In the above case, Presiding Judge Brown said: "The apparent theory of General Order No. 50 is that, while the carriers are operating under federal control, they are mere agents of the government, and, if liability for their torts and the torts of their employees exists, it is against the government and not the carrier, and therefore actions for such torts should be against the Director General of Railroads and not against the carrier. It is only on this theory that the Director General was to have even colorable authority to interfere with a suit against a transportation company, and this theory undoubtedly conflicts with the principles above stated. The only authority for suing a carrier while under federal control must be rested upon the act of Congress which subjects them 'to all laws and liabilities as common carriers, whether arising under state or federal

army of transportation on the theory that the commandeering of the railroads is based upon the same inherent authority as that of the Selective Draft Act. The clearest statement of the nature and character of the control exercised by the government over the railroads under the Federal Control Act, which we have observed, has been by Judge Van Fleet in a recent case[12] in which he said: "In the first place, the act, as expressly declared, is an emergency measure to meet extraordinary conditions growing out of an actual state of war, and calling for an exertion of the most extreme and drastic powers of

laws or at common law,' with certain exceptions, and provides that—

"'Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law,' etc. U. S. Comp. Stat. 1918, pp. 456-458.

"And the validity of this statute is sustainable on no other theory than that the transportation companies are operating their respective systems under federal control. If such companies are in no way connected with the operation of their respective transportation systems, we submit that it would not be within the power of Congress to subject them to liability and suits thereon for the torts, miscarriages, and defaults of the employees of the federal government. Such an act would be an arbitrary exercise of legislative power contrary to the established principles of private rights and distributive justice and tantamount to a denial of due process of law. Zeigler v. South & N. A. R. R. Co., 58 Ala. 594; Mobile Light & R. R. Co. v. Copeland & Sons, 15 Ala. App. 235, 73 South. 131; Bank of Columbia v. Okley, 4 Wheat. 235, 4 L. Ed. 559; Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. 111, 292; Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. 231; Leeper v. Texas, 139 U. S. 462, 35 L. Ed. 225, 11 Sup. Ct. 577; Giozza v. Tiernan, 148 U. S. 657, 37 L. Ed. 599, 13 Sup. Ct. 721; Jones v. Brim, 165 U. S. 180, 41 L. Ed. 677, 17 Sup. Ct. 282; Maxwell v. Dow, 176 U. S. 581, 44 L. Ed. 597, 20 Sup. Ct. 448, 494; 6 Rul. Cas. Law, pp. 433-446, embracing paragraphs 430 to 442, on Constitutional Law.

"On the other hand, if the carriers are operating under federal control and are agencies of the government, the authority of Congress to impose liability on the carriers for the torts of their employees is clearly sustainable on the theory that such responsibility encourages caution on the part of the carriers and their employees promotes efficiency, and safeguards the interests of the government and the general public."

[12] Nash v. Southern Pac. Co., 260 Fed. 280.

government to meet those conditions. It is accordingly to be construed, not with that meticulous nicety which might be dictated by other circumstances, but in a broad spirit of liberality, in keeping with the purpose intended to be accomplished and having in view its emergency character.

"As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession and control of the systems of transportation taken over in whole or in part by the President was to be an exclusive one, to no extent shared in by the owners. If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the government. Such a taking involved in the sense the element of agency by the government for the owners. Agency implies a consentual or contractual relation, but this was not such. It was more nearly analagous or akin to a taking by the sovereign in the right of eminent domain; and the result of such taking

The Act of March 21, 1918, providing for the federal control of railroads during the war and authorizing the President to make regulations therefor, is within the war powers of Congress. Wainwright v. Pennsylvania R. Co., 253 Fed. 459.

In the case of Marshall v. Bush, 102 Neb. 279, L. R. A. 1918E, 385, 167 N. W. 59, the Supreme Court of Nebraska, in annulling an order of the Railroad Commission of that state requiring Bush, as receiver of the Missouri Pacific Railroad Company, to place in service an extra train, said:

"Since the rendition of the order complained of, a consideration has arisen of which the court is justified in taking judicial notice. The country is now in a state of war, and the government of the United States has assumed control over the operation of the railroads. There is a deficiency in motive power and cars, and a shortage of men. To take the necessary engines and rolling stock to operate this train may decrease to that extent the facilities of defendant for the patriotic duty which is imposed upon him of doing everything possible to meet the demands in the transportation field imposed by the new conditions."

was necessarily to relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation, and quite as necessarily an assumption of such responsibility by the government. And this, as is clearly shown by the whole framework of the act, was what Congress desired to accomplish. The conditions to be met in the emergency presented were deemed such that the administration of this vital instrumentality for successfully carrying on the war was to be freed for the time from any hazard arising through a bonded control or responsibility. And as Congress could not in the nature of things foresee the many exigencies and necessities that might arise for prompt, free and unrestrained action by the executive, in the practical administration of this great trust, the President was clothed with the broadest and most plenary powers and authority to deal with the problems as they might arise and in such manner as his judgment should dictate; and this not only as between the government and the owners, but as between the government and the general public, with express power to make all orders and regulations essential to carrying out the purpose of Congress."

The powers conferred by the Federal Control Act were held not to have been affected by the signing of the Armistice since an armistice merely suspends military operations and does not terminate a war.[13]

Aside from the Federal Control Act it has been held that when the government purchases or owns all of the capital stock of a railway company and operates it as a public utility, it is deemed to have abandoned its sovereignty and is to be treated in the same manner as any other public utility.[14]

13 Commercial Coal Co. v. Burleson, 255 Fed. 99; State v. Northern Pac. Ry. Co. (N. D.), 172 N. W. 324.

14 Ballaine v. Alaska Northern Ry Co., 5 Alaska 694; Panama R. Co. v. Curran, 256 Fed. 768.

§ 382. Who Will Be Selected As Receiver.

The same general rules applicable to the question of selecting a receiver for a private corporation are also applicable to public utility receiverships.[1] In applying the rules in respect to selecting a person particularly qualified for the position, the range of selection in respect to a public utility receivership may be somewhat limited on account of the small body of men with the practical experience for such management.

A court in appointing a receiver experienced in railroad management to operate a railroad and preserve the property pending a sale does so to relieve itself from the details of administration and management. His instructions are always general in character and he is expected to apply to the court from time to time whenever special instructions are deemed necessary. The very nature of his relations not only to the court but to the creditors and others entitle him to the largest degree of discretion possible in the discharge of his duties. This discretion in the management will not be interfered with except in the case of abuse or manifest wrong.[2]

A person who is interested in another railroad with which the receivership railway is in litigation should not be selected as receiver.[3] The fact that the person selected as receiver is an officer of the receivership railway will not be deemed an objection if he is otherwise satisfactory,[4] nor will the fact that he is related to certain large

1 See § 343, supra, for discussion of the general qualifications of the person selected as receiver of a corporation.

2 Continental Trust Co. v. Toledo, etc., R. Co., 59 Fed. 514.

The fact that a railroad receiver had expressed his views in regard to those engaged in formulating a plan of reorganization is not sufficient cause for appointing an additional receiver.—Central Trust Co. of New York v. Missouri, K. & T. Ry. Co., 246 Fed. 154.

3 Commonwealth v. North Shore R. Co., 259 Pa. St. 155, 102 Atl. 568.

4 The president of the corporation was appointed in one case at the instance of the mortgagee, who was foreclosing the mortgage.

stockholders and bondholders be an objection where he is specially fitted for the position by reason of his familiarity with the property and its affairs and his selection is favored by substantially all of the parties interested and no charges are made against his integrity.[5] It is not necessary that the receiver be familiar with the mechanical details of operation.[6] In the absence of any statutory objection, a non-resident may be selected.[7] In several of the earlier cases, one railroad company was appointed as receiver of another one but the receivership was the result of close business relationship between them which did not appear to be hostile in character.[8]

Where the duties to be performed in the receivership are of a large operative property, the court frequently appoints two receivers but not where it is quite clear that one alone will be able to perform properly the functions. The practice in this respect was well set forth by Judge Lacombe in an oral opinion in a receivership case[9] arising in a mortgage foreclosure proceeding, in which he said: "That there should be two receivers appointed at

Ralston v. Washington, etc., Ry. Co., 65 Fed. 557.

"Unless in cases of imperative necessity, no person will be appointed receiver of a railroad company who is a party to or of counsel in the cause, or who has been an officer in, or an official of, the insolvent corporation." Finance Co. v. Charleston, etc., R. Co., 45 Fed. 436.

5 Bowling Green Trust Co. v. Virginia Passenger & Power Co., 133 Fed. 186; John A. Roebling's Sons Co. v. Virginia Passenger & Power Co., 133 Fed. 186; Central Trust Co. v. Virginia Passenger & Power Co., 133 Fed. 186.

6 Farmers' Loan, etc., Co. v. Cape Fear, etc., R. Co., 62 Fed. 675; Commonwealth v. North Shore R. Co., 259 Pa. St. 155, 102 Atl. 568.

In Westinghouse, etc., Mfg. Co. v. Binghamton Ry. Co., 255 Fed. 378, a business man not connected with the street railway was appointed receiver.

7 Farmers' Loan & T. Co. v. Cape Fear, etc., R. Co., 62 Fed. 675.

8 Langdon v. Vermont, etc., R. R. Co., 54 Vt. 593, 613; Town of Roxbury v. Central Vt. R. Co., 60 Vt. 121, 14 Atl. 92.

See Dwight v. Central Vermont R. Co., 9 Fed. 785, 20 Blatchf. 200, for an instance where one railroad was in possession of another as receiver.

9 Central Trust Co. v. Third Ave. Ry. Co., 159 Fed. 959.

this stage of the case seems wholly unreasonable and unwarranted, and unnecessarily expensive. One receiver can discharge the functions perfectly well. If, in the future, it should become necessary to unite to the receiver, who is a lawyer, some other receiver who may be a business man or an operating or financial man, or for some other reason such as the circumstances that conflicting camps of bondholders, represented by their respective committees, reach such a stage of entanglement that it seems necessary that both should be represented in the management, the occasion can then be availed of, but to undertake now to appoint two receivers to discharge the functions about to be intrusted to a receiver of the Third Avenue Railway Company seems to me most unwise, and not to be considered.

"There remains then only the question as to who the receiver shall be. Mr. Whitridge has been nominated by the trustee under the mortgage and by the committee of bondholders who represent substantially a majority of the bonds, even if through some technicality a number of bonds are not yet actually filed. From the stockholders, so far as we hear anything from them, there comes no objection to his selection, only from certain bondholders vague criticisms upon the propriety of the court making such an appointment upon the request of a majority of the bondholders. The court, on the contrary, has reason to feel thankful that a gentleman of such professional and personal standing in this community is willing to accept the position. It is a thankless office, the receivership of a public service corporation; it is laborious and engrossing of time; it is fretting, irksome, and exasperating. The work is so large, and the details so manifold and complicated. There are so many diverse interests and such a multitudinous number of persons to be considered and planned for. And it grows still more wearisome, because it seems as if it must always be done in a constant atmos-

phere of suspicion and misrepresentation, and under an intermittent downpour of unfounded criticism, not malicious at all, save possibly in a few instances, but merely uninformed and thoughtless. For it seems to run with the popular humor to assume that no one who is discharging functions which affect the public, or large interests even, ever acts with a simple desire to do his duty; that there must be some mysterious, some devious and hidden ulterior object to be unearthed, that he is striving to find what there is in for himself or for his friends. It is a mistaken notion. There are in this community today as many men as there ever were who, whatever the work that may be allotted to them to do, public or private, are content to do it faithfully, with a scrupulous regard for the rights of all affected. It is a source of gratification and comfort to any court to know that when the occasion arises for the services of trustees in such matters it can always find men who for upwards of a generation have, within this community, practiced their profession or transacted their business not in a small way, but active, energetic, achieving success, broadening in experience, dealing with large affairs; and who yet throughout their whole career have so conducted themselves that no one can point a finger to any transaction of theirs in which they have not acted as upright and honorable men, and in accordance with the best ideals of their business or profession. This court has always been able to find such men, as undoubtedly it always will be, who often at some personal sacrifice, are willing to accept such burdensome office, and, when appointed, the court can rest assured that all interests committed to their charge are in safe hands."

§ 383. Appointment of Ancillary Receivers.

Inasmuch as most railway systems are interstate in character and the jurisdiction of a state court does not

extend beyond the confines of the state, it naturally follows that ancillary receivers must be appointed in such circumstances.[1] The orders of the court of primary jurisdiction are generally followed as a matter of comity by the courts of ancillary jurisdiction, although such a court is not deprived of an independent power to deal in respect to the property within its own jurisdiction. A very strong case for such independent action must, however, be shown before a court of ancillary jurisdiction will make any orders in conflict with that of the one of primary jurisdiction, since it is the desire of all courts dealing with a property of large magnitude requiring maintenance as a unit in order to function properly and be preserved to the best advantage, to so act in respect to it that its welfare as a whole will best be subserved. Of course the ancillary courts act independently in respect to those matters which particularly concern the claims of its own citizens insofar as they have jurisdiction and their orders in matters of that sort are likewise respected by the court of primary jurisdiction.[2]

1 Central Trust Co. v. Wabash, St. L. and P. Ry. Co., 29 Fed. 618; Dillon v. Oregon, etc., R. Co., 66 Fed. 622, 628; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co., 58 Fed. 268; Horn v. Pere Marquette R. Co., 151 Fed. 626.

See § 370, supra, relating to ancillary receivers of corporations, and § 327 relating to such appointments in cases of foreign corporations.

2 New York, P. & O. R. Co. v. New York, L. E. & W. R. Co., 58 Fed. 268; Ames v. Union Pac. Ry. Co., 60 Fed. 966; Guarantee, etc., Deposit Co. v. Philadelphia, R. & N. E. R. Co., 69 Conn. 709, 38 L. R. A. 804, 38 Atl. 792.

Where a primary receiver is appointed also as an ancillary one he is required to obey the orders of the ancillary court in respect to the local assets. Hammond v. National Life Assn., 31 Misc. Rep. 182, 65 N. Y. Supp. 407.

And where a federal court has appointed an ancillary receiver to one appointed primarily in a state court it will frequently refer matters to it for determination. United States Trust Co. v. New York, etc., Ry. Co., 25 Fed. 797.

2. Disposition of the Operative Property Through a Receivership.

§ 384. Usual Method of Disposing of the Property.

There is, as might be expected, a very general similarity of outline, or plan, of administration of the estate among the federal cases that form, as we have above pointed out, a distinct type, or class, of receiverships of public utility corporations. This similarity is not more marked, perhaps, with reference to any other detail, than it is with reference to the usual method of disposing of the operative property of the corporation involved.

In these cases there is primarily present in the mind of the court the need of preserving and continuing for the public the service to which it had grown accustomed. It is constantly stated that the business of the corporation must be kept going. As a practical proposition this does not necessarily mean that the old corporation must be kept going. Usually it is not ultimately kept going. The result generally is to leave it a mere shell,[1] without power to function—a result which, in the minds of some courts, has formed an insuperable objection to the assumption, by a court of equity, of the jurisdiction, or power, to appoint receivers.[2] The purpose to continue the service is present at the time of the disposal of the operative property as well as at any other stage of the proceedings. The property must be sold as a unit to a

1 Speaking of the effect of the appointment of a receiver as constituting a breach of an executory contract, the court said: "In such a case there is actually total inability of performance on the part of the shell of the lessee corporation." Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503, 540.

In appointing a receiver for a public utility corporation the court will assume, unless shown to the contrary, that it can be operated successfully from its income without impairing the value of the property of the receivership, even though temporarily embarrassed. Central Bank & Trust Corporation v. Cleveland, 252 Fed. 530.

2 See § 304. note 9.

purchaser prepared to operate it in the interest of the public.

In the ordinary case this desideratum would require too severe financing to be capable of accomplishment through an ordinary, or, as it is commonly called, a strict foreclosure sale. The proceedings are usually instituted by an action on the part of a creditor, who can secure the appointment of a corporation receiver. This brings all of the assets of the company before the court and prevents the breaking up of the system pending the administration of the estate. In the course of time a mortgagee, whose security embraces practically all of the operative property of the company, commences an action to foreclose and breaks the way for a sale as a unit.[3] All those having claims upon the property—stockholders, bondholders, and general creditors—are before the court and their claims bear the lion's share of financing the sale. Some ready cash is generally furnished to take care of the expenses of the proceedings, such as the immediate expenses of the future, including perhaps desirable additions or greatly needed improvements to the system, etc. A foreclosure decree is rendered and a sale ordered. The sale is made to a prepared bidder, who promptly transfers his purchase to a new company. Securities or stock of the new company are issued in favor of those interested in or having claims against the old company who were to be provided for according to the pre-arranged plan. The shell of the old company is left behind; its personnel is represented somewhere or other in the new company. The public is provided for. This process is known as reorganization.[4]

3 The mortgage foreclosure action may be the opening proceeding. See Guaranty Trust Co. of N. Y. v. Missouri Pac. Ry. Co., 238 Fed. 812.

4 This process of reorganization, as well as some of the other processes employed in administering the estates of utility corporations, such as assuming large

"If the financial difficulties resulting in receivership are not mortal, but are mere embarrassments, which may be relieved by time and readjustment, the custom is a reorganization, embodying a recognition of all interests—bonds and other lien debts, general debts, and stocks—as far down the scale of preference as the value of the property and sound business judgment reasonably justify. As was said in Louisville Trust Co. v. Louisville, etc., Ry., 174 U. S. 674: 'We must therefore recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean, not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor, or mortgagor.' "[5]

§ 385. Whether Receiver Should Continue Operations When Done at a Financial Loss.

In the cases of the large railroad systems and other large public utilities the continuous operation of the public utility pending either a restoration of the property to the corporation or to a reorganized company is taken as a matter of course. But a serious condition arises when the public utility is a small concern serving only a limited number of people and serving them at a continued loss. We are not here concerned with the question as far as it does not relate to a receivership situation. Where, however, such a concern so situated, or a large concern hopelessly overcapitalized and insol-

expense in keeping the business going, are sometimes applied in the cases of private concerns. See Guaranty Trust Co. v. International Steam Pump Co., 231 Fed. 594, 145 C. C. A. 480; American Pig Iron, etc., Co. v. German, 126 Ala. 194, 85 Am. St. Rep. 21., 28 So. 603.

[5] Guaranty Trust Co. of N. Y. v. Missouri Pac. Ry. Co., 238 Fed. 812.

vent, is placed in the hands of a receiver, can the public who are served by it intervene and compel the receiver to operate the public utility at such a loss that the cost of operation will consume the corpus of the receivership? It really amounts to this, namely, do the stockholders, lienholders, and creditors of a public utility dedicate their interests in the concern to the public to such an extent that their financial interests in it can be taken without compensation for that purpose? In view of the interest of lienholders and general and preferred creditors in the corpus of the receivership, to so compel a receiver to operate at a loss would constitute a taking of their property for public use without compensation. The question was presented to the United States Circuit Court of Appeals of the Fourth Circuit in a comparatively recent case.[1] In the case presented the railway covered some 23 miles of railway. It had never paid interest on its first mortgage and had for some years been running at an annual net loss which at the time of the receivership had aggregated over $41,000. After the appointment of the receiver and upon his application, the operation of the road was ordered to be discontinued upon the showing of its unsafe condition and operation at a loss. Thereupon a petition was filed in the court by a number of residents and property owners along

1 Central Bank & Trust Corporation v. Cleveland, 252 Fed. 530.

A receiver should be directed to sell an electric railroad to pay the debts of the company, although a loss of service to the community served will result, where its operations have been suspended by the receivership court on account of having been unsuccessful during normal times, and unable to resume without the expenditure of additional capital and with not sufficient future prospects of future profitable operation and especially while there was a particularly good market for scrap iron and machinery. Re Rockland S. T. & S. & G. R. Co. (Me.) P. U. R. 1918 E. 877.

A mining and lumbering railroad operated as a common carrier should be allowed to discontinue its service where its business has so decreased as not to produce sufficient revenue to justify its operation. Cain v. Mono Lake Lumber Co. (Cal.) P. U. R. 1918B 292.

the line of the railroad, asking the leave of the court to intervene and asking that the court should rescind its order directing the discontinuance of operation of the railroad. The court allowed the intervention and took evidence in the matter. All of the parties interested in the railroad were before the court, including the trustee for the bondholders, the unsecured creditors, the railroad company, and its unfortunate stockholders. It appeared that the amount of bonds outstanding, secured by the mortgage, was largely in excess of any possible value of the railroad and its assets. The interveners were not interested in the affairs of the company except as residents along the road who were discommoded by its non-operation and who asserted their claim as the right of the public to have the railroad operated. District Judge Smith, speaking for the Circuit Court of Appeals, in holding that the court would not compel the receiver to operate the railroad under the circumstances, said:

"The contention of these interveners is that, under the law, the court can compel (as the state of South Carolina in their view can compel) the operation of the railroad, although its operation is at a continuous loss, and may mean a continuous impairment and ultimate possible entire loss of all the capital invested in the railway. The logical consequence of their contention is that the effect of subscribing to the capital, or lending on the application of a railroad company, and its construction therewith, is to subject all the property of the corporation to a first lien to the state for the indefinite operation of the road, and, although its operation may prove to be unprofitable and at a loss, the owners of the property, or the holders of securities secured by a lien upon the property, can not cease operation and realize on the security, but they are bound to continue the operation of it, even to the entire exhaustion of the assets of the railroad.

"Upon this point the controversy is between all the persons who have any financial interest in the property on the one side, and on the other only the interveners, who have no financial interest in the property, but claim the right on behalf of the public to compel the operation of the railroad upon the theory that in the case of a railway the public has a right to compel its operation, even if the result be the sequestration of the entire amount invested without compensation to the owners. This court has authoritatively declared its view to be the contrary of this contention.

"A railroad was formerly constructed along the very line of the railroad now concerned. Its name was the Carolina, Knoxville & Western Railway Company. The operation of the railroad having proved unsuccessful, and that it could only be operated at a loss, foreclosure proceedings were instituted, in the Circuit Court of the United States for the District of South Carolina, for foreclosure and sale, and a sale at auction was ordered. It was twice exposed for sale at auction without any bidders, and it was finally bid in for $15,000. The purchaser did not attempt to operate it, but sought to remove and sell the rails. Thereupon a number of persons, relators, acting in the name of the state, just as in the present cause, intervened and sought to have the court require the rails taken up and sold to be replaced by the purchaser and the road to be operated.

"The case came on to be heard before Judge Simonton, sitting in the Circuit Court. The very point was made that is made in the present case, that under the statute of the state of South Carolina referred to in the order of the learned judge below, slightly modified as embodied in section 3117 of the Code of Laws of South Carolina, the purchaser of a railroad was required to organize and put it in operation within 60 days of the purchase and acquisition thereof, and that that meant that the stock-

holders accepted an obligation to maintain and operate, and keep on operating, although the operation was at a loss. After a full hearing, Judge Simonton decided to the contrary. Jack v. Williams, 113 Fed. 823. He held that, while a railroad was in a sense a public concern, for whose construction and operation the action of the sovereign was needed, yet that, whilst thus serving the public, no corporation or person is thereby bound to continue the service without a reasonable remuneration. No one can be compelled to serve the public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. He decided, further, that the effect of the act of the Legislature referred to was not to forfeit or sequestrate the property of a railroad company to the use of the public, by requiring its operation even at a loss, but only that, if the purchasers did not organize and operate within the time limited, they forfeited the franchises of the railroad corporation. The state could not compel the stockholders to exhaust their assets in the operation of a losing concern, but it could say that, if you do not choose to operate, you shall not be entitled to the public franchises given to a common carrier, and in that case the only thing left to the owners of the property would be to sell the property, without being able at the sale of the property to sell the franchises and the right of operation.

"That decision was appealed from, but was affirmed by this court. State of South Carolina v. Jack, 145 Fed. 281, 76 C. C. A. 165. This court affirmed the judgment of Judge Simonton, and the only question would be whether it be so that it be established that the road can not be operated except at a loss to the owners. This court further held in that case that the very fact that the road does not pay the expenses of running trains was persuasive evidence that the service to the public did not require it to be kept in operation. The learned

judge below in the present cause in his order finds as a conclusion of fact that the railroad has lost money from the beginning, but voices his belief that, notwithstanding previous losses, the receivers should issue a sufficient amount of receivers' certificates to put the railroad in condition to run trains over it, and that the interest of the public made this service imperative, and that he is bound to believe that such service would be equally beneficial to bondholders.

"Were this the case of a private corporation there would be no difficulty. The rule is generally accepted in the case of private financial corporations that, without the assent of the existing lienholders, a court of equity will not, by the issue of receivers' certificates, displace prior liens, save to the extent actually required for necessary expenditures incident to administering the assets and preserving the property from deterioration pending the winding up of the business and the settlement of the receivership. The whole rule is fully discussed in International Trust Co. v. Decker Bros., 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152, cited and reaffirmed in Nowell v. International Trust Co., 169 Fed. 505, 94 C. C. A. 589. It seems, also, generally accepted that where a receiver is directed to operate a business, it is because the income of operation will, as clearly shown by the facts, exceed the outgo, and the operation therefore be beneficial to the holders of the liens; the income being the primary fund to which the expenses of a receivership must be referred.

"In the case, however, of public utility corporations, especially in the cases of railways, the rule has been modified by reason of the interest that the public have in the operation of the concern. In the case of a great railway corporation, for instance, if suddenly its operation were put an end to, all the avenues of transportation and trade around which public life and interests

had grown up and clustered for many years would be destructively paralyzed by a sudden stoppage. So, also, in the case of a receivership of a large public utility corporation for the furnishing of gas, water, or other public necessity to a community, its sudden stoppage would entail such untold injury to the community that the stoppage is not permitted; and the theory has been adopted that, unless it manifestly appears otherwise, the very existence of the utility corporation shows that it can be operated at sufficient income to pay its cost of operation and not to impair the value of the property.

"This does not mean, however, in these cases, that the courts have a right to require an indefinite operation, to the exhaustion of the assets, but that, in view of the fact that the public utility corporation has been created and exists, the court will take it for granted that it can be operated so as not at least further to impair the value of the assets, and will direct it to be operated, even by the issue of receivers' certificates, until arrangements can be made to meet the exigencies. If it should be found that it cannot be operated, except at a loss, it would be open to the public, if it be authorized as a public measure, to condemn the property and take it for public purposes at its ascertained value; but it can not take it by the method of requiring its operation to the absolute exhaustion of the assets, and in that way effect the taking of private property for public purposes without compensation.

"There has been no case in which such a doctrine has been announced. For the general rule, see Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Kneeland v. American Loan Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 34 L. Ed. 379; Thomas v. Western Car. Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; V. & A. Coal Co. v. Central R. R. Co., 170 U. S. 355,

18 Sup. Ct. 657, 42 L. Ed. 1068. The principle decided in these cases extends to the effect that certain classes of debts already incurred for operating expenses may, by reason of the public right and necessity for operation, be given priority in payment over mortgage liens, under the view also that, like supplies advanced or repairs made to a vessel, they had been actually necessary to preserve the existence of the res itself, upon the existence of which res all other liens depended.

"The present case, however, does not fall in any of these categories. In the first place, it is a small branch railroad, and it is not the public, as a general whole, which is affected, but only the limited number of individuals who are connected with the neighborhood of a small branch railroad. Next, the facts show that it is unreasonable to expect this railroad to be operated, so as to pay its costs of operation, except as a speculative hope. The only grounds upon which expectations are based that it can be operated so as not to entail further loss by the operating expenses being greater than the operating receipts is a speculative hope that business may be built up so as to have this result. This is not a conclusion based upon past operation, but a hope voiced upon speculative contingencies. The railroad, therefore, is in the same position as the line referred to in the previous case, when it was ordered in the previous decree of this court to be sold.

"The insistence of the relators in this intervention is in effect that private property should be taken for public use without compensation. All the owners of this property, stockholders, unsecured creditors, and bondholders, object to its further operation and the creation of this prior lien. The only ground upon which it can be justified in the face of further objection is that there is some superior right of the public to have the road operated, although at the destruction of the property of the

security holders. This doctrine was openly announced by the counsel for appellees at the hearing. If the residents along the railway, or the public generally, desire that the railroad should be operated for their benefit, they can do so by supplying the income for that purpose, without making it a prior charge upon the property. The operation of the property otherwise than by the creation of a prior lien in the issue of receivers' certificates would not appear to be practicable under the circumstances in this case. It would seem that the judge below should direct that the test of whether or not its operation would be successful, in the sense of procuring enough to pay for the expense of operation, should be at the charge and at the expense of the persons to be benefited and who insist upon that operation. It should be required of the parties for whose benefit the railroad is thus to be operated to secure the receipt of a sufficient amount to pay for its operation without creating any prior charge on or further depreciating the value of the assets of the corporation and security holders by the furnishing of such security as the court will require, so that no ultimate loss shall be upon the parties interested in the property.

"This can be effected by the requirement that, before the operation of the railroad be resumed and continued, and the certificates issued, sufficient security be given on behalf of the relators for the repayment of these certificates, and of all loss or impairment of value that may result from the operation, less any increased value that at any sale may be shown to have accrued to the security holders from any expenditures for permanent repairs or betterments, or from the sale of the property as a continued operating railway. The cause must therefore be remanded to the court below for a modification of its order so as to accord with this opinion."

The opinion of the court from which we have quoted

covers the question so fully and is so sound in its reasoning and regard for the rights of the public in such a situation that we think the question can be considered as settled.

The policy of the courts in dealing with public utility corporations is to keep an extensive railway system[2] or other public utility property which consists of units, intact as one system if it is possible to do so,[3] but where part of a street railway system is unprofitable the receiver may be permitted to surrender the franchises of the unprofitable portion of the system.[4]

2 Pennsylvania Steel Co. v. New York City Ry. Co., 176 Fed. 471; Lorain Steel Co. v. Union Ry., 165 Fed. 500; Pennsylvania Steel Co. v. New York City St. Ry. Co., 165 Fed. 477.

3 The court will endeavor to keep a system of electrical and gas generating companies under one company intact as a system where the operation of each unit is necessary to the success of the whole enterprise. Gay v. Hudson River Electric Power Co., 173 Fed. 1003 (affirmed in 177 Fed. 1003, 100 C. C. A. 667).

A receiver will not be directed by the court to discontinue service over a part of the system where to do so might result in a forfeiture of the franchise of the company. Lorain Steel Co. v. Union Ry., 165 Fed. 500.

Where a receiver is already in charge of a street railway system, another receiver will not be appointed over a part of the system, notwithstanding that the title to the latter may be in doubt. Clap v. Interstate St. Ry., 61 Fed. 537.

4 Pennsylvania Steel Co. v. New York City Ry. Co., 187 Fed. 288. See also Pennsylvania Steel Co. v. New York City Ry. Co., 165 Fed. 459.

The right of a receiver to abandon a dilapidated and unprofitable line of railway was also declared in State of Iowa v. Old Colony Trust Co., 215 Fed. 307, 131 C. C. A. 581. In that case the system consisted of an electric line of some 125 miles in length and a short steam line in the condition above stated. The steam line was not only in a dangerous condition for use but would require a large amount of money to rehabilitate it, and the company was hopelessly insolvent. The operation of the electric line was, however, of public importance and in good condition and in profitable operation. The steam line in and by itself did not pay operating expenses. The circuit court of appeals affirmed an order allowing the receiver to discontinue the operation of the steam line.

Where a railroad is being operated by the receiver at a loss, he may be permitted to turn it over to a connecting road for operation without the payment of rent. The operating company under such circumstances is the agent of the re-

It is the rule that by the acceptance by a railroad corporation of a charter which confers upon it the power of eminent domain and other valuable privileges, it assumes those duties for which it was organized, and in consideration of which the privileges were conferred.[5] Under this rule it is held that it may become necessary in order to furnish a proper service, as required by its charter, that a railroad may be required to operate a branch line at a loss or to furnish other service at a loss, but in determining whether a requirement that such facilities be increased is just and reasonable, the nature and extent of the existing facilities must be considered. And if it is shown that the enforcement of the order would so affect the general scheme of the operation of the entire system that it would inevitably require its operation at a loss, the order may be deemed so unreasonable as to violate the Fourteenth Amendment of the Federal Constitution. This situation would arise where the whole interstate system is in the hands of a receiver on account of inability to pay fixed charges against the system. In other words there is a distinction between requiring service to be performed upon a portion of a railroad system at a loss, and the fixing of a schedule of rates for transportation so unreasonably low as to require the whole system to be

ceiver. South Carolina, etc., R. Co. v. Car, etc., Ry., 93 Fed. 543, 35 C. C. A. 423.

And a receiver will under proper circumstances be permitted to dismantle a road and sell the property independent of the right of way. Royal Trust Co. v. Washburn B. & I. R. Co., 113 Fed. 531.

5 Chesapeake & O. R. Co. v. Public Service Commission, 242 U. S. 603, 61 L. Ed. 520, 37 Sup. Ct. 234; Missouri Pac. R. Co. v. State of Kansas, 216 U. S. 262, 54 L. Ed. 472, 30 Sup. Ct. 330; Atlantic C. L. R. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398, 27 Sup. Ct. 585; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115.

The attorney-general of a state may file a suit in a state court to restrain the receiver of a federal court from tearing up a railroad pusuant to orders of the receivership court. Attorney General v. Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915.

operated at a confiscatory rate. In the one case the loss incidental to the operation of a portion of the system at a loss may be overcome by readjustment of train service or other economies, whereas inadequate rates applying to the whole system result in a form of confiscation which is violative of constitutional provisions.[6]

§ 386. General Attitude of Receivership Toward Large Financial Transactions Made in Course of Business.

The court in viewing large borrowing transactions made by a public utility corporation in which it has pledged collateral securities with banking institutions in order to obtain funds necessary to maintain itself as an operating corporation during times of financial stress, such as during war or the like, will so act as not to make loans of such character difficult to obtain by taking a narrow or very technical point of view of the matter but will look at the situation from a broad point of view where there is no suggestion of bad faith or disguises to cover the real transaction and where the transactions were, as was said by Judge Mayer,[1] "honestly conceived and honestly carried out in the ordinary course of business of this character which has to do with the financing of a large public utility company."

6 Marshall v. Bush, 102 Neb. 279, 167 N. W. 59 (in a well-considered opinion by Mr. Justice Letton). (See also Chesapeake & O. R. Co. v. Public Service Commission, 242 U. S. 603, 61 L. Ed. 520, 37 Sup. Ct. 234; Atlantic C. L. R. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398, 27 Sup. Ct. 585 and Missouri P. R. Co. v. State of Kansas, 216 U. S. 262, 54 L. Ed. 472, 30 Sup. Ct. 330, regarding confiscatory regulations in this respect.

1 Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., 256 Fed. 465.

3. Powers and Duties of the Receiver.

§ 387. General Statement as to Extent of Powers of the Receiver.

Certain general principles concerning the relation of a receiver to the estate over which he has control and to the parties interested in the estate apply to a federal public utility receiver as well as to a receiver in any other kind of a case. In the public utility cases, as elsewhere, one of the fundamental equitable justifications for the receivership is the necessity of preserving the property involved until the court can determine the various rights of those claiming to be interested in it. This principle ties this special class of cases to receivership cases in general and makes applicable to them the great body of general rules regarding receivers. It is true, for instance, that a federal utility receiver is simply an officer of the court, not the agent of the defendant company, nor of the party at whose instance he may have been appointed, nor of any other party interested in the estate; he is an impartial person, and, as far as the parties before the court are concerned, is not interested on behalf of one rather than another; he is a trustee for all of them.[1] The receiver obtains his entire authority from the court and is at all times under its direction and control; independent engagements made by the receiver are not binding on the court, unless within the scope of

[1] In Memphis & C. R. Co. v. Hoechner, 67 Fed. 456, 14 C. C. A. 469, it is held that a receiver appointed by a court of equity to hold, manage, and operate an insolvent railroad company is not the agent of the insolvent railroad corporation, but the hand of the court appointing him, and holds, manages, and operates the property under the orders and directions of the court as its custodian and not for or under the control of the directors or shareholders of the corporation. His management is for the benefit of those ultimately entitled under the decree of court. His acts are not the acts of the corporation, and his servants are not the agents or servants of the corporation.

the orders of the court.[2] The jurisdiction of the court and, therefore, the right of possession of the receiver is limited to the property involved in the case. In a mortgage foreclosure case the jurisdiction is limited to the property covered by the mortgage.[3] It is to be remem-

2 An order of the receiver discharging an employee without a hearing may be called to the attention of the court and the court may reinstate the employee. Farmers' Loan & T. Co. v. Central R. & B. Co., etc., 166 Fed. 333.

A promise made by the receiver of a gas company before application to the court, to a consumer concerning a change in an existing contract, is not binding on the court. St. Joseph Gas Co. v. Barker, 243 Fed. 206.

A court will not permit a receiver of a gas company to extend a pipe line in such a manner as to interfere with the possession of another receiver appointed by another court. Fidelity Title & T. Co. v. Kansas Natural Gas Co., 219 Fed. 614.

A receiver may not appeal from an order of the court giving him certain directions to follow the provisions of an existing contract with another road concerning the maintenance of guards at a crossing, if the order is simply interlocutory and not finally determinative of the rights of the respective parties under the contract. Hunt v. Illinois C. R. Co., 96 Fed. 644, 37 C. C. A. 548.

When a court has made an order authorizing its receiver to make a contract, and the other party has incurred obligations with reference thereto, the court will not authorize a change without the consent of the other party in the absence of strong equitable grounds justifying such a course. Morton Trust Co. v. Metropolitan St. Ry. Co., 165 Fed. 493.

3 Receivers in a foreclosure suit of a railroad are entitled to the custody of only the property subject to the mortgage and involved in the litigation, not including trustees' rights under collateral agreement against third party, and the court can not enjoin the prosecution of an independent action concerning such rights. Ex parte Equitable Trust Co., 231 Fed. 571, 145 C. C. A. 457.

Although a railroad mortgage covers after-acquired property, it is the property as it existed at the commencement of the action that is within the jurisdiction of the court. Therefore a receiver in a foreclosure action on a railroad mortgage is not receiver of any property except that covered by the mortgage, and has no authority, at least without the consent of all interested parties, to contract for municipal aid in the construction by him as receiver, of an unfinished portion of a branch road. Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637.

It is to be remembered that the desideratum in a federal utility receivership is to have all of the property that has been devoted to a certain public service kept intact pending receivership proceed-

bered that a federal utility receiver is an equity receiver and the consequences that follow this fact apply. The receiver is not the assignee of nor the successor to the company as far as title is concerned. The power of the corporation to function is limited by the receiver's possession of its property and his control of its business under the orders of the court. But the corporation still exists; actions against it do not abate and their prosecution may be continued, or new actions against it may be instituted without joining the receiver.[4] However, the receiver's possession and control will be protected by the court in every way. A proceeding that tends to interfere with the receiver can not be maintained without the consent of the receivership court; any such proceeding is ancillary to the receivership cause and must, if the court so directs, be prosecuted in the receivership

ings so that, if possible, it may be sold under such circumstances as will insure the continuance of the service to the public. If this purpose can not be accomplished by a foreclosure suit a creditor's insolvency action is instituted.

A receivership of a railroad corporation under the usual practice covers all the assets, papers, records, and books of account of the corporation. The assets include not only the railroad and its proper appurtenances, but supplies on hand, cash and cash items, traffic balances and other credits, and the tolls and other income accrued, accruing, or to accrue. New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219.

The receiver of a railroad may dispose, on general equitable principles, of all the supplies and tolls or other income as the corporation could have done if it had remained in possession. But the courts, having in view the fact that such receiverships are to prevent disintegration and maintain activity in the operation of the railroad, do not go beyond applying such assets to the liquidation of such matters as the corporation would presumably have first applied then in the event that it had retained possession. That is, it applies such funds to the payment of accruing expenses and accrued traffic balances, current supply bills and pay rolls, and to meeting such temporary emergencies, threatening the system, as could not otherwise be met. New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219.

[4] Fidelity Insurance, etc., Co. v. Norfolk, etc., R. Co., 114 Fed. 389; affirmed in Hampton v. Norfolk, etc., R. Co., 127 Fed. 662, 62 C. C. A. 388.

case itself.[5] The equity jurisdiction of the court to try and determine every issue that may be involved in a case over which it has assumed charge will overrule provisions of statutes concerning limitations to the court's jurisdiction based upon facts of citizenship; and any matter connected with the receivership estate may be brought before the federal receivership court regardless of the citizenship of the interested parties.[6] The possession of the receiver and his control of the business of the insolvent corporation may be protected from invasion through the injunctive powers of the court.[7] The receiver may be, and usually, in the appointing order is, authorized to prosecute or defend suits already existing by or against the company and to commence, in his own name, or that of the company, any actions necessary to protect the estate. The right to sue in his own name may be exercised where no question as to the extra-territorial power of the receiver to sue may be raised, and especially before the court in which the receivership matter itself is pending. It is sometimes said that this

5 Where railroad property is in the control of a court through a foreclosure receivership, and a judgment holder is seeking to satisfy his judgment by execution against the property, claiming it to be the property of his judgment debtor and not that of the company involved in the receivership case, the receivership court may enjoin the execution proceedings and with the consent of the parties, may try the issue of title; that court could have compelled the trial of the issue before it, even without consent of the parties. People's Bank v. Calhoun, 102 U. S. 256, 26 L. Ed. 101.

6 Vallery v. Denver & R. G. R. Co., 236 Fed. 176, 149 C. C. A. 566; Hampton Roads Ry. & E. Co. v. Newport, etc., Co., 131 Fed. 534.

7 Interference with the right of a receiver to use the track of another company as a part of his main line will be enjoined. Metropolitan Trust Co. v. Columbus, S. & H. Ry. Co., 95 Fed. 18.

A competing company's wrongful interference with a receiver's use of a city bridge may be enjoined. Brady v. South Shore Traction Co., 197 Fed. 669.

Injurious interference with a receiver on the part of a competing street railway company by maintaining gates across a highway, may be enjoined. Hampton Roads Ry. & Electric Co. v. Newport News & O. P. Ry. & Electric Co., 131 Fed. 534.

right to litigate in his own name is an enlargement of the receiver's authority but such statements are probably prompted by the great increase in the volume of work that has devolved upon public utility receivers rather than by any change in the underlying equitable principle involved in the matter.[8] Where considerations of saving time or expense warrant it a receiver may be authorized to compromise a claim.[9]

§ 388. Respecting the Operation of the Business of the Public Utility.

In regard to the management of the estate with reference to the matters mentioned above and the host of other

[8] In Davis v. Gray, 83 U. S. 203, 21 L. Ed. 447, an order was made that the receiver should be authorized and empowered to defend and continue all suits brought by or against the railroad company before or after his appointment, and a suit relating to certain land grants to the company was instituted by the receiver in his own name to enjoin the defendants from all illegal acts which the bill alleged, if done, would render the rights and title of the company to its property of greatly diminished value, if not wholly worthless. The court says: "We think it is competent for him to perform this function in the mode he has adopted. The decree in the case wherein he was appointed expressly authorizes him to sue for that purpose in his own name. The order was made by a court of adequate authority and in the regular exercise of its jurisdiction." The proceeding by the receiver was held to be auxiliary to the original suit. The court further says: "In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. It is not unusual for courts of equity to put them in charge of railroads or companies which have fallen into financial embarrassments, and require them to operate such road until the difficulties are removed or such arrangements are made that the roads can be sold with the least sacrifice of the interest of those concerned."

A receiver of a water company may file a bill in equity to fix water rates. Lanning v. Osborne, 79 Fed. 657.

While such a suit is pending in the federal court a suit in the state courts for the same purpose will be enjoined. Ward v. San Diego Land, etc., Co., 79 Fed. 665.

An order granting to a receiver power to sue is not a determination in advance that any particular proceeding begun by the receiver is proper and protected by the order. Jones v. Moore, 198 Fed. 301.

[9] Pennsylvania Steel Co. v. New York City Ry. Co., 180 Fed. 514.

similar details involved therein there is nothing peculiar to a federal utility receivership. It is only when we come to the operation of the business of the corporation that we find anything different from what occurs in other receiverships. The difference is not in the fact that the court conducts the business. Courts will conduct the business of a private, commercial corporation or even of an individual. The difference is in the attitude of the court toward the character of the business engaged in by the corporation. In the case of the commercial corporation or the individual the court is reluctant to engage in business through its receiver and will not do so against the will of the interested parties. In the case of a public utility receivership the court insists on keeping the business going if it is possible to do so. In the former case the court usually conducts the business to liquidate it and produce the largest possible dividends for those interested. In the latter the court conducts the business to keep it going as a public utility and to turn it over ultimately in a going condition to some one who will continue to keep it going.

The difference above noted is in the mind and attitude of the court at all times and influences its actions in respect to the matter. It is reflected in the powers assigned to and the duties imposed upon the receiver. That official must bear the burden of giving force to the purpose of the court and he is given power and discretion accordingly. While he is under the authority of the court and can not act beyond the power given him the orders imposing powers and duties upon him are for the most part very general in their terms and give room for the exercise of wide discretion. This situation is shown by the usual grant of powers in the order of appointment.[1] We have

[1] In Atlantic Trust Co. v. Chapman, 208 U. S. 360, 52 L. Ed. 528, 28 Sup. Ct. 406, 13 Ann. Cas. 1155, the receiver was authorized by the order of court "to continue the operation of the main and branch canals of the mortgagor company in the usual and ordinary way as

seen, for instance, that, in a general way, he is authorized to pay on his own discretion preferred claims, and, if he errs in this regard, the order of the court, protects him.[2] In general it may be said that he is authorized to conduct the business as the company itself would or should have conducted it,[3] and he is expected to report for further orders only in regard to matters of importance.[4] The receiver may make contracts usual to the character of the business he is conducting. As a common carrier he may make, through an agent, an agreement for transportation beyond his own line and assume responsibility for the through shipment;[5] he may make contracts for

the same were then operated, discharging, as far as practicable, contracts for water supplies entered into by the company, collecting rents, tolls, moneys payable under water contracts, keeping the property in good condition and repair, employing needful agents and servants at such compensation as he deemed reasonable, paying for needful labor, supplies, and materials as to him might seem necessary and proper in the exercise of a sound discretion, with leave to apply to the court from time to time, as he may be advised, for instructions in the premises. He shall do whatever may be needful to preserve and maintain the corporate franchises of said defendant corporation and its rights to the use of the water and all its property, until final judgment in this action, and to defray the necessary and proper expenses incident thereto."

2 See § 429, infra.

3 Northern Pac. R. Co. v. American T. Co., 195 U. S. 439, 49 L. Ed. 269, 25 Sup. Ct. 84; South Carolina, etc., R. Co. v. Carolina, etc., Ry. Co., 93 Fed. 543, 35 C. C. A 423.

Where the corporation has no power to lease its property, no power exists in its receiver to do so. See State v. McMinnville & M. R. Co., 6 Lea (Tenn.) 369; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; York & Md. L. R. Co. v. Winans, 58 U. S. (17 How.) 30, 15 L. Ed. 27; McMinnville & M. Railroad v. Huggins, 3 Baxt. (Tenn.) 177.

4 In regard to matters that come within the purview of general orders granting power to the receiver only a showing of bad faith or gross extravagance will justify a review of his acts by the court. State of South Carolina v. Port Royal, etc., R. Co., 89 Fed. 565.

In the matter of paying damages for injury to freight, baggage, express, etc., due to collision, the receiver is justified in following common usage. Central Trust Co., etc., v. Colorado, etc., R. Co., 89 Fed. 560.

5 Decree (C. C. 1902), 112 Fed. 829, reversed. (1903) Farmers' Loan & Trust Co. v. Northern Pac.

necessary labor and supplies;[6] he may make contracts to supply the service furnished by his public utility, according to the custom and necessities of the business, even though the contracts may continue beyond the probable term of the receivership;[7] he may make changes in the conduct of the business intended to give increased service to the public;[8] and in that respect he is aided by the power of the court to issue receiver's certificates in often giving a better service than the financially burdened company could have done. As a carrier he may make a traffic arrangement with another company whereby each obtains the privilege of running its cars over the lines of the other.[9]

The court will, of course, have in mind that it is desirable to have the business result in benefit, if possible, financially, to the creditors and the stockholders;[10] and it may, therefore, decide not to continue the operation of a losing part of the business.[11] However, where a public

R. Co., 120 Fed. 873, 57 C. C. A. 533; affirmed in Northern Pac. R. Co. v. American Trading Co. (1904), 195 U. S. 439, 49 L. Ed. 269, 25 Sup. Ct. 84.

6 State of South Carolina v. Port Royal, etc., R. Co., 89 Fed. 565.

7 Gay v. Hudson River Electric Power Co., 173 Fed. 1003 (order affirmed in 177 Fed. 1003, 100 C. C. A. 665).

8 In re Forty-second Street, M. & St. N. Ave. R. Co. (In re New York City Ry. Co.), 160 Fed. 226.

9 Lorain Steel Co. v. Union Ry. Co., 174 Fed. 262.

10 Where some portions of the system of a street railway system are leased and the rental is excessive, their operation may be discontinued. Pennsylvania Steel Co. v. New York City Ry. Co., 165 Fed. 459, 462.

While the curtailment of transfer privileges of passengers will increase the earnings of the street railway system, the receiver may be permitted to discontinue such transfers. In re Receiverships of Street Rys., 161 Fed. 879.

And where the transfer system is not required by any law or contract, it may be discontinued by the receiver even though it may result in the forfeiture of the franchise of a disconnected company. Central Trust Co. v. Third Ave. R. Co., 165 Fed. 494, 495.

11 The receiver may be instructed to remove disused tracks and surrender the franchises of an unprofitable portion of the system. Pennsylvania Steel Co. v. New York City Ry. Co., 187 Fed. 288.

A federal court has jurisdiction

utility, such as a railroad or a street-railroad, has been conducted as a system, composed of various units, one dependent upon the other and each contributing to the service as a whole, the court will strongly endeavor to preserve the unity of the system as far as possible.[12] This consideration may justify the appointment of a single receiver over the entire system rather than separate receivers for each of several parts against which separate suits have been instituted.[13] Of course in details such as have just been mentioned the court must largely be guided by the special conditions before it.[14]

In carrying on the business of the public utility under its charge the court will have in mind, in the interest of the public, the rights and interests of other utilities and public or political institutions. As a common carrier, for instance, the court, in such matters as track-crossing privileges, using public streets, and granting service to other carriers, will see that the public utility operated by its receiver not only performs its duty but, as far as possible, shows a spirit of accommodation.[15] A receiver

in a suit to foreclose a railroad mortgage to order its receivers to abandon and dismantle a portion of the road owned by defendant and to sell the salvage for the benefit of the creditors. State of Iowa v. Old Colony Trust Co., 215 Fed. 307, 131 C. C. A. 581, L. R. A. 1915A, 549.

12 Pennsylvania Steel Co. v. New York City Ry. Co., 176 Fed. 471; Lorain Steel Co. v. Union Ry., 165 Fed. 500.

Repairs upon a leased line, operated in one system with its own line by a lessee, where the lease requires repairs to be made and the repairs will preserve the unity of the system, inure to the benefit of the lessor in such a way that the court is justified in ordering to be spent for such repairs money raised for improvements and betterments and the repayment of which has been made a lien upon the property prior to a mortgage being foreclosed. Pennsylvania Steel Co. v. New York City Ry. Co., 165 Fed. 477.

13 Pennsylvania Steel Co. v. New York City Ry. Co., 160 Fed. 221; Gay v. Hudson River Electric Power Co., 173 Fed. 1003; order affirmed 177 Fed. 1003, 100 C. C. A. 665.

14 See Gay v. Hudson R., etc., Co., 173 Fed. 1003.

15 Stewart v. Wisconsin C. Co., 89 Fed. 617; Louisville Trust Co. v. Cincinnati, etc., R. Co., 78 Fed. 307.

In Beers v. Wabash, St. L. &

of a public utility in so far as he transports passengers and property is a common carrier with rights and civil responsibility as such a carrier.[16]

§ 389. Indebtedness for Operation Incurred by Receiver.

The matters above set forth amply evidence the fact that the attitude of the court toward the matter of operating the business of a public utility is entirely different from its attitude toward the business of a private concern, whether it operates the latter only for liquidating purposes or to keep it in condition to produce the largest possible dividends for the creditors. It is evident, too, that what the court does in the maintenance of a public utility as a going concern involves expense. It is in connection with the matter of raising funds to meet these expenses that the court has most plainly stated the reason for its peculiar attitude in these cases. We find this reason stated in several instances by the United States Supreme Court itself.

In a comparatively early case,[1] the receivers were authorized by the order appointing them to put the road in repair and operate the same and to procure such rolling stock as might be necessary; and for these purposes to raise money by loan to an amount named in the order,

P. R. Co., 34 Fed. 244, 35 Am. & Eng. R. Cas. 646, it was held to be the duty of a receiver of a railroad, who controls its operation and who is no less a common carrier because the property is in the custody of the court, to receive and transport cars and freight, and to furnish accommodations to connecting lines to the same extent and in the same manner as are the proper officers of railroad companies. The court says: "His rights and duties are those of a carrier. He is bound to afford to all railroad companies whose lines connect with his, equal facilities for the exchange of traffic. It is his duty to receive from and deliver to other connecting roads both loaded and empty cars. He can not discriminate against one road by maintaining a policy of nonintercourse with it."

16 United States v. Nixon, 235 U. S. 231, 59 L. Ed. 207, 35 Sup. Ct. 49; Eddy v. Lafayette, 163 U. S. 456, 464, 41 L. Ed. 225, 228, 16 Sup. Ct. 1082.

1 Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895.

and issue their certificates of indebtedness therefor, and the order declared that such loan should be a first lien on the property, payable before the first mortgage bonds. The court said: "The power to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for the repayment, can not at this day be seriously questioned. It is a part of that jurisdiction always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund."

Later the matter was stated as follows:[2] "Property subject to liens and claims and debts of various characters and ranks which is brought within the cognizance of a court of equity for administration and conversion into money and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable it must be sold by way of preservation. A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate, decay, and perish if not cared for and kept up but its business and goodwill will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporators but to furnish a public highway; and all persons who deal

[2] Union Trust Co. v. Illinois M. R. Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809.

with the corporation as creditors or holders of its obligations must necessarily be held to do so in the view that if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands to have the purposes of its creation still carried out, the court while in charge of the property has the power, and under some circumstances it may be its duty to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent nor on prior notice. Consent is desirable but is seldom practicable, where the debts exceed the value of the property."

In this case, in which the original receiver was not a foreclosure receiver, it was suggested that, as far as any right of the mortgagee to object to the expenditures was concerned, it was sufficient that after the mortgagee had been brought into the case, and had learned of the order, he had not made any objection to it. In a still later case it is said:[3] "A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or

[3] Kneeland v. American L., etc., Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950.

rentals, and make such expenses a prior lien on the property itself."

It may be noticed that this is the case in which the Supreme Court took occasion to warn the lower federal courts that the doctrine of preferred claims should be confined to narrow limits.[4]

The court, as all courts of equity do in receivership cases, is, through an official custodian, preserving the property *pendente lite*. But it is preserving it primarily in behalf of a factor that is not usually considered as having any interest before the court, namely the public that has been served by the public utility.[5] The preserving of the franchise, which is usually covered by the

[4] See Kneeland v. American L., etc., Co., supra.

[5] Of a court operating through its receiver an extensive street railway system, the first consideration is in the maintenance of an adequate service to the public. Hence the current accounts of its receiver for expenditures for that purpose, should be passed without being complicated by controversies between the parties interested in various parts of the system, as to which interest or property should be charged with any particular expenses. Application to appeal to United States Supreme Court, 168 Fed. 937, denied. Guaranty Trust Co. of New York v. Metropolitan St. Ry. Co., 171 Fed. 1014.

See, also, Miltenberger v. Logansport, etc., R. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.

This point has been called to attention in private corporation cases where the court has been desirous of pointing out the limitations of its jurisdiction, or power therein. We find it said: "Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the Supreme Court of the United States has sustained orders giving priority to receiver's certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public." Farmers' Loan, etc., Co. v. Grape, etc., Coal Co., 50 Fed. 481, 16 L. R. A. 603. See Wood v. Guarantee T. & S. Deposit Co., 128 U. S. 416, 417, 32 L. Ed. 472, 9 Sup. Ct. 131.

Of course the limitation to railroad cases in the above quotation is not strictly correct. See Gay v. Hudson R., etc., Co., 173 Fed. 1003; cases cited in Crane Co. v. Fidelity Trust Co., et al., 238 Fed. 693, 151 C. C. A. 543, majority and minority opinions.

mortgage and which may be the most valuable asset of the estate, is of advantage to the mortgagee, but the court goes far beyond what is technically necessary to prevent any forfeiture of the franchise through non-user. It is sometimes said, and with good reason, that every public utility mortgagee takes his security with the knowledge that a court of equity may be called upon to interpose in the management of the business and to use part of his security to pay the expenses of the court's management.[6] However that may be, many of these receiverships have been created with the consent of the interested parties on the theory that many things necessary for the rehabilitation of the property and the remedying of their methods of financing and management can best be done through the process of a receivership. It must be remembered that all of these cases are insolvency cases and commenced at a time when the whole enterprise is about to collapse under its financial burdens. The security holders are at such time generally willing to let the court serve the public, even though at their expense, for the time being; that situation has its counterpart in the fact that the court will hold the property until arrangements can be made to give the creditors another opportunity to save their interests through a reorganization process.[7]

But all that the public is entitled to is a continuance of the service that it was receiving at the time the receiver was appointed. Extensions of the service that might have been provided by the company itself if it had continued prosperous are, as a rule, not to be expected at the hands of the court during the receivership although generally the reorganization process which results at the end of the receivership will give promise at least of larger plans for service to the public. The expenditures that the court may assume are only those

6 Pennsylvania Steel Co. v. New York City Ry. Co., 190 Fed. 609.

7 See § 384, infra.

that are directly related to the mere operation of the property as the court finds it. Expenditures for betterments, improvements, or extensions are not to be incurred without the consent of the creditors who may be affected thereby.[8] Sometimes the line between operating expense in the nature of repairs and new construction or reconstruction may be very close; and expenditures under such circumstances may be justified by a slight extension of the concept denoted by repairs or by a slightly exaggerated force given to circumstances taken to denote consent or to amount to an estoppel, or by the fortunate appearance of an exception to the rule under special circumstances. In the nature of things very wide discretion must be allowed a court in passing upon matters of this sort and much will depend upon the actual outcome of any expenditure. At least courts of appeal have the advantage of being able to look at the matter from these various angles.[9] Even with the consent of lien-

[8] Bear Lake, etc., Irr. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. 7; Atlantic Trust Co. v. Chapman, 208 U. S. 360, 52 L. Ed. 528, 28 Sup. Ct. 406, 13 Ann. Cas. 1155; Savings & Trust Co. v. Bear Valley Irr. Co., 93 Fed. 339; Bibber White Co. v. White River, etc., R. Co., 115 Fed. 786, 53 C. C. A. 282; Kelly v. Receiver of Green Bay, etc., Co., 5 Fed. 846, 10 Biss. 151.

[9] Kuseland v. Luce, 141 U. S. 491, 35 L. Ed. 830, 12 Sup. Ct. 32; Mercantile Trust Co. v. Kanawha, etc., R. Co., 50 Fed. 874.

Where the receiver comes into possession of an improvement fund that had been created pursuant to provisions of the mortgage, he may use that fund in his management of the utility. Union Trust Co. v. St. Louis, etc., R. Co., 234 Fed 809.

An item for betterment may be allowed with the consent of some of the bondholders though others may object. Investment Co. of Philadelphia v. Ohio, etc., R. Co., 36 Fed. 48.

Where the company had left unfinished certain repairs and enlargements of car barns the receiver may finish the work; where the utility consists of numerous parts united into one system such an expenditure may be ordered and the apportionment of the burden among the various branches of the system determined at a later time. Pennsylvannia Steel Co. v. New York C. Ry. Co., 180 Fed. 704, 104 C. C. A. 135.

Miltenberger v. Logansport, etc., Co., supra. In this case expenditures for completing a road of something over ninety miles by building six miles of road and a

holders the court may refuse an order permitting an improvement if there is doubt that it will benefit them.[10]

We have seen that this doctrine of giving preference to indebtedness incurred by the receiver has to a certain extent been extended to indebtedness incurred by the company prior to the receivership by the doctrine of preferred claims.[11] However, the fact that it is the court that primarily incurs the receiver's indebtedness operates to cause several important differences between the payment of the receiver's debts and those of the company. If the receiver properly assumes expense for improvements or betterments, such expense is preferred, although no such expense incurred by the company is so treated. With reference to the receiver's debts there is no time limit, no "six months" doctrine; the receiver's debts are paid no matter what length of time may elapse between their accrual and the possession of means to pay them. There is no expectation nor understanding that receiver's debts will be paid from current income; the court will in every instance pay the debt even if resort to the corpus fund is necessary. Certain claims arising under the receiver's management are paid as expenses of operation, though if they arose under the company's management they would not be so classed; tort claims under the company are considered as hindering rather than aiding operation and are not preferred; under the receiver they are preferred and if necessary paid out of the corpus fund.[12]

bridge were justified on grounds of special circumstance; part of the expense being borne by outside interests and the evidence showing that the security of the mortgage would be enhanced by much more than the cost. See Bibber White Co. v. White R., etc., Co., supra, and Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

[10] Fidelity Title & Trust Co. v. Kansas Natural Gas Co., 219 Fed. 614; Investment Co. of Philadelphia v. Ohio, etc., R. Co., 36 Fed. 48.

[11] See §§ 413 et seq., infra.

[12] Tort claims arising under the receiver are expenses of operation. St. Louis S. W. R. Co. v. Holbrook, 73 Fed. 112, 19 C. C. A. 385; Bound v. South Carolina Ry. Co., 174 Fed. 729.

An employee of the receiver injured in the course of his work

may be allowed his salary for the time he was disabled. Missouri Pac. R. Co. v. Texas, etc., Co., 41 Fed. 319.

A fraudulent attempt to place the burden of satisfying a judgment against the receiver and another company as joint tort feasors upon the receivership fund will not be permitted. Investment Registry v. Chicago, etc., R. Co., 204 Fed. 500.

As a general rule expenses incurred in the administration of a receivership are chargeable only on the income, unless there has been a diversion of current income to the purchase of additional equipment and the making of permanent improvements on the fixed property, in which event, if the current income is insufficient, obligations incurred in preserving and managing the property may be charged on property pledged. Finance Co. v. Trenton & N. B. Ry. Co., 189 Fed. 282.

The trustee in a mortgage of the property of a canal and irrigation company, who brings a suit for foreclosure and sale, and obtains the appointment of a receiver to take charge of and manage the property pendente lite, does not thereby become personally liable for money borrowed, expenses incurred, and certificates issued by the receiver under orders of the court, in keeping the corporation in operation as a going concern, where the proceeds of the sale proved insufficient to pay. Atlantic Trust Co. v. Chapman, 208 U. S. 360, 52 L. Ed. 528, 28 Sup. Ct. 406, 13 Ann. Cas. 1155.

In appointing a receiver of a railroad the court may, where the receiver's income is insufficient to satisfy his indebtedness incurred for necessary operating expenses, direct the payment of the residue out of the proceeds of a sale before a distribution is made to creditors and lienholders. St. Louis Union Trust Co. v. Texas Southern Ry Co., 59 Tex. Civ. 157, 126 S. W. 296.

In this connection see, also, Ellis v. Vernon I., L. & W. Co., 86 Tex. 109, 23 S. W. 858; McIlhenny v. Binz, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655; Union Trust Co. v. Illinois R. Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; Kneeland v. American L. & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; Kneeland v. Bass Foundry & Mach. Works, 140 U. S. 592, 35 L. Ed. 543, 11 Sup. Ct. 857.

In Missouri, K. & T. Ry. Co. v. McFadden, 89 Tex. 138, 33 S. W. 853 the court said, "The court appointing a receiver to take charge of and control a railroad may make the liabilities incurred by him a charge upon the corpus of the property, and upon sale may direct their payment from its proceeds, but the charge so created proceeds from the order of the court, and does not arise by operation of law."

The following are entitled to be classed as item of operating expenses: Car rentals (Kneeland v. American L. & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; Thomas v. Western Car Co., 149 U. S. 95, 37 L. Ed. 663, 13 Sup. Ct. 824), cars destroyed by fire (see Grand Trunk R. Co. v. Central Vt. R. Co., 88 Fed. 636), rolling stock, equipment, and traffic balances due other roads (Miltenberger v.

An item which is a company and not properly a receiver's debt can not be made such by the consent of the receiver.[13]

The general rank, or priority, of various classes of claims, on distribution, in federal utility cases has been indicated, at least by inference in various of the preceding

Logansport, etc., R. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140), damages for injuries to persons or property during receivership caused by torts of the servants of the receiver (Ryan v. Hays, 62 Tex. 42, 49; Green v. Coast Line R. Co., 97 Ga. 15, 24 S. E. 814, 54 Am. St. Rep. 379, 33 L. R. A. 806.

Where a receiver has used in the operation of the railroad over which he is receiver, special funds of individuals in his possession as receiver a judgment for such funds is properly classed and paid as a charge of the receivership in the same manner as demands based on negligence from operation. St. Louis Union Trust Co. v. Texas Southern Ry. Co., 59 Tex. Civ. 157, 126 S. W. 296.

13 Where the obligation to redeem unused tickets issued under a traffic arrangement between the receiver's company and another primarily falls upon the latter and the latter is to look to the receiver's company for reimbursement, the receiver can not agree that reimbursement for the redemption of tickets issued before but redeemed after his appointment shall be a charge upon his own account. Monsarrat v. Mercantile Trust Co., 109 Fed. 230, 48 C. C. A. 328.

Even though a receiver may be made a party to an action founded upon a tort occurring prior to the receivership, a judgment obtained therein is not a charge upon the receiver's account. Hampton v. Norfolk, etc., R. Co., 127 Fed. 662, 62 C. C. A. 388.

Compensation allowed the trustee under the mortgage may not be a receiver's expense. Petersburg, etc., Co. v. Dellatorre, 70 Fed. 643, 7 C. C. A. 310.

Rental of cars used by the receiver is an expense of the receiver's operation [under the company such items are not preferred because the creditor relied on the credit of the company and not the current income]. Meyer v. Western Car Co., 102 U. S. 1, 26 L. Ed. 59; Kneeland v. American L. & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; Thomas v. Western Car Co., 149 U. S. 95, 37 L. Ed. 663, 13 Sup. Ct. 824; Kneeland v. Bass Foundry, etc., Works 140 U. S. 592, 35 L. Ed. 543, 11 Sup. Ct. 857; Taylor v. Delaware, etc., R. Co., 213 Fed. 622, 13 C. C. A. 214.

Where there is sufficient amount in the receiver's income to pay for necessary cars the court will not permit the receiver to enter into a car trust. Taylor v. Philadelphia, etc., R. Co., 9 Fed. 1.

Traffic balances are expenses of operation. Ames v. Union Pac. R. Co., 73 Fed. 49. Such items under the company are preferred —though possibly not to the extent of being paid out of the corpus fund. See § 425, infra.

sections, but it may be here set forth specifically. There may, in general, be in the receiver's hands for distribution the following funds: (1) remnants of the company's income fund turned over by it to the receiver or afterward collected by the receiver; (2) unmortgaged assets; (3) the receiver's net income; (4) restorations to the income fund, either of the company or the receiver, from the proceeds of the sale of the mortgaged property to offset and to be limited in amount to diversions occurring either under the company or the receiver; (5) the corpus fund, balance

An obligation to refund to a lessor taxes which it has paid but which the receiver should have paid as rental under a base which he has adopted is a receiver's debt of operation. (Rental items accruing under the company are not preferred because they were not to be paid out of current income). United States Trust Co. v. Mercantile T. Co., 88 Fed. 140, 31 C. C. A. 427.

Rental of a leased road operated by a receiver is payable out of the corpus fund. Central T. Co. v. Continental T. Co., 86 Fed. 517, 30 C. C. A. 235, certiorari denied; 171 U. S. 687, 18 Sup. Ct. 940.

The receiver's expenses of operating an entire system, consisting in part of leased lines, will be made a burden upon the leased property to the extent that they can not be paid out of the assets of the lessee. Pennsylvania Steel Co. v. New York C. Ry. Co., 171 Fed. 1019; although the cost of repairs on a leased road which are not authorized by the lease can not be imposed upon the interests of the lessor. Felton v. City of Cincinnati, 95 Fed. 336, 37 C. C. A. 88.

Even though the operation of a road had been discontinued because of its dangerous condition through lack of repair, danger of forfeiting the franchise and prospect of increased business may warrant incurring necessary expense for repairs and renewing operation. Central Bank, etc., Co. v. Greenville, etc., R. Co., 248 Fed. 350.

Where a gas and electric power company, controlling and operating as a system, several separate companies, was under a receivership, and the plant of one of the companies was in such a state of disrepair as to render it dangerous and incapable of giving adequate service to the public, the court was justified in causing the plant to be properly repaired before permitting foreclosure of a separate mortgage on that particular plant. Gay v. Hudson River Electric Power Co., 166 Fed. 771.

In this same receivership, in connection with another matter (173 Fed. 1003), the court said: "The court is not only to protect and preserve the physical properties as such, but the business, and keep them running as a 'going concern' or business, or as 'going concerns or businesses.'

of proceeds of the sale of the mortgaged property left after restorations. In theory there might be a balance fund after the mortgage debt has been entirely paid; but probably there has not been any case in which a court has been called upon to give any attention to such a fund. The first three funds are entirely exhausted on distribution before restorations are made or the corpus fund itself invaded.

Claims are paid in the following order: (1) costs of the litigation, including the compensation of the receiver and of any others, as for instance, reorganization committees, whose activities are considered as having been for the general benefit of the estate; (2) receiver's indebtedness; (3) preferred claims, many of which, however, are not permitted to share in the corpus fund; (4) the mortgage debt; (5) general creditors; general creditors may participate in any of the funds not covered by

In a field where competition exists, as it does here, it is evident that power to authorize the making and extension and renewal of contracts for the making and supply of gas generators and supply of electrical power or energy must reside in this court, or it has no power to continue or protect the business of these corporations, or of any one of them. Let go the business, let it pass to competitors, and the value of these properties of these corporations is substantially destroyed—largely, depreciated, in any event. It is also a self-evident proposition that the court can not continue this business on any 'hand to mouth' basis. Business of this kind is not done, and can not be done, in that way. It is a business generally speaking of producing, transporting, and selling—here the production, transportation and delivery and sale of electrical power and gas. The business of one company can not be dropped, even if not immediately of much profit, without injury to that company and to all the others. Again, this particular corporation, and each of the corporations has many general creditors, as well as secured creditors (bondholders) and it is the promise and duty of the court to protect and preserve the rights and interests of all those of both classes. Here there is an equity for the general creditors, as fully and plainly appears. Hence this court is not to consult the wishes of the bondholders alone. A court of equity would act unjustly, unwisely, and show favoritism, should it do so. Still the court has no right to sacrifice the interest of either class, or to subordinate the rights of one to those of the other."

the mortgage, but such funds are exhausted in favor of the first three classes of claims before restorations are made or the corpus fund used; (6) stockholders. Special lien claimant, such as judgment or mechanic's lienors are taken care of as their rights may dictate.

On reorganization claimants are taken care of in this same order. Usually cash must be provided to take care of the first three classes. A detail in the reorganization of the Metropolitan Street Railway Company of New York is spoken of as follows, the corpus mentioned being that of a lessor company, and the claims mentioned having accrued under the management of the lessee: "This proceeding is peculiar also in the circumstance that, at no expense to themselves, with no assessment laid against them, the holders of these tort claims (damages for injuries or deaths) were permitted and invited to come in and share in this acquisition of the corpus, to which their debtor had no title, on the same basis as the holders of first mortgage bonds. Out of $1,900,000 of such claims proved, $1,465,000 availed of this unique opportunity. Those of the claimants who neglected or rejected such opportunity seem hardly in a position to insist that new law should be made in this case in order to classify them with operating supply claimants."[14]

§ 390. Issuance of Receiver's Certificates.

Inasmuch as the general subject of receiver's certificates is one which concerns receiverships in general and the same general principles apply quite generally to all corporations, we will discuss the subject in a special chapter devoted to that subject and will there discuss those features which are particularly applicable to public utilities.[1]

14 Pennsylvania Steel Co. v. New York C. Ry. Co., 208 Fed. 168, at 185.

1 See the chapter devoted to Receiver's Certificates.

§ 391. Executory Contracts of the Public Utility Itself.

In the nature of things it is probably true that the executory contracts that are passed over from an insolvent public utility company to its receiver are greater in number and more varied in character than in other receivership cases. However, for the most part, the principles that govern the question as to whether or not such contracts are binding upon the receiver are the same.[1] "An executory contract is not one that is not binding until it is renounced; it is one that is not binding until it is adopted."[2] The receiver is not the assignee of the contract. If the contract is secured by a lien or is one that runs with the land, the receiver, of course, is bound by it. Such a contract is executory simply in the sense that something remains to be done under it on one side or the other; and that must be done. The obligation placed upon the company may be the consideration that it was to pay for some of its property or some privilege enjoyed by it; if the obligation is not fully performed at the time of the receivership and the receiver continues to hold the property or exercise the privilege he must perform the obligation.[3] If, however, the performance of the obligation is not protected by a lien and amounts simply to a method of paying a debt or interest upon a debt specific performance can not be enforced against the receiver. Contracts that do not run with the land, nor

The relation of principal and agent is created by contract, and the mere appointment of a receiver for the principal does not ipso facto revoke the agency. Missouri K. & T. Ry. Co. v. Hudson (Okl.) 175 Pac. 743 as bearing on the subject. See also Leupold v. Weeks, 96 Md. 280, 53 Atl. 937; Simpson v. East Tennessee V. & G. Ry. Co., 89 Tenn. 304, 15 S. W. 735; Grady v. Richmond & D. R. Co., 116 N. C. 952, 21 S. E. 304; Farris v. Receivers of Richmond & D. R. Co., 115 N. C. 600, 20 S. E. 167; Central Trust of N. Y. v. St. Louis, A. & T. Ry. Co., (C. C.) 40 Fed. 426.

2 Kansas City So. R. Co. v. Lusk, 224 Fed. 704, 140 C. C. A. 244.

3 Joy v. City of St. Louis, 138 U. S. 1, 34 L. Ed. 843, 11 Sup. Ct. 243; Fidelity Insurance, etc., Co. v. Norfolk, etc., R. Co., 72 Fed. 794.

impose any lien upon the property, nor convey any title in the utility itself nor any interest in it, nor secure any particular sum of money can not be specifically enforced against the receiver, and he may renounce them.[4] Where a contract has been fully performed on one side and nothing remains but the turning over of a certain fund in the hands of one party but belonging to the other, the fact that the contract was illegal in its inception can not serve as a valid excuse for retaining the money.[5]

A court may make an order to the effect that an executory contract will not be binding until the court has expressly directed the receiver to adopt it. Under an order of that character the receiver may operate under the contract without losing the right to reject it.[6]

§ 392. What Constitutes an Adoption or Rejection of Executory Contracts.

A receiver can not adopt part of an indivisible contract and reject the remainder.[1] In any case where a receiver is entitled to an election between adoption and renouncing he is entitled to a reasonable time in which to make his choice. What will constitute a reasonable time depends upon circumstances. The mere taking possession of and using leased property, such as cars or other equipment

[4] Intercontinental Rubber Co. v. Boston & M. R. R., 245 Fed. 127.

See Baker v. Central T. Co., 235 Fed. 17, 148 C. C. A. 511, in which a traffic agreement by which the receiver's company was to allow the other company a certain extra percentage of the business whenever said company needed the money to pay interest on its bonds was held to be such a contract as the receiver might renounce.

An agreement to grant the express privileges over a road until a certain loan, which was made to the railroad by the express company at the time the agreement was made may be renounced by the receiver. Southern Express Co. v. Western U., etc., R. Co., 99 U. S. 191, 25 L. Ed. 319. See also, Central Trust Co. v. Marietta & U. G., etc., Co., 51 Fed. 15, 16 L. R. A. 90.

[5] Central Trust Co. v. Ohio, etc., R. Co., 23 Fed. 306.

[6] Landon v. Public Utilities Commission, 245 Fed. 950.

[1] Easton v. Houston, etc., R. Co., 38 Fed. 784.

for a period of time need not constitute an adoption of the lease, especially in the absence of some action on the part of the lessor to obtain an election,[2] but use of it during the remainder of the term of the lease would.[3]

2 Farmers' Loan, etc., Co. v. Chicago & A. R. Co., 42 Fed. 6.

3 Easton v. Houston, etc., Co., 38 Fed. 784.

The court does not bind itself or its receiver eo instanti by the mere act of taking possession of the leasehold property. After taking possession of such property the receiver is entitled to a reasonable time in which to ascertain the situation of affairs and determine whether it will be advantageous to the parties in interest, or the estate, for him to retain and use the leasehold property. In all such cases the receiver should act with reasonable promptness, and in the meantime do no act that may be construed as an adoption of the lease. St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. Ed. 690, 12 Sup. Ct. 795; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787; Turner v. Richardson, 7 East, 335; Broome v. Robinson, cited in 7 East 339; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 322, 35 L. Ed. 1025, 1028, 12 Sup. Ct. 235; Commonwealth v. Franklin Ins. Co., 115 Mass. 278; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915, 12 Sup. Ct. 104; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co., 58 Fed. 268; Farmers' Loan & T. Co. v. Northern P. R. Co., 58 Fed. 257; United States Trust Co. v. Wabash Western R. Co., 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. 86; Sency v. Wabash Western R. Co., 150 U. S. 310, 37 L. Ed. 1092, 14 Sup. Ct. 94; Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309. But see People v. Universal L. Ins. Co., 30 Hun (N. Y.) 142.

What acts of the receiver may be construed as an acceptance of the lease must, in the very nature of things, be determined from the circumstances surrounding each particular case, and is often a question of much difficulty. In the matter of assignees in bankruptcy where the same rules apply, it has been held, that advertising the leasehold for sale with a view of ascertaing its value is not an adoption, but it would be if a bid were accepted. Lord Ellenborough, in Turner v. Richardson, 7 East, 335; or if at the sale the assignee bid in the property, Hastings v. Wilson, Holt, N. P. 290; or conveyed it, Page v. Golden, 2 Stark. 309. As to what would be a reasonable time in which to make the election, see ex parte Fletcher, 1 Deac. & Ch. 318; Ex parte Scott, 1 Rose, 446, note; Ex parte Blandy, 1 Deac. 286.

The general rule as to what constitutes an acceptance of a lease by an assignee in bankruptcy is stated by Ch. J. Fuller in Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 99, 36 L. Ed. 632, 638, 12 Sup. Ct. 787, as follows: "If, however, they accepted a bidding, or dealt with the estate as their own, or used it in a manner injurious

An express rejection is not always necessary to show that there has not been an adoption. In the case of rented equipment the receiver may pay the stipulated rent for a period of months but if he does so under the sanction of the court as a temporary proposition his conduct in the premises does not indicate an adoption of the lease.[4] An order of court acquiesced in by the parties may amount to a stipulation modifying a contract.[5] Presenting a contract to the court on several occasions for the purpose of obtaining orders that amount to recognition of it may indicate adoption.[6] The fact that the receiver within a reasonable time has petitioned the court for permission to renounce a contract precludes the possibility of an adoption by conduct or of an estoppel against rejection.[7]

§ 393. Liability Created by Adoption of Executory Contract.

Where the receiver adopts an executory contract he naturally makes such contract one of the obligations of the receivership and subjects the receivership to its obligations and such liens as may be created by it.[1]

to the persons otherwise entitled, they are not within this protection." The same doctrine is held in Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; American File Co. v. Garrett, 110 U. S. 288, 28 L. Ed. 149, 4 Sup. Ct. 90; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915, 12 Sup. Ct. 104; Martin v. Black, 9 Paige (N. Y.) 641, 38 Am. Dec. 574; Commonwealth v. Franklin Ins. Co., 115 Mass. 278; Berry v. Gillis, 17 N. H. 9, 43 Am. Dec. 584; Hoyt v. Stoddard, 2 Allen (Mass.) 442.

4 Platt v. Philadelphia R. R. Co., 84 Fed. 535, 28 C. C. A. 488.

5 Thomas v. Cincinnati, etc., R. Co., 77 Fed. 667.

A corporation receiver, unless authorized by court appointing him, is without authority to make any binding agreement as to the modification or abrogation of a contract between the corporation of which he was receiver and a third person. St. Joseph Gas Co. v. Barker, 243 Fed. 206.

6 South Carolina, etc., R. Co. v. Carolina, etc., Ry. Co., 93 Fed. 543, 35 C. C. A. 423.

7 Peabody Coal Co. v. Nixon, 226 Fed. 20, 140 C. C. A. 446.

1 Charlotte, Columbia & Augusta R. R. Co. v. Chester & L. R. R. Co., 118 N. C. 1078, 24 S. E. 769.

A receiver adopting a lease takes it subject to any lien created

§ 394. Liability Created by Rejection of Executory Contract.

When a receiver rejects an executory contract under which a service was to be rendered to the company and paid for by the company, the receiver, if he accepts the service during the period he used to determine his policy with reference to the contract must pay for the service. However, he pays the reasonable value of the service, not necessarily the price stipulated in the contract. What the reasonable price is is to be determined by the ordinary rules of evidence governing such a matter. The stipulated price may be *prima facie* evidence of the reasonable price, or value.[1] In many cases it would not be. Under a car-trust agreement, either in the form of a conditional sale or a lease, under which the company was to pay a certain sum periodically with the right to obtain title when the total payments equaled a stated sum, the amount to be paid periodically by the company would not indicate what the receiver should pay, which would be only reasonable rental for the property during the period he used it.[2] If the contract that the receiver rejects is

thereby for rent. Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179; Lane v. Washington Hotel Co., 190 Pa. 230, 42 Atl. 697.

A contract of a corporation is not binding on its receiver, unless it has been affirmatively adopted by him. Landon v. Public Utilities Commission of Kansas, 245, Fed. 950; St. Joseph Gas Co. v. Barker, 243 Fed. 206.

Receivers are liable for the rentals of branch roads operated as an entire system. Central R. & Bkg. Co. v. Farmers' Loan & T. Co., 79 Fed. 158.

Receivers who take possession of cars held by an insolvent railroad company under a lease, with full authority to do so, and operate the cars with full knowledge of the lease and the burdens assumed by the company, are bound by the lease as assignees of the company. Easton v. Houston & T. C. R. Co., 38 Fed. 784.

1 Receivers during the time they used electric current before composition with the creditors, are liable for the ordinary and reasonable rate for temporary use though the debtor had a contract for a lower rate under which he was in arrears. Odell v. Bedford Co., 224 Fed. 996.

2 Kneeland v. American L., etc., Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Southern Express Co. v. Western, etc., R. Co., 99 U. S. 191, 25 L. Ed. 319. See, Savannah, etc., R. Co. v.

one calling for a service to be rendered by the company and paid for by the other party, the receiver is bound by the contract as to price so long as he operates under it.[3] The rejection of an executory contract by a receiver constitutes a breach of the contract dating back to the beginning of the receivership; and if damages of a provable sort flow from the breach the other party may present a claim therefor against the estate.[4]

Jacksonville, etc., R. Co., 79 Fed. 35, 24 C. C. A. 437; Platt v. Philadelphia, etc., R. R. Co., 84 Fed. 535, 28 C. C. A. 488.

[3] Manhattan Trust Co. v. City of Dayton, 59 Fed. 327, 8 C. C. A. 140. See General Electric Co. v. Whitney, 74 Fed. 664, 20 C. C. A. 674.

An action by a receiver to collect moneys due under a contract with the company is ancillary to the receivership and may be instituted in the receivership court. Keihl v. City of South Bend, 76 Fed. 921, 22 C. C. A. 618, 36 L. R. A. 228.

[4] In as much as claims of this sort are not preferred claims (See § 412, infra), there seems to be a bit of judicial humor in this statement: "We think we can take judicial knowledge of the fate of contracts made by an insolvent railroad company, which passes into the hands of a receiver, and are not assumed by him. Such contracts are practically ended. Kansas City, etc., R. Co. v. Lusk, 224 Fed. 704, 140 C. C. A. 244.

In this case it was held that a contract for the use of another road's terminal could be rejected, opposition to such action being resisted on the ground that the receiver was rejecting the contract because his company had obtained other terminals, that the arrangement by which this had been accomplished was illegal, and that, therefore, the receiver was not before the court with clean hands, being overruled as raising an issue with which the court at the time and in the matter before it was not concerned. An order granting a receiver's petition for permission to reject an executory contract is final (in the words quoted above, it ends the contract) and is appealable. Idem.

A receiver is not bound by a contract of the company with its employees concerning the manner of their discharge. In re Seattle, etc., R. Co., 61 Fed. 541, where a receiver discharges an employee contrary to the contract of his employment by the company, the receiver can not make the employee's claim for damages due to the breach a preferred claim, nor a charge against his own account. Whightsel v. Felton, 95 Fed. 923.

When a railroad company is, pursuant to an order of the receivership court, temporarily operating a receiver's road and using cars that were in the receiver's possession under a contract not

§ 395. Status of Leases of the Public Utility Operative Property.

A lease of public utility operative property, held by a company at the time it passes under a receivership, is an executory contract. "When the property embraces a leasehold estate it is his (the receiver's) duty to take possession of it, but he does not by such act become assignee of the term."[1] With reference to a leasehold

yet adopted by him, if the contract is subsequently rejected and the cars returned to their owner, the operating company being under contract to pay all operating expenses, is obligated to pay only reasonable rental for their use. Platt v. Philadelphia, etc., R. R. Co., 84 Fed. 535, 28 C. C. A. 488.

In Barber Asphalt Paving Co. v. Forty-second St., etc., Ry. Co., 180 Fed. 648, 103 C. C. A. 614 (reversing Barber Asphalt Co. v. Forty-second St., etc., Ry. Co., 175 Fed. 154) a mortgage was given by a street railway company to secure bonds running for a long term of years. The company owned a controlling interest in constituent companies. The mortgage required the mortgagor's stock in those companies to be pledged with the trustee of the mortgagee and it also required that the constituent companies should create no liens on their properties and incur no indebtedness other than for current operating expenses for a period not exceeding six months, except to the mortgagor company, and the mortgage also provided that all claims against the constituent companies then held or thereafter acquired by the mortgagor should be held in trust for the trustee of the mortgagee as additional security for the bonds issued under the mortgage and that such claims should be assigned to it upon demand. It was held that the lessee of the mortgagor, succeeding to all of its property rights subject to the mortgage, held any indebtedness from the constituent companies to it for operating expenses or otherwise, subject to the trust created by the mortgage since the six months' provision was intended only to give that length of time for the payment of such expenses by the constituent companies or by the mortgagor, its successor or assigns, but such indebtedness so incurred by them to receivers of the lessee, who were operating the system was not subject to the mortgage trust mentioned.

A receiver of a street railroad system will not be required by the court to continue an arrangement by which it furnished power and the use of its tracks to an independent company without compensation. Central Trust Co. v. Third Ave. R. Co., 165 Fed. 494.

1 Pennsylvania Steel Co. v. New York C. Ry. Co., 198 Fed. 721, 117 C. C. A. 503.

contract the receiver's position is much the same as with reference to other executory contracts and most of the general rules, as set forth in the preceding section, apply.[2]

[2] The receiver is entitled to a reasonable time to decide whether or not he will adopt the lease, and unless and until he does so he is not liable upon its covenants to pay rent. Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503, reversing decrees (C. C.); In re New York City Ry. Co., 188 Fed. 339 and (C. C.); Pennsylvania Steel Co. v. New York City Ry. Co., 188 Fed. 343, modifying decrees (C. C.) Pennsylvania Steel Co. v. New York City Ry. Co., 189 Fed. 661, 190 Fed. 609, and (D. C.) 189 Fed. 661, 194 Fed. 543; Central Trust Co. v. Wabash, etc., Ry. Co., 34 Fed. 259; Quincy M., etc., R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787.

A court does not bind itself or its receivers to pay the agreed rentals of a leased line eo instanti by the mere act of taking possession. Reasonable time necessarily had to be taken to ascertain the situation of affairs. United States Trust Co. v. Wabash West. Ry. Co., 150 U. S. 287, 300, 37 L. Ed. 1085, 14 Sup. Ct. 86, 90.

A reasonable time is allowed to the receiver within which to adopt or reject leases upon branch railroads held by the receivership. (C. C. A. 1897) Mercantile Trust Co. v. Farmers' Loan & Trust Co., 81 Fed. 254, 26 C. C. A. 383, affirming decree Mercantile Trust Co. v. St. Louis & S. F. Ry. Co. (C. C. 1893) 71 Fed. 601; (certiorari denied Mercantile Trust Co. v. Farmers' Loan & T. Co., 168 U. S. 710, 42 L. Ed. 1213, 18 Sup. Ct. 944).

Mere payment by receiver of compensation required by the lease for use of a street railroad does not constitute a final adoption of the lease by him. Pennsylvania Steel Co. v. New York City Ry. Co., 176 Fed. 471.

For the purpose of preserving the system and continuing operation until a permanent receiver may be appointed and have time to act, a temporary receiver may be ordered to comply with terms of the lease and a provision in the order to the effect that such action shall be without prejudice to the receiver's right to abandon the lease is effective. Intercontinental Rubber Co. v. Boston & M. R. R., 245 Fed. 127.

An order directing a receiver temporarily to pay rent in order to prevent a forfeiture of the lease may effectively provide that such payment shall be without prejudice to the receiver's right subsequently to reject the lease. Pennsylvania Steel Co. v. New York C. Ry. Co., 175 Fed. 812.

When a system has been disrupted by foreclosure of mortgages on part thereof, the situation renders inoperative a provision of a lease postponing for one year after default the lessor's right of re-entry. Pennsylvania Steel Co. v. New York C. Ry. Co., 165 Fed. 463.

A claim of the lessor for rent accruing before the receivership is not entitled to priority over lien creditors. It is an unsecured lia-

There is an important distinction, however, relative to leases of utility operative property, with reference to the obligation placed upon the receiver to pay rent for the time he uses the property, if he finally rejects the lease. Such a lease is not like that of a business building by a commercial corporation nor even of equipment and similar property by a public utility corporation. In the latter cases lessors, as a practical proposition, can readily find other uses for their property if it is suddenly turned back to them. But a public utility company, whose operating organization has been disbanded because its property is being operated by a lessee, can not itself suddenly take hold of, nor find another lessee ready to take hold of the property and operate it so as to prevent danger of forfeiture of franchises, or deterioration, or other loss from non-user. If the lessor is so situated that it can "knock at the door of the court and demand back its property, it is, of course, in a position to demand the stipulated rent."[3] But if the lessor is not so situated and must leave the property for a time in the hands of the receiver, and the latter can not make it a profitable part of the estate and must turn it back to the owner, then the presumption is that he has been operating it for the benefit of the lessor. The general rule, then, is with exceptions for special cases, such as branch or feeding lines that were never operated for any profit they themselves could make, that all the lessor is entitled to is the net income that the receiver has been able to realize from the property; and

bility and must rank along with all other claims of the same class on final distribution of the assets. Huidekoper v. Hinckley Locomotive Works, 99 U. S. 258, 25 L. Ed. 344; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Union Trust Co. v. Illinois M. R. Co., 117 U. S. 434, 470, 29 L. Ed. 963, 975, 6 Sup. Ct. 809; Thomas v. Western Car Co., 149 U. S. 95, 37 L. Ed. 663, 13 Sup. Ct. 824; New York P. & O. R. Co. v. New York, L. E. & W. R. Co., 58 Fed. 268.

3 Farmers' Loan, etc., Co. v. Northern Pac. R. Co., 58 Fed. 257; Pennsylvania Steel Co. v. New York C. Ry. Co., 198 Fed. 721, 117 C. C. A. 503, 512.

that, if the receiver has suffered actual loss, the lessor must reimburse him.[4]

A receiver who adopts a lease must pay the stipulated rental, including collateral payments, in the nature of rental, such as taxes, interest on bonds, and repairs.[5]

[4] Quincy, etc., R. R. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632, 12 Sup. Ct. 787; United States Trust Co. v. Wabash, etc., R. R. Co., 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. 86; Park v. New York, etc., R. Co., 57 Fed. 799; New York P. & O. R. Co. v. New York L. E., etc., R. Co., 58 Fed. 268; (1897) Mercantile Trust Co. v. Farmers' Loan & Trust Co., 81 Fed. 254, 26 C. C. A. 383, affirming decree Mercantile Trust Co. v. St. Louis & S. F. Ry. Co. (C. C. 1896) 71 Fed. 601; (certiorari denied Mercantile Trust Co. v. Farmers' Loan & Trust Co., 168 U. S. 710, 42 L. Ed. 1213, 18 Sup. Ct. 944); Pennsylvania Steel Co. v. New York City Ry. Co., 219 Fed. 939; Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503.

See also: In re New York City Ry. Co., 188 Fed. 339 and (C. C.); Pennsylvania Steel Co. v. New York City Ry. Co., 188 Fed. 343, modifying decrees (C. C.) Pennsylvania Steel Co. v. New York City Ry. Co., 189 Fed. 661, 190 Fed. 609, and (D. C.) 189 Fed. 661, 194 Fed. 543.

A receiver's claim for a deficit against the lessor is an expense of the receiver's operation and, if necessary, when the lessor is also under a receivership, may be paid out of the latter's corpus fund. Pennsylvania Steel Co. v. New York C. Ry. Co., 198 Fed. 721, 117 C. C. A. 503.

If a mortgagee, under the terms of his mortgage, is entitled to have the property, including a leased branch or feeding line, operated as a unit, the receiver will not be permitted to abandon the lease. Mercantile Trust Co. v. St. Louis, etc., Ry. Co., 71 Fed. 601.

Because the lessor, while full rent is being paid, is not in a position to declare a forfeiture, a receiver, who, while operating a leased road, has been paying full rental, can not on subsequently abandoning the lease, have his former payments credited as having been paid on account of net income. Pennsylvania Steel Co. v. New York C. Ry. Co., 225 Fed. 734, 141 C. C. A. 6.

A mortgagee of a leased road, which is operated by a receiver of the lessee at a loss, has no equitable right to have an amount equal to what is claimed to be the rental value of the leased and mortgaged road taken from the income derived by the receiver from the operation of another road owned by the lessee and applied to the mortgage debt. Cox v. Terre Haute, etc., R. Co., 133 Fed. 371, 66 C. C. A. 433.

[5] Decree Mercantile Trust Co. v. Atlantic & P. R. Co. (C. C. 1897), 80 Fed. 18, affirmed; United States Trust Co. v. Mercantile Trust Co., 88 Fed. 140, 31 C. C. A. 427; Pennsylvania Steel Co. v. New York City Ry. Co., 176 Fed. 471; Mercan-

Under the general rule that a court will protect its own receiver in every necessary and equitable way, the court will not permit a forfeiture of a leasehold interest to be declared against the receiver if he has acted with due diligence, under the circumstances, in paying the rent, or if there exists an equitable ground of estoppel against the lessor.[6]

§ 396. Duty of Receiver Respecting Wages of Operating Employees.

A receiver is generally authorized by the order of the court to employ needful agents and servants on such compensation as he deems reasonable with leave to apply to the court for instructions from time to time.[1] But by an act of Congress the employees of a railroad company in the hands of a receiver are given a specific right to be heard in respect to the terms and conditions of their employment. Thus in the Arbitration Act of July 15, 1913, one of the provisions (§ 8674 U. S. Comp. Statutes, 1918) provides as follows: "Whenever receivers appointed by a federal court are in the possession and control of the business of employers covered by this act the employees of such employers shall have the right to be heard through their representatives in such court upon all questions affecting the terms and conditions of their employment; and no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway or in the cus-

tile Trust Co. v. Farmers' Loan, etc., Co., 81 Fed. 254, 26 C. C. A. 383; Pennsylvania Steel Co. v. New York City Ry. Co., 176 Fed. 471; Central Trust Co. v. Continental Trust Co. of City of New York, 86 Fed. 517, 30 C. C. A. 235, certiorari denied, 171 U. S. 687, 18 Sup. Ct. 940.

6 Johnson v. Lehigh Valley Traction Co., 130 Fed. 932.

1 Atlantic Trust Co. v. Chapman, 208 U. S. 360, 52 L. Ed. 528, 28 Sup. Ct. 406, 13 Ann. Cas. 1155.

tomary places on the premises of other employers covered by this act."

Prior to the enactment of this act the matter of fixing the wages of the employees of the receivership and reducing them when deemed necessary were matters attended to by the receiver subject to review by the receivership court,[2] but the practice recommended by the courts was that the receiver should not reduce wages without giving the employees an opportunity to be heard in regard to the matter.[3] The right of the receiver to act in matters relative to the employees of the railroad property involved in the receivership is not an arbitrary one.[4] The court, however, will not interfere with the actions of the receiver in regard to the details of management unless there appears to be an abuse of discretion. The court necessarily can not take a hand in all the details of management and must rely upon the discretion of its receiver in such matters. If the court becomes convinced that the policy of management by its receiver amounts to an abuse of discretion, the proper remedy is to displace him by a new receiver to whom such matters can be more satisfactorily intrusted.[5]

§ 397. Extent of Protection Given by Court to Receivers in Operating Railroad.

The rights of the receiver in respect to the business of operating the railroad under the orders of the court are not different in any respect from those of a private railway corporation. The only difference in the remedy which the courts will apply to prevent or punish a viola-

[2] In Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. 17, a 10 per cent reduction in wages by the receiver was approved. See, also, United States Trust Co. v. Omaha, etc., Ry. Co., 63 Fed. 737.

[3] Ames v. Union Pac. Ry. Co., 60 Fed. 674. See, also, in this connection, Ames v. Union Pac. Ry. Co., 62 Fed. 7.

[4] United States v. Kane, 23 Fed. 748.

[5] Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 59 Fed. 514.

tion of the orders of the court when such a violation prevents or impedes the operation of the road and is intended to do so.[1]

The general policy of the court in this respect is shown by the following quotation from a Supreme Court decision[2] in which the court said:

"Railroads are common carriers, and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation."

Any unlawful interference with the operations of the railroad while in the hands of the receiver constitutes a contempt of court since it is in the nature of a direct disobedience or resistance to the orders of the court.[3]

In one of the well-known cases[4] the court said: "There is no doubt that Phelan intended to prevent utterly the operation of the Southern road by calling out the receivers employees. He wished thus to paralyze his business. He did the trust a very substantial injury by stopping all traffic for the time, by making it necessary for the

1 Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803.

2 Jay v. St. Louis, 138 U. S. 1, 50, 11 Sup. Ct. 243, 34 L. Ed. 843.

3 Secor v. Toledo, etc., R. Co., 7 Biss. 513, Fed. Cas. No. 12605; Re Doolittle, 23 Fed. 544; United States v. Kane, 23 Fed. 748; In re Higgins, 27 Fed. 443.

In re Wabash R. Co., 24 Fed. 217, it was held that one signed himself as chairman and sent a notice to an employee of a railroad in the hands of a receiver requesting him to stay away from its shops until the present difficulty, a strike being in progress, and stating that his compliance would command the protection of the employees of the road, was guilty of contempt in that he was interfering with the operation of the road.

4 Thomas v. Cincinnati, N. O. & T. P. R. Co., 62 Fed. 803.

receiver to pay heavy expenses for unusual police protection, and putting him to much trouble and expense by securing new employees. Now, if the receiver were a private corporation, could he recover damages for the injury thus inflicted on the business of the road? A malicious or unlawful interference with the business of another by inducing his employees to leave his service is an actionable wrong, and subjects the offender to liability for the loss so occasioned. In Walker v. Cronin, 107 Mass. 555, it was held that a count in a declaration which alleged that a plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendants, well knowing this, did maliciously and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services and profits and advantages, and was put to great expense to procure other suitable workmen, and was otherwise injured in his business—stated, a good cause of action. See, also, Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307.

"The real question, therefore, is whether the act of Phelan in instigating and inciting the employees of the receiver to leave his employ was without lawful excuse, and therefore malicious. The question is not whether such an act would subject Phelan to punishment by indictment and trial under the criminal laws, but whether the act was unlawful in the sense that he could be made to pay damages for the loss occasioned. Of course if the act would subject him to punishment for an indictable misdemeanor and crime, a *fortiori* would the act be unlawful; but his act may be a contempt without being a crime."

The court will not allow rules of a union of railway employees to interfere with the employees of the receiver handling freight from other roads which are under the ban of the union.[5]

And in one case[6] where the obstruction to the operation of the railway system was attempted to be justified in a contempt proceeding on the ground of the right of assembly and free speech the court remarked: "If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue, rather than his hand."

§ 398. Adjustment of Labor Grievances by the Court Itself.

The receiver appointed by the court to manage and operate a railroad pending the receivership proceedings is an officer of the court and in such capacity represents all parties interested in the property. The persons employed by him occupy such a relation to the court that, in a controversy between them and the receiver concerning any wrongs and injuries arising out of their employment, they may be heard by the court upon a proper application being made to it. And when such an application is made it becomes the duty of the court to consider the same, and if facts set forth in the application are of a character to make it proper to further consider them, the receiver should be required to answer them. The court will then be able from the pleadings to determine whether the issue is of such a character as to make it proper to hear testimony and make a formal investigation, either by a reference to a master or by hearing witnesses in open court. The receiver from the nature of the qualities and abilities for which he is selected, is expected to look after the details of the business and to

[5] Waterhouse v. Comer, 55 Fed. 149, 19 L. R. A. 403.

[6] Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. 803.

apply to the court from time to time when special instructions seem necessary. The very nature of his relation to the court and his duties in respect to those interested in the property require him to exercise the largest degree of discretion possible in the discharge of his duties. The supervision of the management by the receiver is in the court which appointed him and in which the primary jurisdiction attached. His discretion in such management will not be interfered with except where some abuse and wrong is manifest.[1]

The position of the court in regard to grievances and complaints by the employees of its receiver operating a railroad has always been to remedy any wrongs or abuses which are clearly shown to exist.[2]

Insofar as such grievances relate to the question of wages, whether in regard to lowering or increasing them, the rule has been stated as follows:[3]

1 Farmers' Loan & Trust Co. v. Central, etc., Banking Co., 166 Fed. 333. In the above case the court refused to sanction the discharge of a conductor of long service upon unsubstantiated reports of detectives as to misconduct on his part.

2 United States Trust Co. v. Omaha & St. L. R. Co., 63 Fed. 737; In re Wabash Ry. Co., 24 Fed. 217; United States v. Kane, 23 Fed. 748.

3 An order of the court, adopting a schedule of wages to be paid by its receivers, is not violated by them in respect to employees receiving monthly wages, by varying the train service to meet changing conditions of traffic, even though such change requires somewhat longer hours of service and more miles of service; it appearing that the total service required is not unreasonable in itself or by comparison with the character of the service required on other lines. Dexter v. Union Pac. Ry. Co. (C. C.), 75 Fed. 947.

Upon the theory that by a rule of comity the courts of another state would give heed to its orders, made for the purpose of unity of action and for the best interests of the whole system.

In Guarantee, etc., Deposit Co. v. Philadelphia, R. & N. E. R. Co., 69 Conn. 709, 38 L. R. A. 804, 38 Atl. 792, the receiver reduced the schedule of wages existing in respect to the engineers and firemen but the court by its order required him to resume payment of the old schedule. The order was questioned insofar as it affected the system outside of the jurisdiction of the court in respect to work done in the interstate character

"The Superior Court has the power to direct a receiver in respect to the wages to be paid in the management of a property under its charge; but it is a power to be exercised only in clear cases of necessity, and with exceeding caution. A main purpose of appointing a receiver is to remit to him those details of management which can not well be administered by the court. Where plainly necessary, the power may be exercised either by an order establishing a schedule of wages, or by the appointment of a receiver in whose discretion the court can place greater confidence. The court may act on the application of a receiver or without any application. The situation may be such as to justify the employees of the receiver in bringing the subject to the attention of the court by an appropriate petition, and if an investigation is deemed requisite, they may properly be heard."

Judge Ricks in passing on the duties of the court in relation to wage controversies, in speaking of the propriety of the court in determining the details of such matters, said:[4] "Courts are not constituted to manage and operate railroads. The judges, learned in the law though they may be, are not experienced in large business undertakings. They are not trained in those departments of railroad management which relate to the wages of employees, to the number necessary for the maintenance of the roadbed and for the safe operation of trains, to the tariffs for freight, and the purchase of supplies. Even if capable of mastering such details, their time will not permit. They are occupied in determining the legal rights

of the service. The court, however, disregarded the objection.

[4] Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 59 Fed. 514. This was an application made by a committee of employees to set aside a certain schedule of wages promulgated by the receiver to take effect in the near future and offering to produce testimony to show that there was no necessity on the part of the receiver to reduce wages as proposed in his schedule. The proceedings went into the question of the wages paid on other roads and the like.

of parties in litigated cases, and though in these days of large ventures and improvident railroad enterprises the courts are called upon, through receivers, to temporarily manage them pending litigation necessary to a foreclosure sale, yet as before stated, they assume this burden because it can not be evaded; but they manage them through receivers, selected for their experience and demonstrated ability, and they rely upon their experience and judgment to wisely and economically administer the trust."

In one of the earlier cases[5] which arose in 1893 a petition was filed by a committee of the Brotherhood of Locomotive Engineers seeking the action of the court to adjust and in fact arbitrate a controversy between their trade union and the receiver of the court relative to the wages and conditions of employment of the engineers. The court caused several conferences between its receiver and the engineers with a view to formulating an amicable agreement. The receiver objected to entering into any agreement with the organization basing his objections upon arguments against the propriety and policy of such agreements. The court, speaking through Judge Speer, in meeting the objections and deciding the matter, said: "The gravity and importance of the considerations thus presented are exceedingly great. The control, under any circumstances, by the courts, of contracts between the representatives of the immense values invested with corporations engaged in the public duty of transportation, and the laborers employed in the same service, will doubtless appear to many as novel and dangerous. It is well, however, to consider if a proper provision, by appeal to the courts, in the frequent and destructive conflicts between organized capital and organized labor will not afford the simplest, most satisfactory and effective method for the settlement of such controversies. Is it not

5 Waterhouse v. Comer, 55 Fed. 149, 19 L. R. A. 403.

the only method by which the public, and indeed, the parties themselves, can be protected from the inevitable hardship and loss which all must endure from the frequently recurring strikes.

"It will not be wise for those engaged with the maintenance of public order to ignore the immensity of the changes in the relations of the employing and employed classes, occasioned by the phenomenal development of commerce and the prevalence of labor organizations."

The court then adverted to the enormous amount of business done by the railroads and the fact that more than 80 per cent of the locomotive engineers of the United States belonged to the organization in question, and said: "Whether these facts and other facts equally significant will justify judicial control of contracts essential to the uninterrupted transportation of the country, in which the public is so vitally concerned, it is clear that where the property of railway or other corporations is being administered by a receiver, under the superintending power of a court of equity, it is competent for a court to adjust difficulties between the receiver and his employees, which in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership. Indeed, the power of the court to direct a contract between its officers does not appear to be questioned. The power of the court has always, on proper occasions, been exercised to protect the properties from the damaging and unlawful results of a strike of the laborers in its employ."

The court, however, in the above case refused to sanction a part of the agreement which would permit the members of the Brotherhood to refuse to handle cars belonging to a railroad with which it might have some labor controversy and the court made the agreement entered into as to its terms and conditions apply to all engineers

employed by the receiver whether members or non-members of the Brotherhood.

§ 399. Right of Employees to Quit Employment.

Employees of a railroad company which is in the hands of a receiver may abandon their employment if not satisfied with their wages, hours or conditions of employment and they may by persuasion induce other employees to do likewise, but if they combine together and resort to threats and violence in order to do so or overawe others by demonstrations of force, and thereby prevent a receiver from operating the road, it constitutes a conspiracy to do an unlawful act and places them in contempt of court.[1]

In other words, such employees may quit their employment in the same manner and under like circumstances of employees of public utilities under operation by the corporation rather than a receiver, provided that they do not intentionally disable the property from operation.[2]

§ 400. Right of Employees to Organize and Extent of Their Right to Strike.

The right of the employees of a receiver operating a railroad to organize into or join labor unions which may take collective action in regard to their terms and conditions of employment, is not questioned and has been recognized by the courts in dealing with the subject. In combination with this right to join such organizations must be considered the extent and circumstances under which the right to strike may be exercised. The whole subject was set forth very clearly by Judge Taft in an early case[1] in the federal court, in which he said: "Now,

1 United States v. Kane, 23 Fed. 748 (opinion by Mr. Justice Brewer).

2 In re Higgins, 27 Fed. 443.

1 Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. 803.

In Waterhouse v. Comer, 55 Fed. 149, 19 L. R. A. 403, the court

it may be conceded in the outset that the employees of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because of the necessity of the single employee may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have a right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they may choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood) that if Phelan had come to this city when the receiver reduced the wages of his employees by ten per cent and had urged a peaceable strike, and had succeeded in maintaining one, the loss to the business of the receiver would not be ground for re-

directed its receiver to enter into an employment contract with the Brotherhood of Locomotive Engineers although it refused to sanction certain clauses which had been proposed by the Brotherhood relative to the right to refuse to handle cars of companies with which the organization might have a labor dispute or controversy and the court required the same terms, conditions and regulations provided for in said contract to apply to all employees of like class of service regardless of whether they were members of the Brotherhood or not.

covering damages, and Phelan would not have been liable to contempt even if the strike much impeded the operation of the road under the order of the court. His action in giving the advice, or issuing an order based on unsatisfactory terms of employment, would have been entirely lawful. But his coming here and his advice to the Southern Railway employees, or to the employees of other roads, to quit, had nothing to do with their terms of employment. They were not dissatisfied with their service or their pay. Phelan came to Cincinnati to carry out the purpose of a combination of men. And his act in inciting the employees of all Cincinnati roads to quit service was part of that combination. If the combination was unlawful then every act in pursuance of it was unlawful, and his instigation of the strike would be an unlawful wrong done by him to every railway company in the city, for which they can recover damages, and for which, so far as his acts affected the Southern Railway, he is in contempt of this court.

"Now, what was the combination and its legal character? Was it an unlawful conspiracy? I do not mean by this an indictable conspiracy because that depends upon the statute; but was it a conspiracy at common law? If it was, then injury inflicted would be without legal jurisdiction, and malicious. A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542. What were the purposes of this combination of Debs, Phelan, and the American Railway Union board of directors? They proposed to inflict pecuniary injury on Pullman by compelling the railway companies to give up using his cars, and on the refusal of the railway companies to yield to compulsion, to inflict pecuniary injuries upon the railway companies

by inciting their employees to quit their services, and thus paralyze their business. It could not have been unknown to the combiners that the Pullman cars were operated by the railway companies under contracts with Pullman. Such large transactions are never conducted without contracts saving the rights of both sides, and the combiners had every reason to believe that it would be a violation of those contracts for the companies to refuse further to haul Pullman cars in their trains. One purpose of the combination was to compel railway companies to injure Pullman by breaking their contracts with him. The receiver of this court is under contract to Pullman, which he would have to break were he to yield to the demand of Phelan and his associates. The breach of a contract is unlawful. A combination with that as its purpose is unlawful, and is a conspiracy. Angle v. Railway Co., 151 U. S. 1, 14 Sup. Ct. 240.

"But the combination was unlawful without respect to the contract feature. It was a boycott. The employees of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relations with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury upon the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employees had the right to quit their employment, but they had no right to combine to quite in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of

injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby, that make the injury inflicted thereby unlawful, and the combination by which it is effected an unlawful conspiracy. The distinction between a lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers employment and a boycott is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts although unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota, and they are held to be unlawful in England. . . . But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone upon the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to the life and health and comfort of the people of this country as are the arteries on the human body, and yet Debs and Phelan and their associates proposed, by inciting the employees of all the railways in the country to suddenly quit their service without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employees. The merits of the controversy between Pullman and his employees have no bearing whatever on the legality of the combination

effected through the American Railway Union. The purpose shortly stated was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation can not be a lawful purpose of a combination and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise."

Although the right of employees to strike is fully recognized, if employees of a receiver operating a railroad, by threats and intimidations prevent other employees of the receiver from working, they may be found guilty of contempt of court.[2] But before such striking employees will be found guilty of contempt it must appear that their

[2] In Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803, Judge Taft, after citing authorities, said: "These authorities show that any wilful attempt by any one, with knowledge that the road is in the hands of the court, to prevent or impede the receiver from complying with the order of the court in running the road, when the attempt is unlawful, and as between private individuals, would give a right of action for damages, is a contempt of the order of the court. The rights of the receiver with reference to his business in conducting the railroad under order of the court are not different in any respect from those of a private railway corporation. The only difference is in the remedy which the courts will apply to prevent or punish a violation of them when such a violation prevents or impedes the operation of the road, and is intended to do so."

If those who strike attempt by threats and intimidation to prevent other employees of the receiver from working, they may be found guilty of contempt of court. Secor v. Toledo, etc., Ry. Co., 7 Biss. 513, Fed. Cas. No. 12605; King v. Ohio, etc., Ry. Co., 7 Biss. 529, Fed. Cas. No. 7800; Re Higgins, 27 Fed. 443; Re Doolittle, 23 Fed. 544; United States v. Kane, 23 Fed. 748; Frank v. Denver & R. G. R. Co., 23 Fed. 757 (opinion by Mr. Justice Brewer discussing the subject exhaustively).

See, also, in regard to strikes on railroads: Booth v. Brown, 62 Fed. 794; Southern California Ry. Co. v. Rutherford, 62 Fed. 796; United States v. Clune, 62 Fed. 798; United States v. Elliott, 62 Fed. 801; Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. 803; United States v. Agler, 62 Fed. 824; United States v. Debs, 63 Fed. 436; United States v. Elliott, 64 Fed. 27; United States v. Debs, 64 Fed. 724; Re Lennon, 150 U. S. 393, 37 L. Ed. 1120, 14 Sup. Ct. 123.

language or acts amounted to more than mere requests or persuasions and that it was of such a character and under such circumstances and with such demonstrations, open or covert, that it amounts to a threat or intimidation to the remaining employees.[3]

If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is none the less a contempt because the instrument which the contemner used to effect it was his tongue rather than his hand. In other words the question of right of assembly and free speech is not involved.[4]

Striking employees of a receiver may be restrained from in any manner injuring the property in the hands of the receiver or unlawfully interfering with or obstructing him in the performance of his duty of operating the receivership railroad by a conspiracy to quit his service,[5] but the court will enjoin employees from quitting the employment if done lawfully.[6] But it has been held that railroad employees can not be enjoined from striking and persuading their fellow employees from also striking provided no violence is being employed by them.[7] It has been held[8] that under the Clayton Act (Compiled

[3] United States v. Kane, 23 Fed. 748; In re Doolittle, 23 Fed. 544.

[4] Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803.

[5] Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. 803.

[6] Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

[7] Wabash R. R. Co. v. Hannahan, 121 Fed. 563.

See, also, Clayton Act. (38 Stat. 730 C. 323).

[8] United States v. Norris, 255 Fed. 423. In the above case Judge Sanborn said: "The strike in this case had nothing to do with a dispute over wages, as the jury found; so the Clayton Act is entirely inapplicable. I think that section 20 was intended to legalize lawful strikes, and peaceful, lawful persuasion of workmen. The orders which were issued to workmen in this case were dishonest and corrupt, and they were given no reason for their ceasing work. The statute has no application to such a situation. The Sherman Act is thus left in full force in cases like this. The Clayton Act does not authorize molestation of employees by strikers. Kroger Grocery, etc., Co. v. Retail, etc., Co. (D. C.), 250 Fed. 890. Nor does it apply to an unlawful act like a secondary boycott. United

Statutes § 1243d) that regular and proper strikes by trade unions employed in interstate commerce are not within the purview of the Sherman Anti-Trust Act although irregular and malicious strikes not entered into for the betterment of labor conditions are within the act. And under the Clayton Act the federal courts are prohibited from issuing restraining orders or injunctions in cases between employer and employee involving labor disputes unless necessary to prevent irreparable injury to property or property rights.

§ 401. Right of Strikers to Reinstatement by Receiver.

In Booth v. Brown[1] the court refused to direct its receiver to reinstate to their former positions as engineers and trainmen employees who had gone out on a sympathetic strike without any grievance of their own. The court stated that to do so would necessitate the dismissal of the men who had taken their places. The court refused to interfere with the discretion of the superintendent of the road in the matter but stated that the officers of the court kept no black list and suggested that the superintendent would undoubtedly place all applicants upon the waiting list and call upon them to fill places as fast as vacancies occurred. The court, however, condemned the action of the men in striking without justification or excuse and characterized their actions as tending to obstruct travel on the road.

§ 402. Right of Receiver to Recover Treble Damages Under Anti-Trust Act Against Unincorporated Labor Union.

A notable case involving both the right of the receiver of corporations alleged to have been injured by the actions of a very large organization of coal miners to recover treble damages under the provisions of the Sher-

States v. King (D. C.), 250 Fed. 908."

[1] Booth v. Brown, 62 Fed. 794.

man Anti-Trust law and the right to sue the organization, which was an unincorporated one, by its name as an entity, arose in Dowd v. United Mine Workers of America,[1] decided by the Circuit Court of Appeals for the Eighth Circuit. The court held that the receiver had stated a cause of action as against a general demurrer and that he had properly sued the organization as an entity under the name by which it was commonly known and called. The salient points of the decision appear in the following quotation from the opinion rendered by Judge Carland, in which he said: "The defendants, composing an organization of 400,000 miners, capable of doing great good or wrong, claim that they are not liable to be sued in the name of the association, but that the injured plaintiff must pursue the individual members whom he can show were liable for the injury, leaving the powerful organization to go free. We do not think it can be said that the defendants, United Workers of America and the local unions, are not associations existing under or authorized by law within the meaning of section 8, above quoted. But, if defendants are associations within the meaning of the law, it is next insisted that an incorporated association can not be sued in the name of the association. It is true that, in the absence of a specific statute to the contrary, the rule at common law, and under the codes, is that an incorporated association is not recognized as having a legal existence apart from its members. The action lies against the members individually, but not against the incorporated association in its collective capacity and name. In many of the states statutes have been passed changing this rule, so that unincorporated associations not having corporate powers

1 Dowd v. United Mine workers of America, 235 Fed. 1, 148 C. C. A. 495.

See, also, another phase of the litigation set forth in the above case in United Mine Workers of America v. Coronado Coal Co. (C. C. A.), 258 Fed. 829.

In this connection, see, also, section 321, supra.

may be sued in the name of the association. It has also been ruled that the common-law rule, that only entities known to the law are capable of being sued, may not only be modified by express enactment, but also by statutory implication. Taff Vale R. Co. v. Amalgamated R. Servants' Society, 85 L. T. Rep. (N. S.) 147.

"If we are correct in our view that voluntary unincorporated associations are included in the word "associations" as used in section 8, above quoted, then we are of the opinion that there is a clear and necessary implication that the association may be sued in its own name; otherwise the provision in the law that the association should be liable could not be enforced, and the law would fail as against all such associations, the remedy of the injured party being confined to an action against the mere agents and employees of the association, in most cases unable to respond in damages. The question as to the liability of an unincorporated labor organization to be sued under the act of July 2, 1890, in the name of the association, does not seem to have been discussed in any reported case which we have been able to find. The fact that labor organizations were before Congress seeking to be exempted from the act is of course conclusive evidence that Congress knew of such organizations, and did not intend to exempt them, while by Clayton Act, Oct. 15, 1914, § 4, a remedy is given to one injured in his business or property by reason of anything forbidden in the anti-trust laws, regardless of who shall commit the injury.

"The case of Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, and Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, known as the Danbury Hatters' Case, was twice before the United States Supreme Court. In this case the defendants were members of the United Hatters of North America and also of the American Federation of Labor. The association by name was not a party defendant, but

a large verdict in damages was recovered, and the recovery sustained on appeal. The case of Eastern States Retail Lumber Dealers' Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, was a case brought by the United States for a violation of the act of July 2, 1890, against various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland, and the District of Columbia, and the officers and directors of the associations. No objection to suing the defendants in the name of the association was made in this case. The case of the United States v. Workingmen's Amalgamated Council (C. C.), 54 Fed. 994, 26 L. R. A. 158, was cited with approval by the Supreme Court of the United States in Loewe v. Lawlor, 208 U. S. 301, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. No objection was made that this suit was against the association by name. The result of what has been said is that the United Mine Workers of America and the local unions were properly sued in the name of the association. Whether they are in fact liable in this action is another question, not now to be considered.

"We now come to the question as to whether the complaint states a cause of action. The complaint is necessarily voluminous as it describes an alleged conspiracy. A copy appears in the margin.[2] It will not be necessary or convenient to restate in this opinion the allegations of the complaint, as they are fully stated in the copy set out in the margin. A careful consideration of the same has led to the conclusion that it sufficiently alleges a combination and conspiracy in restraint of interstate trade and commerce between the defendants, that the acts alleged to have been committed by them in pursuance of said

[2] See copy of the complaint referred to above in the chapter devoted to Forms.

combination and conspiracy resulted in damage to some or all of the coal companies, and that when these acts were committed the operating coal companies were engaged in interstate trade and commerce in the mining and shipment of coal. It is objected that the complaint fails to show that the plaintiffs were engaged in interstate trade or commerce at the time of the commission of the alleged wrongs, or that the plaintiffs have suffered damages to interstate trade or commerce by reason of defendant's acts. The complaint alleges that at the time the receiver was appointed and for many years prior thereto certain of the coal companies were engaged in the production, loading, and shipment of coal for interstate trade and commerce from coal lands located in Sebastian County, Ark. It is claimed that, as the complaint does not allege the date when the receiver was appointed it is impossible to determine when the coal companies were engaged in interstate commerce in relation to the mining and shipment of coal. This contention is without merit.

"It is not claimed that the causes of action have been barred by the statute of limitations, and the complaint fully shows that 75 per cent of all coal mined and shipped was shipped to customers outside of the state of Arkansas. It is alleged in the complaint that by reason of the combination and conspiracy pleaded, and the acts done in pursuance thereof, such companies have suffered great loss and injury to their business and property, in the sum of $427,820.77. This allegation is followed by an itemized statement of the character and amount of damage. Whether they have been damaged as alleged only a trial can determine. Certainly on general demurrer the complaint must be held to allege some damage.

"Some of the coal companies were not actually engaged in interstate commerce at the time the alleged acts were committed by the defendants; but they were preparing to

do so, and were prevented from so doing, as they allege, by the wrongs of the defendants. It was held in Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. et al., by the Circuit Court of Appeals of the Second Circuit, 166 Fed. 254, 92 C. C. A. 318, that:

" 'A conspiracy to prevent a manufacturer who procures his supplies and disposes of his products by means of interstate commerce from engaging in business at all necessarily places restraints upon such commerce. Its flow is restricted and interrupted. The importation and exportation of articles of commerce are directly prevented, and none the less so because the conspiracy may be of so wide a scope as to interfere with interstate commerce also.' To the same effect is Thomsen et al. v. Union Castle Mail Steamship Co. et al., 166 Fed. 251, 92 C. C. A. 315 (Second Circuit).

"It is next objected that the alleged wrongs of the defendants do not constitute an interference with interstate trade or commerce. We do not think, since the case of Loewe v. Lawlor, 208 U. S. 247, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, and Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, it can be said that this can be considered an open question. In rendering the opinion of the Supreme Court when the case was before it last, Justice Holmes said: 'The substance of the charge is that the plaintiffs were hat manufacturers who employed nonunion labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor. That, in pursuance of the general scheme to unionize the labor employed by the manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs, and against all hats sold by the plaintiffs to dealers in other states and against

dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other states.'

"This charge being proven, the learned justice further said (235 U. S. 534, 35 Sup. Ct. 172, 59 L. Ed. 341): 'We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statutes were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.' [Here the court referred to the cases appended in the note . . . hereto[3] as bearing on the Sherman Anti-Trust Act.]

"It is next contended that, if plaintiffs have suffered damage to their interstate commerce or trade, such damage is indirect, incidental, and too remote to entitle them to recover in this action. As against a general demurrer the complaint, as we have stated, is good so far as the question of damages is concerned. The law provides that any person who shall be injured in his business or property rights by reason of any thing forbidden or declared unlawful by the act shall recover threefold dam-

3 The court here referred to the following cases as bearing on the construction of the Sherman Anti-Trust Law, namely: Standard Oil Co. v. United States, 221 U. S. 1, Ann. Cas. 1912D, 734, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. 502; United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632; United States v. St. Louis Terminal, 224 U. S. 383, 56 L. Ed. 810, 32 Sup. Ct. 507; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. Ed. 107, 33 Sup. Ct. 9; United States v. Union Pacific R. R. Co., 226 U. S. 61, 57 L. Ed. 124, 33 Sup. Ct. 53; United States v. Reading Co., 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. 90; United States v. Patten, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, 33 Sup. Ct. 141; Nash v. United States, 229 U. S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 780; Straus v. American Publishers' Association, 231 U. S. 222, Ann. Cas. 1915A, 369, 58 L. Ed. 192, L. R. A. 1915A, 1099, 34 Sup. Ct. 84; Eastern States Lumber Assn. v. United States, 234 U. S. 600, 58 L. Ed. 1490, L. R. A. 1915A, 788, 34 Sup. Ct. 951.

ages by him sustained. It is the source of the injury, and not the character of the property injured, which constitutes the test of recovery. Assuming that an unlawful conspiracy or combination in restraint of interstate commerce exists, then, if any person is injured by it in his business or property rights, he may recover. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241. The complaint alleges actual interference with and destruction of cars of common carriers to be used in interstate commerce for the transportation of coal. This fact alone would show an interference with interstate commerce. Steers v. United States, 192 Fed. 1, 112 C. C. A. 423; United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243. . . .

"After considering the complaint and the decisions of the Supreme Court and other courts, we can come to no other conclusion than that the case made by the complaint falls within that class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade, except on conditions that the combination imposes, and therefore violates the act of July 2, 1890."

4. Amenability of Public Utility Receivers to Governmental Control.

§ 403. General Statement.

It is a matter of common knowledge that there are many United States statutes and provisions of state constitutions and state statutes dealing with and regulating the business of public utility corporations. As far as federal power in this direction is concerned the authority of Congress is limited, by constitutional provision, to matters connected with interstate commerce but, within that sphere, it has found occasion and necessity for passing numerous and varied laws. In every state there

are numerous constitutional and statutory provisions dealing with this subject in every phase, from the mode and method of organizing and financing a company down to the minutest detail of the operation of its business. It is, of course, impractical, to deal in a text book with the details of such statutes.

In many instances it is expressly provided in the constitutions and statutes themselves, that their requirements and directions shall apply to utility concerns when they are under receivers' control as well as when they are being operated by the owners.[1] In some instances special statutes provide that statutes relating to utility corporations shall apply to their receivers as well, where such direct enactment is absent courts have construed terms used in the statutes to designate the companies such as common carrier,[2] owner,[3] corporation,[4] to include receiver. In one way or another it may be said that such constitutional and statutory provisions are applicable to receivers in charge of public utility properties and control their management thereof.

§ 404. Amenability of Federal Receivers to State Laws and Regulations.

As far as federal receivers are concerned the federal courts have shown a sedulous disposition not to interfere with state or municipal legislative authority and have required their receivers to respect it. We have seen an instance of this in the argument used by a federal court to sustain a decision to the effect that a claim for freight rates collected by a receiver in excess of those established

1 § 7, United States Employers' Liability Act (1908). See People v. Joline, 65 Misc. Rep. 394, 121 N. Y. Supp. 857, 860.

2 United States v. Nixon, 235 U. S. 231, 59 L. Ed. 207, 35 Sup. Ct. 49.

3 Bush v. State, 128 Ark. 448, 194 S. W. 857.

4 Commonwealth v. Felton, 107 Ky. 330, 21 Ky. Law Rep. 1039, 53 S. W. 1046.

by a state public service commission is a preferred claim and is to be paid, if necessary, out of the corpus fund.[1] In this regard, federal courts have shown not only a willingness to have their receivers submit to such political authority, but also a disposition to be accommodating to a public desire for improvements.[2] Congress itself has taken a hand in this matter and has enacted that receivers appointed by federal courts shall manage and operate the property under their control in accordance with the laws of the state in which it is situated.[3] In deference to the spirit of this act of Congress the courts usually incorporate in the order of appointment a provision to the effect that the receiver shall operate the property in accordance with the laws of the state.[4] Congress has also enacted that a receiver appointed by a federal court may be sued in any matter concerning his management of the

1 See § 425, infra.

2 Central Trust Co. v. Wabash, St. L. & P. R. Co., 26 Fed. 3. In this case Mr. Justice Brewer says: "It is not gracious to the federal court which has taken possession of property by its receivers to make that possession an obstacle to any proposed public improvement. We should, so far as lies in our power, extend every facility to every proposed public improvement, simply aiming to preserve the rights which attach to property while it is in our possession, and that is all."

A federal receiver is bound to obey the laws of the state in the same manner as the original would have been obligated. Railroad Commission v. Alabama Great So. R. Co., 185 Ala. 354, L. R. A. 1915D, 98, 64 So. 13.

3 U. S. Compiled Statutes 1918, § 1047, states: "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section, shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both. (March 3, 1887, Ch. 373, § 2, 24 Stat. 554, Aug. 13, 1888, Ch. 866, § 3, 25 Stat. 436. March 3, 1911, Ch. 231, § 65, 36 Stat. 1104.)"

4 See Kaw Valley Drainage District v. Missouri Pac. Ry. Co., 99 Kan. 188, 161 Pac. 937, for copy of order of federal court appointing receiver over railroad.

estate without previous leave of court.[5] Even before the enactment of such a statute leave of court was not necessary for maintaining an independent action against the receiver in the receivership court itself.[6] The statute has been construed as not depriving the receivership court of jurisdiction to hear and decide matters that are ancillary, or auxiliary, to the receivership proceeding.[7] It has been construed as not depriving the receivership court of its exclusive jurisdiction to determine matters that pertain to the distribution of the funds of the estate.[8] It has been construed as permitting an action to be instituted against a federal receiver in a state court without previous permission and we, therefore, find many actions concerning such receivers decided by state courts.[9] Where a proceeding, such as mandamus, a judgment in which might

5 U. S. Compiled Statutes 1918, § 1048, provide as follows: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same may be necessary to the ends of justice. (March 3, 1887, Ch. 373, § 3, 24 Stat. 555. Aug. 13, 1888, Ch. 866, § 3, 25 Stat. 436 March 3, 1911, Ch. 231, § 66, 36 Stat. 1104.)"

6 Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. 905.

7 In re Swan, 150 U. S. 637, 37 L. Ed. 1207, 14 Sup. Ct. 225; City of Shelbyville v. Glover, 184 Fed. 234, 106 C. C. A. 376.

In the so-called Metropolitan Receivership it was arranged in the order of appointment that tort claims arising under the company's management might be settled in the receivership proceeding itself. See In re Reisenberg (In re Metropolitan Receivership), 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 219.

8 Freeman v. Barry, 63 Tex. Civ. 295, 133 S. W. 748.

While proceedings to garnish a debt in the hands of the receiver may be instituted without the consent of the receivership court, that court must be resorted to to collect any money. Lamb v. Whitman, 17 Ga. App. 687, 87 S. E. 1095; Irwin v. McKechnie, 58 Minn. 145, 49 Am. St. Rep. 495, 26 L. R. A. 218, 59 N. W. 987.

9 Erb v. Morasch, 177 U. S. 594, 44 L. Ed. 897, 20 Sup. Ct. 819; Gableman v. Peoria, etc., R. Co., 179 U. S. 335, 45 L. Ed. 220, 21 Sup. Ct. 171.

act directly against the receiver in his control of the property, has been begun in a state court, it may be moved to the receivership court as being ancillary to the receivership proceeding.[10] It has been decided that this statute refers to acts of the receiver and not of the company occurring before his appointment.[11] The act,

[10] State of Washington v. Northern Pac. R. Co. (C. C.) 75 Fed. 333.

[11] Maxwell v. Missouri Valley, etc., S. Co., 181 Iowa 108, 164 N. W. 329; Galveston H., etc., R. Co. v. Pennefather, etc., Co., 59 Tex. Civ. 636, 126 S. W. 948.

Speaking of this matter in an action for damages for breach of an executory contract which had been repudiated by a receiver, the court, in Brown v. Warner, 78 Tex. 543, 22 **Am. St. Rep.** 67, 11 **L. R. A.** 394, 14 S. W. 1032, said: "The life of a railroad depends upon its active operation as a 'going concern,' and a receiver over it must necessarily exercise many of the powers of a proprietor in its management, and be subjected to a similar liability for his own official acts, and those of his servants and agents. He is liable as receiver for his contracts made in his official capacity, and for the torts committed by his servants and agents in the operation of the road. By reason of the liability incurred by the operation of so much machinery and the employment of so many men, it may seem upon first blush, that their liability is defined by a different rule from that which prescribes the liability of receivers in ordinary cases. But the rule is the same. The receiver of the property of a railroad is no more the representative of the company than the receiver of the property of a natural person is the representative of such person. Let us suppose, then, that the proprietor of a cotton gin has contracted to gin the cotton of his neighbor at a certain rate, and that before he has performed his contract the property is placed in the hands of a receiver, who is directed to operate it. Can it be said that he is liable in damages should he refuse to comply with the contract? Clearly not. He is appointed, not to carry out the proprietor's contracts, but to manage and preserve the property. So, the receiver of a railroad company is no more bound to do a particular thing which the company has contracted to do than he is liable to pay a debt which the company has contracted to pay. Let us, then, apply the principles to the case made by the plaintiff's petition. When the appellants were appointed receivers, and placed in charge of the railway, there was a contract existing between the railroad company and the plaintiff for the maintenance of a switch at Warner's Station. That was purely a personal contract. The duty of the receivers was to hold and operate the railroad and they were no more bound to carry out the company's contract to maintain the switch than they were to

however, gives rise to many actions against the receiver begun without previous permission that, under the general equity rule governing the matter,[12] could not be so maintained but for the sanction of the statute.[13]

In regard to the matter of their amenability to legislative authority there is no difference between the federal equity utility receivers and receivers over utility property appointed by state courts.

§ 405. Amenability of Receivers to the Authority of Public Service Commissions.

Coming now to more specific instances of the matters considered in the preceding section, we find an important instance of the amenability of utility receivers to legislative control in the authority given over their conduct to public service commissions, or railroad commissions, or public utility commissions, or bodies of a like character.

discharge its obligations to pay money. When, in the management of the road, they deemed it proper to remove the switch, and did remove it, the contract of the company was broken, and it was liable in damages for its breach. That the appointment and acts of the receivers do not absolve it from its liability to carry out its contracts, was decided, in effect, by this court in Hunt v. Reilly, 50 Tex. 99. If appellee were unable to recover damages of the company for its breach of the contract, by reason of its insolvency, it is a misfortune he has suffered, doubtless, in company with numerous other simple-contract creditors. For the failure to perform the contract, his cause of action was against the company, and it was not of that character which could be brought against the receivers without leave of the court. U. S. Stat. 1886-87, 49th Cong., 2d Sess., p. 554, sec. 3."

12 See § 405, infra.

13 A receiver of a railroad company appointed by a court of the United States may be sued, without the permission of such court, under the Act of March 3, 1887, for a cause of action arising from the acts of his predecessor in the same office. McNulta v. Lochridge, 141 U. S. 327-332, 35 L. Ed. 796, 12 Sup. Ct. 11 (1891), affirming decision of Supreme Court of Illinois, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. 905.

The receiver may show consent to the jurisdiction by appearing and answering. American Steel & Wire Co. v. Bearse, 194 Mass. 593, 80 N. E. 623.

Congress has created the Interstate Commerce Commission and given it power to deal with certain matters relating to interstate commerce. The commission has itself ruled that receivers are common carriers and subject to its jurisdiction,[1] and provided that "when the line of a carrier is operated by a receiver or trustee both the carrier and its receiver or trustee should be made defendants in cases involving transportation over such lines."[2] The commission itself has ruled that it has no authority to impose any lien upon property belonging to a receivership estate, or, for that matter, to enforce any of its orders. If its orders are not voluntarily obeyed, enforcement is to be found at the hands of a court of proper jurisdiction.[3] The commission therefore deals with a receiver without any reference to his relation to the court and it is not necessary to secure permission of the receivership court to make him a party to a proceeding before the commission.[4] The appointment of a receiver over a carrier does not cause to abate proceedings pending before the commission relative to the business of the carrier.[5]

A receiver is entitled to test by a court proceeding the validity of any order made by the commission that affects his estate and in hearing such a matter instituted by a

1 Independent Refiners' Association v. Western New York & P. R. Co., 6 Interstate Commerce Reports 378 (1896).

2 Article 2, Rules of Practice before the Interstate Commerce Commission.

3 Loud v. South Carolina R. Co., 4 Interstate Commerce Reports 205.

4 Board of Trade v. Alabama, etc., Ry. Co., 6 Interstate Commerce Reports 1; Evans v. Union Pac. Ry. Co. (1896), 6 Interstate Commerce Reports 520.

An order relating to a crossing, affecting a federal receiver, may be made by a public service commission without obtaining the consent of the receivership court. State ex rel Mo. K. & T. R. Co. v. Public Service Com., 271 Mo. 270, 197 S. W. 56.

5 Trammel v. Clyde S. S. Co. (1892), 4 Interstate Commerce Reports 120.

receiver the attitude of the court is the same as it would be if the proceeding had been begun by the company.[6] Since a receiver is not bound by the executory contracts of his company he is not criminally liable under the Interstate Commerce Act for failing to carry out a joint tariff arrangement made by his company with another company and which he has never recognized in any way.[7]

As to state public service commissions, their powers are such that they are brought into touch in an important way with reorganization plans for a utility that is in the control of a receiver,[8] and that their orders fixing rates for service are binding upon a receiver as well as a company.[9] Most of the statutes expressly mention receivers as being amenable to the authority of these commissions. Their powers are usually of much wider scope than those of the Interstate Commerce Commission, including not only the power to fix rates for service, but also to regulate the methods and extent of financing the companies and many details with reference to the construction and maintenance of the utility property both from the point of view of making their operations as free from danger to the public and their employees as possible and of giving as adequate a service to the public as possible. The commissions have themselves expressed the proposition that their jurisdiction extends over federal receivers, basing it upon the United States statutes referred

6 Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co., 83 Fed. 249.

7 United States v. De Coursey, 82 Fed. 302.

8 See chapter devoted to reorganizations of public utilities.

9 Re Benwood & McMechen Consol. Water Co., P. U. R. 1917D, 460.

A receiver appointed by a state court has no jurisdiction to change the legal rates established by a public utility commission without its consent. State v. Independence Gas Co., 102 Kan. 712, 172 Pac. 713. See, also, State ex rel. Bristow v. Landon (Kan.), 165 Pac. 1111. And see McHenry v. Bankers Trust Co. (Tex. Civ.), 206 S. W. 560, where the court held it had authority to fix the rates to be charged by its receiver of an irrigation system.

to in the preceding section and supporting it by the citation of judicial authority.[10]

Orders of the state commissions are, however, subject to judicial review where they are unreasonable.[11]

[10] See Colorado State Board of Stock Inspection Commissioners v. Atchison, etc., Ry. Co., P. U. R. 1916D, 751. This case concerned an order directing the road to build protecting fences. The commission, in view of the fact that the act expressly declared receivers to be within its terms, held that it had authority over a company whose property was in the possession of either a state or federal receiver.

City of Moberly v. Pryor, P. U. R. 1917B, 425. This case involved an order of the Missouri State Commission directing a federal receiver to widen a subway crossing.

Jordan v. St. Louis, etc., R. Co., P. U. R. 1917A, 182. This case involved an order of the Oklahoma State Commission directing the receiver to permit a shipper to maintain bins and a grain elevator on the right of way to facilitate loading.

The fact that a natural gas company has been in the hands of a receiver for over three years and that it has more customers than it can properly serve, may be considered in ascertaining the going value in a rate valuation. Landon v. City of Lawrence (Kan.), P. U. R. 1916B, 331.

[11] Kaw Valley Drainage Dist. v. Missouri Pac. Ry. Co., 99 Kan. 188, 161 Pac. 937. This action was a mandamus proceeding to compel a federal receiver to destroy a bridge over which his line ran on the score that it caused floods in the river and was therefore dangerous to life and property. The court sustained its jurisdiction over the receiver on the authority of the United States Statutes mentioned in the preceding section (citing Grant v. Buckner, 172 U. S. 232, 43 L. Ed. 430, 19 Sup. Ct. 163, as authority). It was held that the order was a valid exercise of the police power of the state to protect the life and property of its citizens; but the peremptory writ of mandamus was withheld pending negotiations as to a compromise.

Other state cases holding, on the authority of the United States statutes, that a federal receiver may be a defendant before the commission or a court without previous consent of the receivership court are: Railroad Commission of Alabama v. Alabama G., etc., R. Co., 185 Ala. 354, L. R. A. 1915D, 98, 64 So. 13; State v. Public Service Commission, 271 Mo. 270, 197 S. W. 56.

Service of notice of a hearing before a service commission upon a general agent who had been, pursuant to constitutional provision, designated by the company as agent upon whom process might be served and who, after the appointment of the receiver, continued in his employ and continued to receive legal notices with the sanction of the receiver,

A receivership court may refuse to direct its receiver to obey an order of a public service commission until the validity and reasonableness of the order have been judicially established;[12] and has not jurisdiction to order, at the instance of a commission, its receiver to make improvements in the property that will put an unreasonable burden upon the bondholders.[13] The fact that receiver's certificates are passed upon and their issuance approved by a public service commission does not affect their standing as against the estate nor add anything of force to what was given by the order of the court authorizing the receiver to issue them. [14] A state court has no jurisdiction to appoint receivers for the purpose of regulating the

is binding upon the receiver. Lusk v. State, 47 Okla. 648, 150 Pac. 151.

See, also, Village of Girard v. Girard Water Co., P. U. R. 1917E, 366; Webb City Commercial Club v. St. Louis & S. F. R. Co. (1914), 1 Mo. P. S. C. R. 334.

If to run a certain character of train service would make the operation of a branch line unremunerative and the balance of the system in the state does not pay the expenses of operation and the interstate part of the system is in the hands of a receiver, such an order on the part of the railway commission may violate the due process constitutional provisions. Marshall v. Bush (Neb.), 167 N. W. 59.

12 Pennsylvania Steel Co. v. New York City Ry. Co., 165 Fed. 470; see People v. Whitridge, 144 App. Div. 486, 129 N. Y. Supp. 295.

Neither the courts nor the receivers of public utility corporations have jurisdiction to change legal rates without the consent of the public utilities commission; but, when the legal rates charged by the receiver of a public service corporation have been enjoined by a court of competent jurisdiction, the receiver may put into effect rates to be charged until the commission establishes a new rate. State v. Independence Gas Co., 102 Kan. 712, 172 Pac. 713.

The jurisdiction of a federal court of a suit by state receivers of a natural gas company to enjoin the enforcement of rates fixed by a state commission, in which a preliminary injunction was granted, is not affected by a subsequent order of the state court fixing temporary rates. Landon v. Public Utilities Commission of State of Kansas, 242 Fed. 658. As to rule respecting interstate service, see Landon v. Public Utilities Commission of Kansas, 245 Fed. 950.

13 Farmers' Loan & Trust Co. v. Burbank Power & Water Co., 196 Fed. 539.

14 St. Louis Union Trust Co. v. Texas Southern Ry. Co., 59 Tex. Civ. App. 157, 126 S. W. 296.

rates of public utility corporations.[15] The fact that the court has appointed a receiver at the instance of a public service corporation (a railroad company) upon its voluntary dissolution pursuant to the statute, will not interfere with the public service commission's issuing its certificate of dissolution pursuant to the statute.[16]

In a strongly contested case[17] in Kansas bearing on the right of control over a receiver by a public utility commission on the question of rates to be charged by him, the court said: "Are the receivers subject to the control of the Public Utilities Commission, under the public utilities act? The Kansas Natural Gas Company, whose property is now in the possession of the receivers, and whose business is now being conducted by them, was engaged in the business of a public utility. When the receivers continue to do the same business and render the same service as that performed by the Kansas Natural Gas Company, they are a public utility, as defined in the public utilities act, and are subject to the provisions of the act. The appointment of receivers to carry on the business of a public utility does not withdraw that public utility or its receivers from the control of the laws of the state. The Public Utilities Commission can make the same orders, rules, and regulations governing these receivers and the property in their control that they could have made concerning the Kansas Natural Gas Company and its property, before the receivers were appointed. The receivers have the same right to appeal to the courts that the Kansas Natural Gas Company had—no greater, no less.

"Who has the power to fix the rates at which natural gas shall be sold by the receivers of the Kansas Natural

15 State v. Independence Gas Co., 102 Kan. 712, 172 Pac. 713.

16 Jeffries v. Commonwealth, 121 Va. 425, 93 S. E. 701, P. U. R. 1918B, 5.

17 State ex rel Caster v. Flannelly, 96 Kan. 372, 152 Pac. 22, P. U. R. 1916C, 810.

Gas Company, the Public Utilities Commission, or the court appointing the receivers? The Legislature has said that the Public Utilities Commission shall fix these rates. The courts have repeatedly declared that the courts can not fix rates, and that fixing rates is a legislative function. When rates are fixed, the courts can ascertain whether or not they are in violation of law or of some constitutional provision. But courts have not the authority to determine what rates will be reasonable, just, compensatory, or legal, and then put in effect those rates. The commission can not finally determine what rates will be legal and will not violate constitutional provisions. The commission is the body authorized by law to say in the first instance what rates are legal and will not violate constitutional provisions, but the courts must finally say whether or not the rates fixed are illegal or do violate such provisions. The one function is legislative, while the other is judicial. The commission can not invade the field occupied by the court; neither can the court invade the field occupied by the commission. The commission must act first, and the courts afterward.

"It is contended that the receivers are engaged in interstate commerce, and for that reason are beyond the control of the Public Utilities Commission. That the transportation of natural gas from one state to another is interstate commerce must be conceded. West v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; Haskell v. Cowham, 109 C. C. A. 235, 187 Fed. 403. Numerous other cases might be cited. However, that is not the question we have to determine. Our question is, When does the natural gas that is sold by the receivers in the several cities in this state cease to be an article of interstate commerce? In 7 Encycl. U. S. Sup. Ct. Rep. 298, we find a clear and condensed statement of the rules to be deduced from the decisions of the United States Supreme Court, as follows:

"'The general rule is that as long as an article imported remains in the hands of the importer in the original and unbroken package in which it was imported, it is protected by the commerce clause of the Constitution from the interference of state laws, and that it is only when the original package has been sold by the importer or has been broken up by him, or has otherwise become mixed with the common mass of property in the state, that it becomes subject to state legislation.'

"The original package rules will be of some assistance in determining whether or not the receivers' sale of gas in this state is interstate commerce. The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate commerce. The gas, when sold, had become mixed with the common mass of property in this state by being so commingled with gas produced here as to completely lose its identity. It is a matter of common knowledge that service pipes from the pipe lines of the distributing companies to private residences and other buildings belong to the owners of the property served, and installations are made at their expense. If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale. The gas then becomes mixed with the common mass of property in the state. To exclude the power of the state from control over an article imported into it, it is necessary that the article be capable of being pointed out and identified, and the owner be able to say:

" 'This came from another state, and had not yet become commingled with the mass of property in this state so as to make it a part of that property.'

"All property now owned in this state, and not produced here, was at one time a part of interstate commerce. The goods on the merchant's shelf, the wagons and plows in the farmer's field, the horses and cattle that he has imported from another state, were all a part of interstate commerce at one time, but have ceased to be such, although they have not been sold and are still owned by the persons that imported them. These ceased to be under the protection of the interstate commerce clause of the Constitution when they became a part of the property of this state. The farmer who imports a wagon, a horse, a car load of corn, or a piano, may or may not intend to sell the article imported. Does the interstate commerce character of this property attach until it is sold? It does not. It can not. A car load or a train load of wheat may be shipped from this state to Kansas City, Mo., and be there placed in an elevator and mixed with another car load or train load of wheat from some county in Missouri, and may be held for delivery to some one who has ordered it, or be held for sale to any one who will buy it. Will that wheat from Kansas, after being commingled with the wheat from Missouri, be under the protection of the interstate commerce clause of the federal Constitution and outside the control of Missouri, under laws legally enacted by its Legislature? If this question is answered in the affirmative, it extends interstate commerce much farther than any decision of any court yet rendered, of which we have any knowledge or information. Before selling natural gas, it became necessary to obtain franchises from the several cities, under the laws of this state. These laws provided that in certain classes of cities the franchises might name the price at which gas should be sold. If the business done by the receivers in this state is

interstate commerce, and the state has no power to regulate the price at which gas may be sold, the laws providing for fixing rates in franchises were invalid, so far as gas coming from another state is concerned.

"Granting for the moment that the sale of natural gas under the circumstances disclosed is interstate commerce, it is not national in its nature, it admits of no one uniform system of regulation, and it is not that kind of interstate commerce which requires exclusive legislation by Congress. It is therefore subject to state control until Congress acts. . . .

"Congress has not acted in this field, except to prohibit unfair methods of competition. We hold, therefore, that the receivers are not engaged in interstate commerce when selling natural gas to consumers thereof in this state."

§ 406. Amenability of Receivers to Remedial Laws of Civil or Penal Character.

Statutory regulations imposed upon public utility corporations, both by national and state authority, are exceedingly numerous and varied. As to how far they control utility receivers in their management of estates certain general principles may be stated.

The receiver may not either abandon public utility property in such a way as to destroy or affect property rights, or rights in the nature of property rights acquired by or created in favor of other parties, public or private, by the conditions or circumstances under which the public utility was constructed; nor will he be permitted to insist upon doubtful rights for his company to the impairment of the rights of others. There may not in this principle be any direct reference to any particular statutory regulation; it may refer simply to public

policy or the care that a receivership court exercises with reference to what might be called the public interest.[1]

Statutes that in their nature are remedial are generally held to be applicable to receivers, whereas those that are penal are held not to be.[2] Such laws as anti-trust laws and those against unfair discrimination are strictly con-

1 Paige v. Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213; see, also, Thompson v. Schenectady Ry. Co., 131 Fed. 577, 65 C. C. A. 325; Louisville Trust Co. v. Cincinnati I. P. R. Co., 78 Fed. 307.

2 United States v. Ramsey, 197 Fed. 144, 116 C. C. A. 568, 42 L. R. A. (N. S.) 1031. (Federal statute with reference to the number of hours an employee of a common carrier might be kept at work held to apply.)

Bush v. State, 128 Ark. 448, 194 S. W. 857. (Statute requiring signals at a crossing held to apply.)

State v. Minneapolis, etc., Ry. Co., 88 Iowa 689, 56 N. W. 400. (Receiver not criminally liable for train obstructing a street.)

In City of San Marcos v. International & G. N. Ry. Co. (Tex. Civ. App.), 203 S. W. 458, the court said:

"Appellant relies upon the fact that Baker was appointed by the federal court; the theory being that the federal statutes requiring receivers appointed by the federal courts in possession of property to manage and operate the same according to the requirements of the laws of the state in which the property is situated makes the receiver liable for any penalty prescribed for failure to comply with a statute of the state. There is no merit in this contention. The liability must rest solely on the state statute, and under the rules for construing penal statutes, receivers can not be held to be included. A receiver appointed by a federal court would be in the same position as one appointed by a state court."

People v. Blair, 183 Mich. 130, 149 N. W. 1039. (Receiver not liable for train obstructing a street.)

Robinson v. Harmon, 157 Mich. 272, 117 N. W. 664, 15 Detroit Leg. N. 713. (Federal receiver liable for not transporting freight as required by state statute, since U. S. statute requires him to obey state laws and particular state statute involved is not penal.)

State v. Norfolk & S. Ry. Co., 152 N. C. 785, 21 Ann. Cas. 692, 26 L. R. A. (N. S.) 710, 67 S. E. 42. (Receivers held indictable for cars obstructing public road.)

Huguelet v. Warfield, 84 S. C. 87, 65 S. E. 985. (Receivers liable for adjusting and paying claim for loss of freight within statutory time.)

A receiver will not be held criminally liable, under the Interstate Commerce Act, for violating a joint traffic agreement of the company where he has not adopted the contract. United States v. De Coursey, 82 Fed. 302.

strued. Any proposed conduct of a receiver will not be viewed as in violation of such statute unless it must necessarily have such an effect; nor will any past conduct be so viewed unless it is clarly shown to have been so.[3]

If, however, the statute applies to commerce carriers in respect to the operation of the carrier business, the receiver so operating will be deemed a common carrier and brought within the terms of the statute.[4]

Statutes relating to the method of serving legal process or notice upon public utility corporations are usually held to apply to receivers.[5]

3 Under an Act of Congress, such as the Hepburn Act (Act of Congress June 29, 1906, 34 Stat. 584, Ch. 3591), which provides after a certain date it will be unlawful for a railroad company to transport from one state to another any commodity mined or produced by it, the fact that a railroad company had in the past done so is not ground for refusing to issue receiver certificates and expend money in developing new coal mines where it does not appear that the receiver will not be able to market the coal produced within the state or operate the properties without violating the law. Central Trust Co. v. Pittsburg, S. & U. R. Co., 52 Misc. Rep. 195, 101 N. Y. Supp. 837; Bayles v. Kansas Pac. R. Co., 13 Colo. 181, 5 L. R. A. 480, 22 Pac. 341.

4 In United States v. Nixon, 235 U. S. 231, 59 L. Ed. 207, 35 Sup. Ct. 49, it was held that a receiver operating a railway was a common carrier within the terms of a cattle quarantine act prohibiting the transportation of cattle from a quarantine state to any other state, the court saying:

"For in so far as he transports passengers and property he is a common carrier with rights and civil responsibilities as such (Eddy v. Lafayette, 163 U. S. 464, 41 L. Ed. 228, 16 Sup. Ct. Rep. 1082; Hutchinson, Carr. § 77). And there is no reason suggested why a receiver, operating a railroad, should not also be subject to the penal provisions of a statute prohibiting any common carrier from transporting live stock by rail from a quarantine district into another state. Erb v. Morasch, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. Rep. 819; United States v. Ramsey, 42 L. R. A. (N. S.) 1031, 116 C. C. A. 568, 197 Fed. 144."

5 In an action in which service of process on a station agent of a railroad in the possession of a receiver was declared to be sufficient, it was said that the third section of the Judicial Act of March 3, 1887, authorizing suit to be brought against receivers of railroads without special leave of court by which they were appointed, is intended to place the receiver on the same plane with railway companies, both as re-

5. Liability of the Receivership Estate for Injuries Due to Negligence.

§ 407. General Statement.

In discussing the question as to liability for injury due to the negligent management or operation of utility property that has been placed under the control of a receiver, it is the common practice to consider the matter as if it were a question between the company and the receiver as to which was liable. To understand the matter correctly, however, it is necessary to have in mind an important distinction. The real question involved is as to how far the receivership estate is liable to pay damages for the injury. That matter has been discussed hitherto. In the absence of a special statute placing liability for the dam-

spects their liability to be sued for acts done while operating the railroad, and as respects the mode of obtaining service. Eddy v. La Fayette, 49 Fed. 807, 1 C. C. A. 441; Central Trust Co. v. St. Louis A. & T. Ry. Co., 40 Fed. 426 (affirmed in Eddy v. La Fayette, 163 U. S. 456, 41 L. Ed. 225, 16 Sup. Ct. 1082); Lamb v. Whitman, 17 Ga. App. 687, 87 S. E. 1095.

Where a receiver continues station agents in office with directions to continue the performance of their duties, statutes allowing service of process upon them is held valid. In re Seaboard Air Line Ry. (In re Boatwright), 166 Fed. 376; Ernest v. Pere Marquette R. Co., 176 Mich. 398, Ann. Cas. 1915B, 594, 47 L. R. A. (N. S.) 179, 142 N. W. 567; Lamb v. McElwaney, 143 Ga. 490, 85 S. E. 705.

Service upon former process agent of the railroad has been held valid. Jacobs v. Blair, 157 App. Div. 601, 142 N. Y. Supp. 897.

Service of process upon the receiver's general manager in charge of the office and in control of the road has been held sufficient. Peterson v. Baker, 78 Kan. 337, 97 Pac. 373.

Receivers of a foreign corporation must be served as natural persons when the cause of action grows out of transactions with receivers of another line and where the line does not extend within the state. Kading v. Waters, 137 Minn. 328, 163 N. W. 521.

Even if service upon a receiver would be good if made in the manner prescribed for service upon his corporation, it is not good if it does not comply with provisions relating to that sort of a service. Gursky v. Blair, 218 N. Y. 41, L. R. A. 1916F, 359, 112 N. E. 431; Beaumont, etc., Ry. Co. v. Daniel, (Tex. Civ.) 186 S. W. 383.

ages upon the property itself, regardless of whose negligence is directly responsible for the injury, or in the absence of personal, as distinguished from official, liability of the receiver, the claim for damages may rank with general unsecured claims or it may rank with claims against the receiver, as arising out of his operation of the property, and have a preference over all claims of general creditors and even over the claims of a secured creditor. The general rule is to place the claim in the former class if the injury was caused before the receivership and while the property was in the hands of the company and to place it in the latter class if the injury occurred after the receiver took possession. As to injuries caused before the receiver took possession the rule may be altered, and in many states is altered, by special statutes.[1] It is proper enough, then, to speak of the liability of the company and the liability of the receiver, if we have this distinction in mind. If the company has assets that are not involved in the estate then a different question arises. As far as the estate is concerned the real question is who shall be sued, the company or the receiver.

§ 408. Liability of the Company.

The general common law rule concerning liability for injury growing out of the negligent maintenance or operation of property is that the responsibility rests upon the person who was in control at the time that the injury was caused, regardless of any question concerning the ownership of the property; and this rule is not changed by the fact that a receivership over the property may have been created pending a determination of the amount

[1] See Preferred Claims, §§ 414 et seq., infra, and Receiver's Indebtedness, §§ 389 et seq., infra. For liability of receiver for torts generally, see § 177.

of damages or a settlement of the claim for damages due to the injury.[1]

Manifestly the receiver could not be in control of the public utility property, as such receiver, before he took possession under his appointment and presumably the company would be. For an injury occurring before the receiver takes possession, the company and not the receiver is responsible. If the purpose of an action for damages is to attempt to satisfy a judgment out of property owned by the company but not involved in the receivership estate, then no question affecting the receiver or the estate arises and the company alone is the proper party defendant. If however the purpose is to establish a claim against the estate then the question as to whether or not the action shall be against the company alone or against the receiver alone depends upon the relation of the receiver to the title of the property. A chancery receiver, such as the federal utility receivers are, is not the assignee of the company's title, but a mere holder and preserver thereof; whether or not a statutory receiver is an assignee or a mere holder of the title depends on the specific provisions of the statute under which he is appointed. If the receiver does not take title his appointment does not affect the existence of the company; the company continues to function except in so far as haulted by proper activities of the receiver; the company remains the only proper party defendant in an action based upon an injury for which the company is respon-

1 Lauber v. Linch, 65 Misc. Rep. 209, 119 N. Y. Supp. 614.

Chicago, R. I. & P. Ry. Co. v. McBride (Ark.), 206 S. W. 149.

Damages for injuries to employees for a receiver of a railroad are a part of the operating expenses and should be paid as such from the earnings of the property. Meyer Rubber Co. v. Georgetown & W. R. Co., 174 Fed. 731.

An action for personal injuries before the appointment of a receiver can not be maintained against him. It must be brought against the corporation. Finance Co. v. Charleston, C. & C. R. Co., 46 Fed. 508.

sible. If the receiver takes title the company ceases entirely to function; actions pending against it abate and are revived by substituting the receiver as defendant for the company; new actions must be commenced against the receiver.[2] Statutes like the United States statutes permitting federal receivers to be sued without leave of

[2] St. Louis & S. F. R. Co. v. Coy, 113 Ark. 265, 168 S. W. 1106; Fountain v. Stickney, 145 Iowa 167, 139 Am. St. Rep. 410, 123 N. W. 947; Price v. Delano, 187 Mich. 49, 153 N. W. 7; Allen v. St. Louis & S. F. R. Co., 184 Mo. App. 492, 170 S. W. 455; St. Louis B. & M. Ry. Co. v. Knowles, (Tex. Civ.) 180 S. W. 1146; San Antonio, U. & G. R. Co. v. Vivian, (Tex. Civ. App.) 180 S. W. 952.

In the following cases it was held that the receivers were proper parties: Hollowell v. Norfolk & S. Ry. Co., 153 N. C. 19, 68 S. E. 894; Dallas Cons., etc., Co. v. Hurley, 10 Tex. Civ. 246, 31 S. W. 73; International, etc., R. Co. v. Ormond, 57 Tex. Civ. 79, 121 S. W. 899; Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814, is one of the earlier leading cases.

In this case the question under review is fully discussed and the doctrine stated in the text established. This is undoubtedly the accepted doctrine and is probably not denied in any well considered case when read in the light of the particular facts of the case. General statement, taken out of their context and interpreted without reference to the character of the receiver may of course be misleading.

In the following cases it was held that the receiver was not liable for torts committed before he took possession.

The law appears to be well settled that, where an action is brought against a railroad company for damages based on negligence in operating its road, it is a sufficient defense to show that the road at the time of the commission of the alleged negligent act was not in its possession and control, but was in the possession and control of a receiver, who had exclusive charge of the employment and management of the agents and employees engaged in operating such railroad. Ohio, etc., R. Co. v. Davis (1864), 23 Ind. 553, 85 Am. Dec. 477; Bell v. Indianapolis, etc., R. Co. (1876), 53 Ind. 57; State v. Wabash Ry. Co. (1888), 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179; Godfrey v. Ohio, etc., R. Co. (1888), 116 Ind. 30, 18 N. E. 61; Chicago & E. I. R. Co. v. Van Stone, (Ind. App.) 119 N. E. 874; Naglee v. Alexandria, etc., R. Co., 83 Va. 707, 5 Am. St. Rep. 308, 3 S. E. 369. Where the accident occurred while the receiver was lawfully operating the road, he is liable, although formal authority to operate cars was only given subsequent thereto. Watkins v. Kansas City & W. B. Ry. Co. (Mo. App.), 209 S. W. 950.

When a railroad is in the hands of and being operated by a receiver, neither the company nor

the receivership court and state statutes expressly making public utility receivers liable for the negligence of their employees and servants have reference only to injuries occurring under the administration of the receiver and have no bearing on those that occur under the company's management.[3]

The receivership court is interested in the question as to whether or not its receiver shall be sued from two points of view. In the first place, the court will not permit the receiver's possession of the property to be invaded. An action that is not intended to nor can not have any such effect does not encroach upon the prerogatives of the receivership court; and it is the general rule, applicable in all receiverships, that such an action against the owner of the property, or even against the receiver, may be prosecuted independently of that court.[4] In the second place, as stated above, the court desires to know the rank of a claim evidenced by a judgment for damages. If the judgment is against the company, presumably the claim would rank as a general, unsecured claim; if against the receiver, the presumption would be that it is an operating claim against him. This is the real reason for the rule

the receiver is liable for an injury to one employee by another employee. Youngblood v. Comer, 97 Ga. 152, 23 S. E. 509, 25 S. E. 838; Henderson v. Walker, 55 Ga. 481; Thurman v. Cherokee R. Co., 56 Ga. 376.

The rule in regard to the joint liability of the receiver and the corporation over which he is appointed does not apply to a corporation where the portion of the road on which the injury happened has been taken out of the hands of the corporation and put in the hands of the receiver. Lock v. Franklin & H. Turnpk. Co., 100 Tenn. 163.

3 Harrell v. Atkinson, 9 Ga. App. 150, 70 S. E. 954; St. Louis, B. & M. Ry. Co. v. Dawson, (Tex. Civ.) 174 S. W. 850.

4 Where judgment is pronounced against a receiver, the judgment is not to be satisfied by execution or like process but is to be made the basis of a claim to be presented against the estate and paid in the ordinary course of administration. Andrews v. Rice, (Tex. Civ. App.) 198 S. W. 666. See, also, Pac. Ry. Co. v. Wade, 91 Cal. 449, 25 Am. St. Rep. 201, 13 L. R. A. 754, 27 Pac. 768; Equitable Trust Co. v. Wabash R. Co. (C. C. A.), 244 Fed. 66.

requiring permission to sue the receiver to be obtained before commencing action against him. The purpose of the rule is to give the court information as to what the rank of a claim based upon any judgment in the action will be and the rule is for the benefit of the creditors of the estate.[5] If the court permits its receiver to be joined

[5] The rule does not apply where the action is brought in the receivership court itself. Curtis v. Mauger, (Ind.) 114 N. E. 408. See Texas, etc., R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. 905.

Justification for joining a receiver as defendant in an action against the company before his appointment may be based upon the fact that the order of appointment included a provision authorizing him to defend existing actions. International & G. N. R. Co. v. Wynne, 57 Tex. Civ. 68, 122 S. W. 50.

In Moore v. Southern States Land & Timber Co., (C. C.) 83 Fed. 399, the court said: "It has, however, been held that when a decree appointing a receiver and awarding an injunction, so far as disclosed upon its face, was to provide for the safe-keeping of the property of the corporation, and to prevent any transfers thereof, and such decree did not state that the ulterior intent of the court was to make an equitable distribution of the funds, and contained no direction to the receiver to give notice to the creditors to file their claims, the decree imposed no restrictions upon creditors in prosecuting their claims, either at law or in equity, and a judgment subsequently recovered by a creditor is as much a lien on the real estate of the corporation debtor as if the appointment of a receiver had never been made (citing authorities). I think this ruling is founded in reason, and my opinion is that until the court has made some decree showing that its ulterior intent is to make an equitable distribution of the funds, and giving notice to the creditors to file their claims, such creditors may sue at law, and acquire a priority. Up to that time the complainant is permitted to dismiss the case and discharge the receiver."

In Marshall v. Wabash Ry. Co., (Mich.) 167 N. W. 19, the plaintiff sought to have a judgment against the railroad company for personal injuries declared a preferred lien upon the property, which was being foreclosed under a mortgage and in which proceeding a receiver had been appointed. The court, in refusing to accord it such preference said: "We are impressed, however, that plaintiff's judgment is valid as it stands, and, under the statute, constitutes a lien on all the property of the defendant Wabash Railroad Company against which the action ran, subject to any valid prior mortgage upon any of such property. His action was legally begun in the circuit court of Lenawee county before the receivers were appointed or suit begun in the foreclosure case. When the federal court of another state later took jurisdiction in the

in an action for injuries for which the company alone is responsible, it does so mainly in order that the receiver, as trustee for all the creditors, may see that an entirely unfounded claim is not fraudulently or erroneously foisted upon the estate. If, because of his statutory relation to the title or because of the provisions of any statute, the receiver is sued, without the permission or knowledge of the court, for an injury for which the company alone is responsible it is his duty when a claim

foreclosure proceedings and appointed receivers pendente lite, presumably to conserve the mortgaged property for the purpose of the decree of foreclosure as between the parties to that suit, the state court was not deprived thereby of its right to proceed with this distinct personal action in which it had first taken jurisdiction. By permission of the court appointing them the receivers could have appeared in the case and defended had they seen fit to do so. Its progress did not interfere with their possession of the mortgaged property or with the mortgage foreclosure. They did not represent the Wabash Railroad in its individual character, nor supersede it in the exercise of its corporate powers, beyond their temporary custody and control of its mortgaged property. The corporation was energetically and independently, so far as shown, pursuing an active defense of plaintiff's case to the court of last resort while the foreclosure proceedings were pending. There is nothing before us to indicate that the foreclosure suit in the federal court was for the purpose of making equitable distribution of the assets of the corporation amongst its creditors or had any object beyond the ordinary foreclosure of a mortgage and incidental conservation of the mortgaged property while the suit was in progress.

"While authorities are cited by defendants sustaining extreme views as to the immunity afforded delinquent railroads from legal liability by appointment of receivers to conserve mortgaged property during foreclosure proceedings, we think there is respectable authority and better reason for the view that so long as the presumably temporary possession by the receivers of the property they are appointed to conserve is not disturbed other courts are not closed by the foreclosure suit to those desiring to pursue their legal remedies against the defaulting corporation."

A person receiving personal injuries for which a judgment had been rendered against the mortgagor railroad company for wrong committed before the appointment of a receiver is a general creditor and the earnings of the receivership need not be applied first to the payment of these judgments. Central Trust Co. v. East Tennessee, V. & G. R. Co., 30 Fed. 895.

founded on a judgment against him is presented in the estate to see that the court is made acquainted with the facts. If the court, the receiver, and the creditors are alert a general unsecured claim, though evidenced by a judgment against the receiver, can not be advanced in rank.[6]

§ 409. Liability of the Receiver.

It might happen that a receiver is not in possession and exclusive control of the property at the time an injury occurs, although it occurs after his appointment. Under such circumstances the receiver would not be liable.[1] Some state statutes expressly make the receiver liable for the torts of his agents;[2] and in some cases[3] he

[6] Hampton v. Norfolk, etc., R. Co., 127 Fed. 662, 62 C. C. A. 388.

One having a just cause of action for injuries caused by the management of a locomotive engine may bring his action against both the railroad company and receivers appointed to take charge of its property, in order to establish his demand in one action against whichever is legally liable. Union Pac. Ry. Co. v. Smith, 59 Kan. 80, 52 Pac. 102.

[1] Pennsylvania R. Co. v. Jones, 155 U. S. 333, 350, 39 L. Ed. 176, 182, 15 Sup. Ct. 136 (Receiver appointed to receive income, but company left in control of operation.) Lauber v. Linch, 65 Misc. Rep. 209, 119 N. Y. Supp. 614 (Another company operating before receiver took possession).

In Washington, A. & G. R. Co. v. Brown, 84 U. S. 445, 21 L. Ed. 675, it appeared that a railroad was operated on the joint account of a receiver of part of it and lessees of the remaining part, and that the tickets were issued by the railroad company, and an injury occurred to a passenger, it was held that the operation of the road by the lessees did not change the relation of the original company to the public, and the company was responsible unless it appeared that the possession of the receiver was exclusive, and the control of the employees exclusively in him. And when the road was run on the joint account of the lessees and receiver, the servants being employed by them jointly, both were liable for the injury complained of together with the original company.

[2] See Central Trust Co. v. East Tennessee, etc., R. Co., 69 Fed. 353; Baltimore Trust, etc., Co. v. Atlanta Traction Co., 69 Fed. 358.

[3] United States v. Bailey, 178 Fed. 302. In this case a receiver was held to be included in the term "successor" as used in a bond to protect the government against

has been held liable under provisions of a contract. But if the receiver is in full and absolute control, he is liable on general common law principles alone, since he is under such circumstances, a common carrier. His position is not like that of a public political official, such as a state or municipal officer, who, on general principles or because of statutory provision, may not be liable for the torts of his agents; he is a common carrier and as such is liable for the negligence of his employees just as the company itself would be.[4]

If the receiver is in absolute control of the property so as to be liable for the injury then the company is not liable. Of course, as far as a claim against the estate is concerned, a judgment against the receiver is of higher rank than one against the company; and a creditor, being aware of this rule, would not sue the company rather than the receiver, if he was in a legal position to sue the latter, unless he desired to seek payment from property not involved in the estate; it would be with reference to this latter phase of the matter that the company would be chiefly interested in seeing that it was not wrongfully sued.[5]

injury from the operation of a road over a certain right of way.

[4] Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Continental Trust Co. v. Toledo, etc., R. Co., 89 Fed. 637; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452; Rouse v. Harry, 55 Kan. 589, 40 Pac. 1007; Kinney v. Crocker, 18 Wis. 74; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332.

This case fully discusses the matter and reaches the conclusion stated in the text.

Receivers operating a railway are common carriers. United States v. Nixon, 235 U. S. 231, 59 L. Ed. 207, 35 Sup. Ct. 49.

"It accords with sound principle and reason that a receiver exercising the franchise of a railroad company shall be held amenable, in his official capacity, to the same rules of liability that are applicable to the company while it exercises the same powers of operating the road." Little v. Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445.

[5] Atlanta, B. & A. R. Co. v. McGill, 194 Ala. 186, 69 So. 874; Memphis, etc., Ry. Co. v. Stringfellow, 44 Ark. 322, 51 Am. Rep. 598; Tallulah Falls Ry. Co. v. Ramey,

A public utility company can not escape liability for injuries caused through the negligent maintenance or operation of its property by voluntarily turning over control to another, such as a lessee.[6] Since, however, a lessee would not be liable for injuries caused during the time that a receiver appointed over its affairs was in control of the property, the lessor would not be liable either.[7] If a receiver is appointed over a lessor and he adopts the lease and permits the lessee to remain in control he is liable for injuries caused during the period of the receivership.[8]

A receiver is liable, just as the company would be, for negligence in the maintenance or operation of the property or for an injury accruing in anyway that would give

137 Ga. 568, 73 S. E. 838; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452; Ohio & M. R. Co. v. Davis, 23 Ind. 553, 85 Am. Dec. 477; State v. Minneapolis, etc., Ry. Co., 88 Ia. 689, 56 N. W. 400; Slider v. Pere Marquette R. Co., 194 Mich. 518, 161 N. W. 961; Moore v. Metropolitan St. Ry. Co., 189 Mo. App. 555, 176 S. W. 1120; Metz v. Buffalo, C. & P. R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Andrews v. Roberts, et al., (Tex. Civ. App.) 192 S. W. 569.

It is a well-settled rule of law, that, when a railroad is being operated by a receiver, the corporation which owns the railroad is not liable for injuries caused by the negligence of the receiver, or those who are acting for him in the operation of the railroad. Missouri, K. & T. Ry. Co. v. McFadden, 89 Tex. 138, 33 S. W. 853; Ft. Worth & R. G. Ry. Co. v. Ballou, (Tex. Civ.) 174 S. W. 337.

International, etc., Ry. Co. v. Dawson, (Tex. Civ.) 193 S. W. 1145 the court said: "The court erred in rendering judgment against the railway company, because the evidence shows that the damages claimed accrued while the railroad was in the hands of a receiver appointed by the federal court. A railway company is not liable for damages suffered after its property has passed into the possession and control of a receiver. St. Louis, B. & M. Co. v. Green, (Tex. Civ.) 183 S. W. 829; Freeman v. Barry, 63 Tex. Civ. 295, 133 S. W. 748."

6 Washington A. & G. R. Co. v. Brown, 84 U. S. (17 Wall.) 445, 448, 21 L. Ed. 675. See Henning v. Sampsell, 236 Ill. 375, 86 N. E. 274.

7 Chamberlain v. New York, etc., R. Co., 71 Fed. 636; Henning v. Sampsell, 236 Ill. 375, 86 N. E. 274. See Tandrup v. Sampsell, 234 Ill. 526, 17 L. R. A. (N. S.) 852, 85 N. E. 331.

8 Atkinson v. F. S. Dismuke & Bro., 11 Ga. App. 521, 75 S. E. 835.

a valid cause of action against the owner of the property, if the owner were in control.[9]

A receiver may, because of direct personal knowledge of the existence of dangerous conditions of the property or of the incapacity of employees or for some like reason, make himself personally liable for injuries caused while he is in control.[10] But where there is no element present in the facts to warrant imposing the liability upon the receiver as personal liability and his liability is due simply to the fact that the actionable negligence is that of his employee, the liability of the receiver is not personal, but official. The rule has been stated as follows: "A receiver of a railroad company, who is exercising the franchises of such company and operating its road, is, in his official capacity, amenable to the same rules of liability that are applicable to the company when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the rail-

[9] Central Trust Co. v. Wabash, etc., Ry. Co., 26 Fed. 12 (Receiver liable for statutory double damage for killing stock); Sheat v. Lusk, 98 Kan. 614, L. R. A. 1916F, 1021, 159 Pac. 407 (Receiver liable for injury caused by a defect in a culvert that had existed for more than a year under his management); Wall v. Platt, 169 Mass. 398, 48 N. E. 270 (Receiver liable under statute for fire communicated by engines); St. Louis, B. & M. Ry. Co. v. Knowles, (Tex. Civ.) 171 S. W. 245 (Receiver liable for killing of animal); Yoakum v. Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411 (Receiver liable under statute for injury to freight); Town of Roxbury v. Central Vermont R. Co., 60 Vt. 121, 14 Atl. 92 (Receiver liable for injury due to negligent contsruction of a crossing); Melendy v. Barbour, 78 Va. 544 (Receiver liable for loss of freight).

Personal injuries inflicted through the negligence of a receiver are payable from the current receipts. Texas Pac. Ry. Co. v. Johnson, 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; Ryan v. Hays, 62 Tex. 42; Barton v. Barbour, 104 U. S. 126, 130, 26 L. Ed. 672, 675; Kain v. Smith, 80 N. Y. 458, 470; Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419.

In receivership proceedings a claim for personal injuries occurring prior to the receivership is not entitled to priority over a prior mortgage. Crawford v. Seattle, etc., Ry. Co., 97 Wash. 651, 167 Pac. 44.

[10] Erwin v. Davenport, 9 Heisk. (Tenn.) 44.

road under his management, he is responsible upon the principle of *respondeat superior*. The liability, however, is not a personal liability, but a liability in his official capacity only; and the damage for such torts are not to be recovered in suits against him personally and collected on executions against his individual property, but recovered in suits or proceedings in which he is named or designated as receiver, and to be paid only out of the fund or property which the court appointing him has placed in his possession and under his control.'"[11]

The reason for the rule is stated to be that the receiver is an officer of the court and acts entirely in pursuance of its orders and directions so that his acts are, in a sense, not his own but those of the court.[12] Because of the rule it is said that claims of this character against the receiver are claims against the receivership fund and in a sense are *in rem*.[13]

Two consequences follow from the rule just stated. (1) In the first place a successor to a receiver, upon a vacancy caused by resignation or otherwise, is in the same official way liable for the torts of his predecessor; he may be substituted as defendant in actions already pending or may be made defendant in new actions.[14] (2) A receiver may not be sued after he has been discharged and there no longer remains in his possession any property out of which he could satisfy a judgment.[15]

[11] McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452.

[12] Kain v. Smith, 80 N. Y. 458.

[13] Davis v. Duncan, 19 Fed. 477; Atlanta, B. & A. R. Co. v. McGill, 194 Ala. 186, 69 So. 874; Atlanta, B. & A. R. Co. v. McGill, 194 Ala. 186, 69 So. 874; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452.

[14] Damages to employees are part of operating expenses and should be paid from income Meyer Rubber Co. v. Georgetown, etc., Ry. Co., 174 Fed. 731.

[15] Farmers' Loan, etc., Co. v. Central R. Co., 7 Fed. 537, 2 McCrary 181; Ryan v. Hays, 62 Tex. 42. See, Erb v. Popritz, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871, as to sufficiency of allegation that the property and fund have passed out of his possession. See, Hovey v. Weaver, (Tex. Civ.) 175 S. W. 1089. A statute of Texas

When the claim, founded on the judgment, is presented to the receivership court for allowance and payment, in accordance with this rule, a judgment of a court that did not have jurisdiction to entertain a suit against the receiver because of lack of previous necessary consent of the receivership court is not binding upon that court.[16] However, under the United States statute permitting a federal receiver to be sued respecting his management of the estate without the previous consent of the receivership court, a state court is not deprived of jurisdiction to entertain an action for tort against a federal receiver because of the clause in the statute to the effect that "such suits shall be subject to the general equity jurisdiction" of the appointing court.[17]

In actions against a receiver, the general principles of law concerning actions based on torts govern.[18]

provides that receivers under certain circumstances may be sued after discharge. It was held in this case that the statute did not apply to federal receivers and that therefore it was necessary for a plaintiff seeking redress under the statute to allege the court by which the receiver had been discharged in order that it might appear on the face of the complaint whether or not the plaintiff came within the provisions of this statute as to this point.

16 Missouri Pac. R. Co. v. Texas, etc., Ry. Co., 41 Fed. 311.

17 Central Trust Co. v. St. Louis, etc., Ry. Co., 41 Fed. 551.

18 The general rules of pleading and evidence concerning the official character of the defendant and concerning his control of the property apply. Strain v. Superior Court, 168 Cal. 216, 142 Pac. 62; McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; McNulta v. Lockridge, 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452; Henry v. Epstein, (Ind. App.) 95 N. E. 275; Moore v. Metropolitan St. Ry. Co., 189 Mo. App. 555, 176 S. W. 1120; Davies v. Texas C. R. Co., 62 Tex. Civ. 599, 133 S. W. 295; Beaumont, S., etc., Ry. Co. v. Daniel, (Tex. Civ.) 186 S. W. 383.

Whether or not receivers come within the scope of special statutes relating to liability for torts is a matter of statutory construction to be determined by the principles governing that matter. Hampton v. Norfolk, etc., R. Co., 127 Fed. 662, 62 C. C. A. 388 (A statute providing that a judgment based on a tort may be satisfied out of the mortgaged property of a corporation does not apply to a judgment against a lessee whose lease was subsequent to the mortgage nor give the judgment owner a prior claim upon the income of the lessee's property after the in-

Where railroad receivers were appointed in the Missouri district and also in the Michigan district on an ancillary bill, a claim arising out of operations in Michi-

come has been impounded for the benefit of the mortgagee by the appointment of a receiver). Biddle v. Riley, 118 Ark. 206, L. R. A. 1915F, 992, 176 S. W. 134 (Where the lines of a receiver are used by a mere licensee, the receiver is liable for injury to a passenger, whether his agents or those of the licensee). Lusk v. Eddington, (Okla.) 159 Pac. 491 (A receiver using the line of another company as a mere licensee is not responsible for the absence of a fence along the right of way). Dillingham v. Scales, (Tex. Civ. App.) 24 S. W. 975 (A receiver is not a "proprietor," "owner," "charterer," or "hirer" in the sense of those terms as used in a special statute giving a cause of action to certain heirs for a death caused by negligence. See, also, Houston, etc., Ry. Co. v. Roberts, (Tex.) 19 S. W. 512; Yoakum v. Selph, 83 Tex. 607, 19 S. W. 145. See, also, Meara's Adm'r v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Little v. Dusenberry, 46 N. J. Law 614, 50 Am. Rep. 445, and, Lamphear v. Buckingham, 33 Conn. 237, 238; Bammel v. Kirby, 19 Tex. Civ. 198, 47 S. W. 392 (The term "any railroads" includes street railroads); Hornsby v. Eddy, 56 Fed. 461, 5 C. C. A. 560 (A statute depriving a railroad company of the benefit of the fellow servant doctrine in case of an injury to an employee applies to a receiver. See, also, Allen v. Dillingham, 60 Fed. 176, 8 C. C. A. 544; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. 905; Rouse v. Hornsby, 67 Fed. 219, 14 C. C. A. 377; Henderson v. Walker, 55 Ga. 481; Central Trust Co. v. East Tennessee, etc., R. Co., 69 Fed. 353).

The rule as to the degree of care is the same for the receiver as for the company. Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587.

The receiver may plead the statutes of limitation. Bartlett v. Keim, 50 N. J. L. 260, 13 Atl. 7.

The verdict must be in accordance with the evidence, and the judgment must be based upon the verdict. San Antonio, etc., Ry. Co. v. McCammon, (Tex. Civ.) 181 S. W. 541.

The exception made to the common-law rule precluding recovery from a master for injuries sustained through the negligence of a co-employee, by Ga. Civ. Code, § 2323, in case of injuries, did not, prior to the passage of Ga. act December 16, 1895, extend to an employee of a receiver of a railroad company; and a recovery can not be had for an injury sustained by such employee before the passage of that act. Barry v. McGhee, 100 Ga. 759, 28 S. E. 455.

A receiver of a railroad is a "fellow servant" under Minn. Gen. Stat. 1894, § 2701, and is liable for an injury to an employee. Mikkelson v. Truesdale, 63 Minn. 137, 65 N. W. 260.

An action against a receiver of a railroad corporation is within the provisions of Ohio act April 2,

gan should be presented there, if that court was independently administering the property in its jurisdiction, but otherwise to the Missouri court.[19]

§ 410. Liability of the Purchaser at a Receivership Sale.

The purchaser at a receivership sale is not of course responsible personally for any injury caused by the negligent use of the public utility property either by the company or the receiver; but we have seen that, for the purpose of facilitating the administration of the estate and closing up the receivership promptly, the court may, in the order decreeing a sale of the property make unpaid claims for damages from tortious injuries a liability against the property. An order of that character is conclusive and its provisions are binding upon the purchaser.[1] And where a liability or lien for damages to shipments is created by a statute, provided that suit is commenced within a certain time, the lien is not enforceable against the property in the hands of a purchaser unless the suit was commenced within the prescribed time.[2]

§ 411. Liability of the Company if the Property Is Returned to It.

It may happen that pending the receivership proceeding the affairs of the public utility company take such

1890, making railroad companies liable in certain cases for the negligence of fellow servants or employees who have power or authority to direct or control the one injured. Peirce v. Van Dusen, 78 Fed. 693, 24 C. C. A. 280, 47 U. S. App. 339.

19 Equitable Trust Co. v. Wabash R. Co. (C. C. A.), 244 Fed. 66.

1 See Houston & T. C. Ry. Co. v. Crawford, 88 Tex. 277, 53 Am. St. Rep. 752, 28 L. R. A. 761, 31 S. W. 176. Chicago, R. I. & P. Ry. Co. v. Lopez (Tex. Civ. App.), 209 S. W. 192, was an instance where a reorganization was effected and an agreement made by which it was made a condition that the company would pay all claims against the receiver arising from his operation. Earnings were used in betterments. See, also, chapter on Sales.

2 Williams v. Missouri Pac. R. Co., 134 Ark. 366, 203 S. W. 1038.

shape as to warrant the court in making an order directing that the property be restored to the control and management of the company. In such a circumstance the property may be liable for obligations or debts of the receiver remaining unpaid at the time of the restoration.

If the receiver, pending his control and management has expended from his income money for improving and bettering the property, then the property, in the hands of the company after restoration, is liable for claims against the receiver to the amount at least so expended by the receiver.[1]

1 Texas & P. Ry. Co. v. Brick, 83 Tex. 526, 29 Am. St. Rep. 675, 18 S. W. 947; Texas Pac. Ry. Co. v. Johnson, 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; Texas & P. R. Co. v. Manton, 164 U. S. 636, 41 L. Ed. 580, 17 Sup Ct. 216; Texas P. R. Co. v. Bloom, 60 Fed. 979, 9 C. C. A. 300; Cozier v. Andrews, (Tex. Civ.) 206 S. W. 975.

In Chicago, R. I. & P. Ry. Co. v. Lopez (Tex. Civ. App.), 209 S. W. 192, the court said:

"Appellee was injured while an employee of the receiver, as such, of appellant's railroad, and engaged in operating the railroad. Damages occurring while the railroad is operated by the receiver are a part of the receiver's expenses incurred in operating the railroad and are payable out of the current earnings of the road, which earnings, if diverted by the receiver and placed in permanent improvements, or turned over to the railroad company without sale, make said company liable to the extent of the earnings diverted or turned over to the railroad company. Railway Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60, and same case on appeal to United States Supreme Court, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81; Holman v. G., H. & S. A. Ry. Co., 14 Tex. Civ. App. 499, 37 S. W. 464; I. & G. N. Ry. Co. v. Perkins, 185 S. W. 657; M., K. & T. Ry. Co. v. Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272. At the time of filing this suit, the receiver had been discharged, and, to fix a liability for his cause of action on the appellant railroad, appellee alleged that the railroad properties had been returned to the company with betterments."

In Chicago, R. I. & P. Ry. Co. v. McBride, (Ark.) 206 S. W. 149, the court said: "Appellant also insists that it was not a party or privy in the original suit and not bound by the judgment rendered therein. This contention is based upon the general rule that a judgment is conclusive only between the parties and their privies. It is true, as an abstract proposition of law, that a corporation is not responsible for the negligent acts of the servants of its receiver while the receiver is in possession of the property, and that only parties and

Again, the court, in so restoring the property to the company, is justified in making it a condition to so doing that the company receive the property subject to all

privies to a judgment are conclusively bound by it. But the cause of action stated in this complaint and admitted by the demurrer is not an attempt to hold the corporation responsible for the negligence of the employees of its receiver nor to recover from the corporation on the ground that there is privity between the corporation and its receiver. This is an attempt to hold appellant on entirely different grounds. The complaint alleged, and the demurrer admitted, that the receiver in the instant case was appointed with the acquiescence and consent of appellant; that the net earnings of the receiver while he had possession of the road amounted to many million dollars, a part of which he put in betterments, a part of which he applied to the payment of interest in the funded mortgage indebtedness of the road, and a large part of which he paid to the corporation when he returned the property to it; that that part of the net earnings returned to the corporation exceeded all claims incurred during the receivership, including the claim of appellee; that the property delivered to the receiver when appointed was not sold under order of court, but was returned, with betterments and additions to appellant corporation, together with many million dollars of net earnings.

"It will be observed that this is an attempt to recover on a judgment in favor of appellee against the receiver of appellant corporation, rendered after a trial of the cause on its merits, out of the proceeds earned by the receiver and transferred by the receiver to the corporation without first paying the valid and binding indebtedness of the receiver. It would be inequitable to permit the corporation to receive and hold the earnings of the receiver and not pay the liabilities incurred by him in the management and conduct of the business; so it was proper for appellee to recover, under the alleged and admitted facts, on equitable principles. In specifying the ground upon which the corporation was held liable in the case of Texas & Pacific Ry. Co. v. Johnson, 151 U. S. 81, 38 L. Ed. 81, 14 Sup. Ct. 250, a case quite similar to the instant case, Mr. Chief Justice Fuller said: 'The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings, to an extent far greater than sufficient to pay the plaintiff, had been diverted into betterments, of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute (Laws Tex. 1887, p. 120, ch. 131, § 6), and, irrespective of statute, on equitable principles applicable under the facts.'

"In the case of Texas & Pacific Ry. Co. v. Bloom's Adm'r, 164 U. S. 636, 41 L. Ed. 580, 17 Sup. Ct. 216, after reiterating and af-

claims against the receiver and it is the general practice to incorporate such a condition. The condition is binding and any rights under it are determined entirely by the terms of the order. A receipt given by the company to

firming the doctrine announced in Texas & Pacific Ry. v. Comstock, 83 Tex. 537, Justice Shiras said: 'It was indisputably shown at the trial, by the testimony of the receiver himself, that the earnings of the railroad while operated by him largely exceeded the expenses, and that a very large sum was applied by him to improvements and new equipments, so that "the road was turned over to the company in far better condition and more valuable by far than when placed in the hands of the receiver." Such a state of facts certainly discloses an equitable claim against the railroad on behalf of the plaintiff below.'

"The same doctrine was announced in the case of Garrison v. Texas & Pacific Ry. Co., 10 Tex. Civ. App. 136, 30 S. W. 725, quoting third syllabus: 'Where the receivers are subsequently discharged, and the property returned to the railway company with betterments of great value made by them, such claim, in judgment against the receivers, may be then enforced by suit thereon against the company, notwithstanding its non-allowance as against the receivers.'

"In the case of Bartlett, Adm'r v. Cicero Light, Heat & Power Co., 177 Ill. 68, 69 Am. St. Rep. 206, 42 L. R. A. 715, 52 N. E. 339, damages for injuries to persons were classed as necessary expenses of the receivership and Mr. Justice Magruder, in rendering the opinion, said: 'Where the net income derived from the business during the receivership is diverted from the payment of such operating expenses, and applied to the permanent improvement of the property of the corporation, and the receiver is afterwards discharged, and the property is again turned over to the corporation, in such case the corporation is liable for torts during the receivership to the extent of the net income so applied.' . . .

"We have not overlooked the contention of appellant that the effect of adopting the rule announced by the authorities cited may result in preventing the original corporation, or the appellant in this case, from defending the suit on its merits. As we see it, the only thing which should concern appellant is whether or not there are sufficient net earnings from the receivership in its hands to pay the judgment obtained against the receiver. The case of Garrison v. Texas & P. Ry. Co., 10 Tex Civ. App. 136, 30 S. W. 725, was a case where a judgment had been rendered against the receiver, and, after his discharge, a suit brought on the judgment against the railway company. The court said in that case: 'We think it must now be accepted as settled that the act of Congress which authorizes receivers appointed by federal courts to be sued without leave of the

the receiver accepting the property upon such conditions is based upon a valuable consideration and is binding upon the company.[2]

In order to establish a lien upon the restored property a claimant must both allege and prove that one or the other of the above mentioned conditions exist.[3]

If the order of restoration limits liens upon the property to claims that would be valid claims against the receiver in the receivership court, then only such claims

court making the appointment has the effect of making the judgments rendered in suits so brought conclusive as to the amount thereof.'

"The declaration of the court touching upon this point seems to be amply supported by authorities. The original corporation had no right, in equity and good conscience, to have more out of the earnings of the receivership than the net earnings after the payment of all just and valid claims. Especially is that true where it is conceded that appellant acquiesced in and consented to the receiverships."

[2] In an order restoring the property to the company and making it liable for all "lawful liabilities and obligations" of the receiver, the terms liabilities and obligations include a claim for damages for personal injuries due to the negligence of the receiver. Vandalia Ry. Co. v. Keys, 46 Ind. App. 353, 91 N. E. 173.

The word "obligations" includes a cause of action for injury to an employee. St. Louis, B. & M. Ry. Co. v. Webber, (Tex. Civ. App.) 202 S. W. 519.

Such a receipt as is mentioned in the text is a promise made by one person to another for the benefit of a third under such circumstances that the third party can himself enforce it. Idem.

Although the receivership court, after the return of the property and the discharge of the receiver retains, pursuant to the order of restoration, jurisdiction to hear and determine all claims and to order them fixed, if allowed, by the company, a claimant need not present his claim to the receivership court, but may bring suit upon it in the state court, and that court may enforce its judgment against the property. Kansas City, etc., Ry. Co.v. Latham, (Tex. Civ. App.) 182 S. W. 717.

The receiver having been discharged and not being personally liable is not a necessary party to such an action. Idem.

Where the property was restored to the company upon condition that it assume all obligations created under the receivership, a judgment for damages to a passenger caused by the tort of a conductor becomes a liability. Beaumont, S. L. & W. Ry. Co. v. Daniels, (Tex. Civ.) 204 S. W. 481.

[3] Ft. Worth & R. G. Ry. Co. v. Zidell, (Tex. Civ. App.) 202 S. W. 351; Honey v. Weaver, (Tex. Civ.) 175 S. W. 1089; Beaumont, S. L. & W. Ry. Co. v. Daniel, (Tex Civ.

may be enforced against the property. A claim for tort against the company prior to the receivership,[4] or a claim based upon some act of the receiver that was beyond and not necessary to the proper performance of the powers bestowed upon him by the court[5] could not be so enforced.

6. Presentation and Allowance of Claims and Their Priorities.

§ 412. General Rules Governing Presentation and Allowance.

In the matter of handling claims against the estate, federal receiverships of public utility corporations have, in practice, been peculiar and different from receiverships of other corporations, both because of the vast amount of business involved and because of the varied and intricate nature of the claims presented. This fact has made it necessary for the courts to work out and apply a special set of rules governing the matter of the provability of claims against the estate. Bankruptcy rules are not available; nor are the rules established by state courts with reference to claims against insolvent or dissolved corporations. These rules and decisions concerning them are of use only in so far as they appeal to the conscience of the chancellor.

The fundamental principle governing the distribution of the assets of a public utility corporation under receivership—as it is in cases of other corporations—is that equality is equity.

Claims against the corporation which are in such shape that at the beginning of the receivership they constitute a present cause of action against the company—such, for

App.) 195 S. W. 625; Kansas City, M. & O. Ry. Co. v. Russell, (Tex. Civ. App.) 184 S. W. 299; Texas & Pac. Ry. Co. v. Adams, 78 Tex. 372, 22 Am. St. Rep. 56, 14 S. W. 666.

Dest & Russell Cigar Co. v. William Reese Co. (Tex. Civ. App.), 210 S. W. 317.

[4] Foreman v. Central Trust Co., 71 Fed. 776, 18 C. C. A. 321.

[5] Kansas City, etc., Ry. Co. v. Weaver, (Tex. Civ. App.) 191 S. W. 591.

instance, as a matured note or an overdue account—present no difficulty. Neither do claims that, although constituting direct obligations of the company, have not matured—such, for instance, as a note due at some time in the future. The value of such a claim at any time prior to its maturity may be determined by well-recognized methods of computation. Likewise claims for damages growing out of tortious conduct of the corporation which have not been liquidated by compromise or judgment present no particular difficulty. If the claim is valid the liability exists at the time the receiver is appointed. The only thing lacking is the liquidation of the amount, and that can be readily accomplished. Difficulties of liquidation are not objections to provability.

The difficulties that give rise to the rules are found in connection with contingent claims. Not all such claims are difficult, however. One class of contingent claims grows out of executory contracts of the company. The receiver may elect to abide by them or abandon them. He is entitled to a reasonable time in which to decide upon his course in that respect. If he finally abandons it there arises a claim for damages for breach of the contract. This claim was contingent at the outset of the receivership. But, since, during the time the receiver was experimenting to determine his policy, he was really not operating under the contract, the breach, whenever it happens, is counted as having occurred at the beginning of the receivership. When one party to an executory contract places himself in a position in which he will be unable to perform his part while the other party remains able and willing to perform his, there immediately accrues to the latter a claim against the former for damages for breach of the contract. Accordingly when a receiver abandons an executory contract to which the corporation was a party there accrues, at the beginning of the receivership, a claim on the part of the other

party. Can the amount of damage be determined? The answer to that question depends upon the nature of the contract. If the contract was to furnish to the company certain material used by it in its operations, the total amount and the cost being fixed, and it being covenanted that the material shall be delivered in installments as called for by the company within a certain period of time; if the company has already received a portion of the material and the receiver refuses to call for or accept the balance, although the seller is ready to deliver it, the amount of the damage is easily proved. But if the contract is a lease of a railroad, the situation is different. Such a lease is not like the lease of a dwelling house in a city.[1] The matter of the lease of a railroad is so complicated that it would be impossible to state on what terms or for how long another lease could be made. Not until the end of the lifetime of the breached lease could the amount of the damages due to the breach be determined in any practical way. On the abandonment of such a lease by the receiver we have a contingent claim that has become certain, as if the time of the beginning of the receivership, in so far as its character is concerned but which can not be liquidated as to amount except through the lapse of time.

Again, the contract may be one by which the company has become a guarantor—as, for instance, the guarantor to bondholders of the payment of interest on their bonds as it accrues. The company is the secondary debtor, the mortgagor the primary debtor. It is only in case the primary debtor defaults that there will be a claim against the company. The claim is contingent and only the lapse of time can make it positive either in character or amount.

If sufficient time was allowed to elapse all of these claims would become fixed and then there could be absolute equality of distribution among all the claimants.

1 See § 219, supra.

Two elements militate against such an arrangement. In the first place, the fact that the court is not well equipped to manage and conduct a complicated business makes it desirable that the receivership should be wound up at as early a date as is compatible with just treatment of all the interests involved. In the second place, as against the equity in favor of claimants who will be shut out altogether if not allowed time in which to establish their claims, is the countervailing equity in favor of claimants who may be compelled to wait unduly for their money. These considerations lead to a rule to the effect that a definite time will be appointed by the court as of which claims must be established. Bankruptcy laws and state statutes concerning the dissolution of corporations usually fix the date of the appointment of the receiver or the filing of the complaint or the adjudication of bankruptcy as the time for this purpose. In federal utility receiverships, however, it has been considered inequitable to fix the time at such an early stage of the proceedings. No harm can come to any one if the accounts are not made up until it has become possible to declare a dividend. When this will be will depend entirely upon circumstances and can be known as well by the judge of the receivership court as by any one else.

We have, then, the rule established as follows: The court will make an order fixing a date as of which all claims must be proved; claims which are certain both as to character and amount at that date may be proved; claims which are not certain both as to character and amount at that date may not be proved. This does not mean that claims must necessarily be filed at that date. The court will allow claims to be filed at a later date but *nunc pro tunc* as of the date fixed by the order. As stated above, the liquidation of the claim as to the amount may occur as of any subsequent time. In special cases, where

equitable considerations prompt it to do so, the court may extend the time for proving claims.[2]

§ 413. General Liability of Receivership for Preferred Claims.

"A chancery receiver being a mere holder, his appointment does not change the title to the property in his charge nor alter any lien of contract."[1] "Equality is equity."[2] The foregoing two statements were made in one of the large federal receivership cases, that commonly known as The Metropolitan Railway Receivership. The first may be recognized as the statement of a general principle applicable to all receiverships; the second as a general statement applicable to all corporation receiverships of corporations.[3] In this very same receivership we find, in regard to these two rules, numerous instances where they were not applied. Whether or not these instances shall be spoken of as exceptions to the rules or as indicating rules of superior force is merely a matter of terms. As the same judge, Judge W. C. Noyes, of the Second Circuit, who made the above statements, said in another connection,[4] if these instances are exceptions to the rules, then, as far as the frequency with which they are applied is concerned, "the exceptions are as broad as the rules themselves." In almost every public utility receivership case occasion arises for giving a certain class of unsecured, or general, creditors a prefer-

[2] Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503, 517; Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 132 C. C. A. 518; New York Security & T. Co. v. Lombard Inv. Co., 73 Fed. 537; Baker v. Central Trust Co., etc., 235 Fed. 17, 148 C. C. A. 511; Wheeling & L. E. R. R. Co. v. Carpenter, 218 Fed. 273, 134 C. C. A. 69; United States Trust Co. v. Wabash W. Ry. Co., 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. 86; Dushane v. Beall, 161 U. S. 513, 40 L. Ed. 791, 16 Sup. Ct. 637; Central Trust Co. v. East Tennessee Land Co., 79 Fed. 19.

[1] Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 117 C. C. A. 503.

[2] Pennsylvania Steel Co. v. New York City Ry. Co., supra.

[3] See § 293, supra.

[4] See § 304, supra, note 9.

ence over other unsecured creditors and even over mortgage claimants.

An attempt to state a general rule sufficiently definite as to the class of creditors that would be so preferred and the fund from which they would be paid to furnish an accurate guide for saying in advance what the decision of a court would be in any given case would certainly not be without difficulty. Perhaps the best that can be said about this point is, as was said in the first case in which the United States Supreme Court entered an opinion on the subject,[5] that: "No fixed and inflexible rule can be laid down for the government of courts in all cases. Each case will necessarily have its own peculiarities which must to a greater or less extent influence the Court when he comes to act." One Circuit Court of Appeals has stated that the decisions of those courts are in "hopeless confusion."[6] In one case the United States Supreme Court felt it necessary to admonish the lower federal courts not to carry the application of the principle involved to an unwarranted extent, or, rather, to confine its application to narrow limits,[7] Mr. Justice Brewer in that case saying: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts

5 Fosdick v. Schall, 99 U. S. 235, 252, 25 L. Ed. 339, 342.

6 Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171.

7 Kneeland v. American L. & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950.

have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when the court appoints a receiver of railroad property it has no right to make that receivership conditional on the payment of other than those few unsecured claims which by the rulings of this court have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

A period of twenty-six years (1879-1905) elapsed between the first and the latest decisions of the United States Supreme Court touching the subject, and during the interval that court had been called upon to consider it a great number of times.[8] The latest decision, that of

[8] The following are some of the United States Supreme Court cases dealing with the question: Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415; Lackawanna Iron, etc., Co. v. Farmers' Loan & T. Co., 176 U. S. 298, 44 L. Ed. 475, 20 Sup. Ct. 363; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347; Virginia & A. Coal Co. v. Central R. R., etc., Co., 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657; Thomas v. Western Car Co., 149 U. S. 95, 37 L. Ed. 663, 13 Sup. Ct.

Gregg v. Metropolitan Trust Company,[9] was by a court divided four to three as to what the decision should be. Only one of the members of the court that decided the Fosdick Case was a member of the court that decided the Gregg Case, and he, Justice Harlan, sided with the minority. It may be stated, in passing, that the Supreme Court decision affirmed a conclusion reached by the Circuit Court and sustained by the Circuit Court of Appeals. In a comparatively recent case[10] the Circuit Court of Appeals of the Eighth Circuit reached a decision different from that of the majority in the Gregg Case on facts concerning which it must be said that only the keenest power of judicial analysis, if any power at all, could perceive that they were different from the facts involved in that case. In its argument the court reviews several cases dealing with the "preferred claims" doctrine, and says its decision is not contrary to anything decided in the Gregg Case, and repeated this statement on denying a petition for a rehearing based on the proposition that its decision was in direct conflict with the Gregg Case.[11]

824; Morgan's, etc., Co. v. Texas, etc., R. Co., 137 U. S. 171, 34 L. Ed. 625, 11 Sup. Ct. 61; Kneeland v. American L. & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; Toledo, etc., R. Co. v. Hamilton, 134 U. S. 296, 33 L. Ed. 905, 10 Sup. Ct. 546; Wood v. Guarantee, etc., Co., 128 U. S. 416, 418, 32 L. Ed. 472, 9 Sup. Ct. 131; St. Louis, etc., R. Co. v. Cleveland, etc., R. Co., 125 U. S. 658, 31 L. Ed. 832, 8 Sup. Ct. 1011; Union Trust Co. v. Morrison, 125 U. S. 591, 609, 31 L. Ed. 825, 8 Sup. Ct. 1004; Porter v. Pittsburg B. Steel Co., 120 U. S. 649, 30 L. Ed. 830, 7 Sup. Ct. 741; Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675; Union Trust Co. v. Souther, 107 U. S. 591, 27 L. Ed. 488, 2 Sup. Ct. 295; Union Trust Co. v. Walker, 107 U. S. 596, 27 L. Ed. 490, 2 Sup. Ct. 299; Miltenberger v. Logansport, etc., Ry. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419; Huidekoper v. Hinckley Locomotive Wks., 99 U. S. 258, 25 L. Ed. 344.

[9] Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415.

[10] United States & Mexican Trust Co. v. Beaty, 240 Fed. 592, 153 C. C. A. 396.

[11] United States & Mexican

We think the ground for the decision is one that takes the case entirely out of the "preferred claims" class; it is, however, a ground upon which the minority branch of the court held that the Gregg Case might have been decided and a ground that would necessarily have, in that case, led to a conclusion different from that reached by the majority. The majority did give some attention to this ground, but an attention that, in the view of the minority, was altogether too cursory, and ruled that the instant case was not within the class to which it applied. It must be said, however, that the minority differed from the majority as to the proper conclusion to be reached even on the ground on which the majority based its conclusion. In two very similar and comparatively recent cases the Circuit Court of Appeals of the Ninth Circuit was divided.[12] The majority decided against giving a preference to the claims involved in both cases. The majority said that the matter might have been regarded as settled by the Gregg Case; but the ground on which it reached the conclusion was not, in either case, and could not, under the facts, have been the ground on which the majority decision in the Gregg Case was based. The minority, Judge Gilbert, observed this fact and, reviewing the facts of the instant cases from the point of view on which the majority conclusion was based, reached a different result. It may be said that this point of view is one which sometimes requires the drawing of a very uncertain line between preferred and unpreferred claims, and in regard to which it may be said that when a case has to be decided with reference to it, the court must very largely be guided by the impression made on its conscience by the peculiar facts of the case. In these two cases in the Ninth Circuit there was a point of view

Trust Co. v. Beaty, 243 Fed. 541, 156 C. C. A. 242.

12 Crane Co. v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543; John A. Roebling's Sons Co., etc. v. Idaho Ry., L. & P. Co., 243 Fed. 527, 156 C. C. A. 225.

other than that on which the majority conclusion was expressly based, from which the facts could be considered and which furnished the majority with a supporting ground of decision. In regard to this point of view the minority judge felt that it did not necessarily point to a conclusion against the preference, but it seems probable that if the decision had been primarily framed from this point of view, it might have been unanimous.

In spite of the situation shown by the above facts, a situation existing after the matter has been receiving the attention of the federal courts for more than forty years, we think it possible to state generally the principles and rules governing the question of preferred claims in such a way as to furnish a basis for a fairly accurate indication of what the conclusion ought to be in any given case, except, perhaps, in one or two details calling for close distinctions.

§ 414. General Rule as to What Constitutes a Preferred Claim.

Some difficulty, at least, will be avoided if care is taken to have in mind an accurate idea of the meaning, or scope, of the term "preferred claim." We get something of such an idea by considering what is not a preferred claim. A preferred claim is not one that arises during the receivership itself or out of the operation of the business of the corporation by the receiver. Such claims, in a sense, are preferred in every receivership. The compensation of the receiver and his attorney and expense that he is necessarily put to in protecting the property under his care are always paid before the debt of the party at whose instance the appointment is made or the claim of any other person before the court. Expenses properly incurred by any receiver in conducting a business are likewise given priority in distribution. But a "preferred claim," in the technical sense here being considered, is peculiar to a public utility receiver-

ship. "The payment of such debts stands, *prima facie,* on a different basis from the payment of claims arising under the receivership."[1] A receiver's claim is preferred to a "preferred claim."

Again, a preferred claim is not one to which preferential consideration may be given because of inherent special equities that would entitle it to such consideration in any receivership case, even though, arising in a public utility case, it might possess also the equities of a preferred claim. Traffic balances owed by an insolvent railroad company are usually preferred claims. But where the bondholders have been the stockholders of or otherwise in control of the corporation, and traffic balances, because of practically fraudulent conduct on the part of the bondholders, remain unpaid, to be presented as claims to the receiver, they will, if necessary, be paid preferentially out of the proceeds of the corpus of the property, regardless of their status as preferred claims.[2]

1 Miltenberger v. Logansport, etc., Ry. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140. See Gregg v. Metropolitan Trust Co., supra, both majority and minority opinions.

2 Central Trust Co., etc. v. Chicago, A. & U. Ry. Co., 232 Fed. 936; First Trust Co. v. Crooked Creek, etc., Co., 243 Fed. 450.

Under an order authorizing receivers to pay traffic balances due other railroads, they are authorized to pay compensation received under mail-carrying contract to another road, which did the carrying. Equitable Trust Co. of New York v. Wabash R. Co., 244 Fed. 66, 156 C. C. A. 494.

Where two railroad companies had the same fiscal agent, who received the earnings of both, from which payments were made for each, an account being kept between them, a balance of such account in favor of one company is not entitled to priority of payment from the proceeds of the foreclosure of a prior mortgage on the other, in preference to the mortgage bondholders. Morgan's Louisiana & T. R. & S. S. Co. v. Texas C. R. Co., 137 U. S. 171, 34 L. Ed. 625, 11 Sup. Ct. 61; Penn v. Calhoun, 121 U. S. 251, 30 L. Ed. 915, 7 Sup. Ct. 906; Kneeland v. American Loan & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co., 125 U. S. 658, 31 L. Ed. 832, 8 Sup. Ct. 1011.

Neither the rental nor the net earnings of such lines during the time they are in the receiver's possession as part of the entire railroad system can be claimed by creditors of such lines in pref

Again, a preferred claim is not one of such inherent equity that the court might have made its payment a condition for obtaining the appointment of a receiver in any kind of a case. For instance, after considerable negotiation, a claim against a railroad corporation for damages for a death caused by an accident was compromised and the claim was to be paid on a certain day; on that day, within a few hours in the morning, a complaint and an answer were filed, and a receiver appointed over the company's property; payment of the claim was refused by the company on the ground that it was under a receivership. Circumstances and the evidence showed that the receivership had been in contemplation by the company for some time; when the matter was called to the attention of the court the claim was ordered paid on the ground that its payment could properly have been made a condition of the appointment if the court had known of its existence at the time the appointing order was made.[3] But while the appointment even of a public utility receiver is strictly not a matter of right and the appointment of such a receiver may be made on conditions, a court may not, even in the fully recognized existence of the doctrine of preferred claims, make the payment of any and every claim, on the theory that it is preferred, a condition of the appointment.[4]

Again a claim that is given certain priority because of some statutory provision is not a preferred claim.[5]

erence to the general mortgage creditors, although the trustee of the former might, under sanction of the court, have terminated the right of the receiver by demanding possession. Central Trust Co. v. Wabash, St. L. & P. R. Co., 46 Fed. 26.

[3] Harmon v. Blaskwell, 232 Fed. 440, 146 C. C. A. 434.

[4] See quotation to which note 7, § 413, this chapter, is appended.

[5] See North American Co. v. St. Louis & S. F. R. Co., 246 Fed. 260, in which it was held that a judgment for damages caused by an accident in Missouri, rendered in favor of a non-resident by an Arkansas state court, after a federal receiver of the company had been appointed, in an action commenced before the appointment, constituted a claim against the company's property in Arkansas

Claims such as are above mentioned, entitled to some priority of payment on the grounds mentioned, are not preferred claims as that term is used to describe a certain class of claims peculiar to public utility corporation receivership cases. Preferred claims, in the latter sense, are claims accruing or growing out of obligations created before the receivership, while the corporate affairs were under the control of and being managed by the corporation itself, and accorded a certain preferential standing because of equitable considerations based upon the peculiar nature, or character, of a public utility receivership.[6]

§ 415. Characteristics, and Qualities, Essential to Preferentiality.

There are two points of view from which the question of determining what claims are to be preferred may be approached. The underlying equitable reason for granting the preference may be considered with a view toward reviewing claims and determining which come within the reason. On the other hand, assuming the equitable jurisdiction to grant preferences, the claims themselves may be examined for the purpose of determining which make

superior, under a state statute, to mortgages placed after the statute was passed.

6 A special fund, open only to a certain class of creditors, may come into the estate. Prior to receivership a lessee company did some permanent improvement work on the leased property. Funds were to have been obtained from a loan that had been contracted for. Many of the labor and material bills remained unpaid at the time the lessee went into receivership. The lender refused to advance the promised money, but it was recovered in an action by the receiver. It was held that in equity this fund should be used to pay the claims for labor and materials arising out of the work, and should not be open to general creditors or mortgagees. Such claims are not "preferred" in the technical sense. Pennsylvania Steel Co. v. New York City Ry. Co., 206 Fed. 663, 124 C. C. A. 463, 202 Fed. 607; Miltenberger v. Logansport, etc., Ry. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140. See Central Trust Co., etc. v. East Tennessee, V. & G. R. Co., 80 Fed. 624, 26 C. C. A. 30.

such a strong appeal to the conscience of the chancellor that they ought to be paid in any event. It may be said in a general way that the earlier opinions are much concerned with the reasons for granting a preference, the later with a scrutiny of the character of claims presented for a preference. Occasionally we get, as it were, a glimpse behind the curtain to see how, as a practical proposition, this problem came to be worked out by the courts.

The primary purpose of the receivership in the mind of the court always was to keep as continuous and as unrestricted as possible the public service that the utility had been furnishing. But the receiver met with a recalcitrant engineer who refused to enter his cab unless guaranteed that two months' arrerages of wages would be paid. Coal—at least in the day before oil burners came into vogue—could not be obtained by the receiver on credit unless the company's back bills were paid. Heeding the appeals of the receiver, the court ordered the bills paid and then looked for a reason, feeling compelled to this latter act by the necessity for preserving the integrity of the law as a science and bringing his instant act into proper alignment with precedent. In the Miltenberger case[1] the receiver paid "because creditors threatened not

1 Both the Gregg Case and the Miltenberger Case are reviewed by Judge Dietrich in Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171, wherein, speaking for the Circuit Court of Appeals, he said:

"Conceding that under certain circumstances and within certain limitations the claim of a general creditor of an insolvent railroad corporation may be preferred to a pre-existing mortgage lien, appellants contend that the decree should be reversed or modified for the following reasons:

"(1) The preference of the respondents, if any they have, is limited to the amount of income diverted, namely, $30,000.

"(2) No one of the respondents is entitled to priority, because the trustee did not commence an action of foreclosure or secure the appointment of the receiver, or, as is claimed, submit itself to the operation of the rule that he who seeks equity must do equity.

"(3) There is no proof that any current income was diverted during the six months' period after

to furnish any more supplies on credit unless they were

the indebtedness of any one of the respondents had become payable.

"1. As already intimated, the general question involved in the first proposition is whether we shall give place to what is known as the 'net income' theory, or to the 'going concern' theory, as the basis for preferential allowances. Are claims, such as those of the respondents are conceded to be, for current supplies and services which are necessary to the maintenance of the property of a public service corporation, and to keep it in operation, to be paid out of the current income in prefence to the bonds, upon the assumption that the lien of the mortgage attaches only to the residue of the income remaining after the payment of the operating expenses, or may they displace the vested lien of the mortgage upon the corpus of the estate, because the claimants by their labor and supplies rendered necessary assistance in continuing the operation of the property, thus enabling the debtor to discharge its obligations to the public?

"In the court below, as we have seen, the latter view prevailed. The point urged by the appellants is, not that an incorrect application of the principle was made, but that the principle itself is inherently incorrect. The question has been the subject of frequent consideration in the federal courts, but the decisions are in hopeless conflict. Different rules have prevailed in the several circuits, and in some instances there has been an apparent lack of uniformity in the same circuit. Entertaining, as we do, the opinion that the point is conclusively ruled by Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415, we do not deem it necessary to review or attempt to classify the numerous decisions cited in the briefs. This case was brought against the Columbus, Sandusky & Hocking Railroad Company for foreclosure of two mortgages, and a receiver was appointed. Within the six months' period prior to the receivership, Gregg, in pursuance of the terms of a contract with the railroad company, furnished cross-ties for the replacing of ties decayed in the current operation of the road. A large proportion of the ties were on hand when the receiver was appointed, and used by him in maintaining the roadway. The circumstances indicated that payment would be made out of the current income. Furthermore, it was stipulated that the claim was for 'necessary operating expenses in keeping and using said railroad and preserving said property in a fit and safe condition.'

" 'The case stands,' such is the language of Mr. Justice Holmes, speaking for the court, 'as one in which there has been no diversion of income by which the mortgagees have profited, or otherwise, and the main question is the general one, whether in such a case a claim for necessary supplies furnished within six months before the receiver was appointed should be charged on the corpus of the fund. There are no special circumstances affecting the claim as

a whole, and if it is charged on the corpus it can only be by laying down a general rule that such claims for supplies are entitled to precedence over a lien expressly created by a mortgage recorded before the contracts for supplies were made. An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 58, 21 C C. A. 219, and perhaps in other cases. But we are of opinion, for reasons that need no further statement (Kneeland v. American Loan & Trust Co., 136 U. S. 89, 97, [34 L. Ed. 379, 10 Sup. Ct. 950]), that the general rule is the other way, and has been recognized as being the other way by this court.'

"If by this language any doubt were possible of the intention of the court to disapprove of the 'going concern' theory, the dissenting opinion most clearly indicates that it was this precise question upon which there was a division.

"It is pointed out by respondents that their labor and supplies 'were necessary to the business' of the road, while in the Gregg Case, after referring to certain allowances sanctioned in Miltenberger v. Logansport, etc., Railway Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140, the following language is used:

" 'The ground of such allowance as was made was not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road — a very different proposition.'

"Attention is also directed to that part of the opinion where it is observed that:

" 'The payment of the employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts.'

"And to the further statement that:

" 'We already have intimated that the payment of railroad hands might stand on stronger grounds than the payment for past supplies, etc.'

"But plainly all of these expressions have reference to the principle underlying an exceptional class of preferences considered in the Miltenberger Case. In brief, this principle is that a receiver may sometimes be authorized to pay past debts and charge the same against the corpus of the fund, where failure to make such payment would result in injury to, or would make it difficult to carry on the business of, the estate. If, for illustration, upon the appointment of a receiver, he finds that the pay of the enginemen of the railroad is in arrears, and that they are unwilling to render further service unless their claims are paid, the receiver may very readily conclude, especially where other skilled men are unavailable, that payment is necessary to the business of the road, and disbursements so made may be held to constitute a prior lien, upon the theory that they are required for the preservation of the value of the estate. So in the case where there is only one available source of fuel supply, and the owner declines to furnish the receiver with fuel until past bills are paid, a

similar course may be taken for like reasons.

"'It is easy to see,' said the court in the Miltenberger Case, 'that the payment of unpaid debts for operating expenses, accrued within 90 days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitled them to be made a first lien.'

"In such cases the nature or character of the debts which the receiver is called upon to pay is comparatively unimportant; the controlling consideration is the present necessity of the receiver. If the exigency is such that he must pay past debts before he can procure indispensable future supplies, he must, in deference to his paramount duty to preserve the value of the estate, yield to the necessity, provided, of course, that the probable loss would exceed the required payments. It is to be noted that in the language above quoted from the Gregg Case a distinction is not drawn between supplies necessary for the preservation of the road and supplies necessary to the business of the road; it is difficult to see how, upon principle, such a distinction could be made. The ground of the allowance, says the court, was not merely 'that the supplies were necessary,' but that 'the payment [therefor] was necessary.' The distinction is between the necessity of past supplies and the necessity of present payment therefor. Accordingly it was further said in the Gregg Case that:

"'The payment of employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts.'

"Not that a different principle applies to labor claims, but that they are more likely to fall within the principle. In any case it is a question of business necessity, and such necessity is more likely to arise in the case of skilled labor than in the case of general supplies, which, if they cannot be procured from one source, may be gotten from another.

"In the case at bar the receiver recognized this rule of necessity in the payment of a limited number of claims for rentals which are not here in controversy. But very clearly it was not made, and under the facts of the case it could not properly be made, the basis of the allowance of respondents' claims. So far as appears, the receiver never concluded that, as a matter of business policy, it was necessary to pay these claims, and

paid the arrears." In the Fosdick Case[2] the court set forth a lengthy statement of the reasons for a preferential grant in order to justify a conclusion that the claim under discussion was not entitled to a preference. In the later cases, when it had become recognized that there could and would be such a thing as a preferred claim, creditors found it unnecessary to use compulsion upon the receiver and courts became busy scrutinizing the claims themselves in order to head off the crowd trying to press through the entrance marked "preferred" without the proper pass-word. Much the same thing has happened as happened in regard to the question of the creation of a receivership in the first place. The earlier courts felt compelled to the course of adopting receiverships to save an important and essential public service from the impending ruin that threatened as the inevitable result of the then prevalent, and perhaps only possible, method of financing great public utility enterprises; but they were likewise embarrassed by what they considered the necessity of giving a scientific reason for the remedy employed. Later courts have taken the reason for granted and have ordered a "judicial moratorium" as a matter of course, providing only the practical necessity therefore was made to appear.[3] This history, then, reveals the fact that we will get a better understanding of what claims may be preferred by considering the character of claims that have been preferred, without much ref-

no order was ever made directing or authorizing him to pay the same. There are no facts in the record from which it can be intelligently inferred that any one of the claimants continued to perform labor for or to furnish supplies to the receiver upon the condition or assumption that his claim would be paid. Indeed, there is no evidence that any one of the respondents was furnishing supplies or performing labor at the time the receiver was appointed, or thereafter furnished any supplies or performed any labor."

2 Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339.

3 See § 378, this chapter.

erence to the reason for granting the priority, than by pursuing an opposite plan.

It is universally held, and without any conflict of opinion on the matter at all, that to be classified as a preferred claim, a claim must have two essential qualities, or characteristics.

§ 416. The Consideration as an Essential Characteristic.

The first of these qualities relates to the consideration for the claim. It is essential that that consideration should have been the rendering to the corporation of a service—furnishing personal service or supplies or material—that was absolutely necessary to the mere operation of the public utility so as to keep it a going concern. It might be a service connected with the actual operation itself or connected with the maintenance of the property in such condition as to be safe for at least a temporary operating. "Mere operation" is here used in contradistinction to long-continued operation as a permanent property. Nothing can be stated as to whether or not a claim is to be preferred from considering simply the service that forms its consideration. Personal service, such as that of a locomotive engineer who runs trains over the line, is connected with mere operation; the personal service of a civil engineer who surveys a new branch line is not connected with mere operation. Ties furnished for the ordinary constant repairing necessary to keep the roadway safe for traffic are connected with "mere operation"; ties furnished for the construction of a new branch line are not so related to the business of the corporation.

In a case decided by the United States Court of Appeals of the Eighth Circuit,[1] this essential quality, or consid-

1 Illinois Trust & Sav. Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

In Chicago & A. R. R. Co. v. United States & Mexican Trust Co., 225 Fed. 940, 141 C. C. A. 64, Judge Sanborn, after referring to the series of earlier cases of the United States Supreme Court which had allowed preferences

eration, of a preferred claim is stated as follows: "The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred. The Supreme Court has refused to apply the principle of the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel to the distribution of the proceeds of the foreclosure of mortgages of quasi public corporations. Railroad Co. v. Cowdrey, 11 Wall. 459, 474, 482, 20 L. Ed. 199; Thompson v. Railroad Co., 132 U. S. 68, 74, 10 Sup. Ct. 29, 33 L. Ed. 256. If the consideration of a claim is not a part of the current expenses of the ordinary operation of the mortgaged property, but is a part of the

upon the ground that the necessity or business policy demanded immediate payment, referred to the series of cases commencing with Kneeland v. American Loan & Trust Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950, and ending with Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415, and stated that the earlier cases were largely controlled by the element of estoppel. He then observed that: "A thoughtful consideration of these cases and others which have followed them and of the opinions in the later cases in the Supreme Court which have been cited, convinces that if claims of the nature of those allowed as preferential in the Miltenberger and Union Trust Company cases were now presented, under objection of bondholders under no estoppel, to the Supreme Court, they would be denied preference over the claims of the bondholders in payment out of the corpus of the mortgaged property. Again, if a claim for the current expenses of the necessities of this operation of a railroad is payable in preference to the claims of secured bondholders out of the corpus of the property in any case in the absence of diversion of the income from such expenses, it is only when such preferential payment is necessary to keep the railroad a going concern, or when its preferential payment is necessary to prevent a loss at least equal to the amount of the payment. Gregg v. Metropolitan Trust Co., 197 U. S. 183, 186, 187, 49 L. Ed. 717, 25 Sup. Ct. 415; Moore v. Donahoo, 217 Fed. 177, 181-183, 133 C. C. A. 171; Taylor v. Delaware & E. R. Co., 213 Fed. 622, 624, 130 C. C. A. 214."

expense of constructing a permanent addition or improvement to it, out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure it, will give the claim a preferential equity over the lien of a prior mortgage."

It will be observed from the last sentence in the above quotation that the court was there stating not the general rule but the rule as related to a particular fund, namely a fund in which a mortgagee was interested. We are here, however, stating the rule with reference to a preference as to any fund at all that may be in the receiver's hands. For that purpose the above quotation is too narrow and the second sentence should be read without the clause, "which inured to its benefit." In the Gregg case[2] the majority opinion was based on the ground that the claim involved did not have a preference as to the only fund in which there was any money in the hands of the receiver; for the purpose of making this point clear, it was admitted that, as far as its consideration was concerned, the claim came within the general class of preferred claims and it was stated that the claim was for "necessary operating expense in keeping and using said railroad and preserving said property in a fit and safe condition." Frequently, for the purpose of saving time, stipulations as to the facts of the case are made, and the stipulations are so drawn as to show as clearly as possible the exact point in issue. In the two cases from the Ninth Circuit above referred to,[3] it was stipulated

[2] Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415.

See § 413, this chapter.

[3] See § 413, this chapter. Crane Co. v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543; John A. Roebling's Sons Co., etc. v. Idaho Ry., L. & P. Co., 243 Fed. 527, 156 C. C. A. 225.

that there was money on hand in a fund to which any preferred claim would be entitled; but it was not stipulated that the disputed claims possessed the essential quality now under review, and the facts about the claims—the material supplied and the use made of it by the company—were set forth in the stipulation, leaving it for the court to determine what the character of the claims was. The material had been principally used to enable the company to extend its service,—furnishing water, gas, and electric light and power,—to new customers; the majority ruled that the claim was not "for the current expense of the necessities of the operation of" the public utility; and that, on the score of its consideration alone, the claim was not a preferred claim.

§ 417. The Source of Payment as an Essential Characteristic.

The second quality, or characteristic, which it is essential that a claim should possess in order to give it preferential status is related to the source from which payment is intended or expected to be made, or from which it would in the ordinary course of business be made. If the claimant has accepted security or something in the nature of security, as, for instance, on the part of a lessor, the right to reënter in case of default in payment of the rent, the claim has not this quality. If the creditor relies on the personal, financial, responsibility of the company, its ability, for instance, through the possession of quick assets or borrowing strength, to raise ready cash in an emergency, he is not entitled to be a preferred creditor. It must be expected and intended, or in accordance with ordinary business practices, that the claim will be counted among the claims, or expenses, that the company will first pay out of its current gross income before any other calls upon its treasury receive attention.[1] This matter has been expressed as follows: "Neither the fact that the

1 Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339.

consideration of a claim conserved the property of the railroad and increased the security of the mortgagees nor the fact that it was necessary to keep the mortgagor a going concern and to continue its business, will raise a preferential equity in its favor, if its consideration was not a part of the current expenses of the ordinary operation of the mortgagor."[2]

In regard to this quality, or characteristic of the claim, it is not necessary that the parties should have stipulated for payment out of current income nor even that the claimant should have had consciously in mind the source from which payment was to come or the fact that there was a rule of equity concerning the matter. "Every one is assumed to know the law, however ignorant he may really be of its provisions. This assumption has resulted in many cases of great hardship to the individual; there is no reason why it should not be applied when the result will give him a benefit. If as matter of public policy claims of this character are accorded a special equity, they should have it whether the vendor at the time of sale did or did not know that he was entitled to it."[3] The fact that a claim possesses this characteristic may be inferred by the court from the surrounding circumstances, as was stated by the court in the New York City Railway Receivership Case[4] wherein the court said: "The next contention is that the sale of materials and supplies must have been made upon the understanding, tacit or expressed, that current earnings would be appropriated to the payment therefor, and that they were for operating purposes. It is in effect urged that the burden is on the claimant of establishing this, and that this they have not

[2] Rodger Ballast Car Co. v. Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403.

[3] Pennsylvania Steel Co. v. New York City R. Co., 208 Fed. 168.

The principle set forth in the text is also applied in giving a vendor a vendor's lien even where he did not know that he was entitled to one, if he brings himself otherwise with the requirements for one.

[4] Pennsylvania Steel Co. v. New York, etc., Co., 208 Fed. 173.

done. The truth is, however, that where materials such as oil, coal, lamp wicks, lanterns, and sand are delivered to a railroad company on its order at such times, in such quantities and at such places as those here were, there can be but one inference, and that is not only that they were intended for operating purposes, but that they were ordered on the faith of the security that the law accords to claims for such materials so ordered, and delivered in the absence of anything to indicate a contrary intent. The case of the Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, admits of no other conclusion. In fact the conclusion in this regard, that the court may draw from the circumstances surrounding a claim may have even greater weight than the declaration of the claimant himself.[5]

A claim will not be taken out of the "current expense" class simply because a promissory note is given for it;[6] but, if a secured note is given, it has been held it will not be regarded as coming within that class.[7] It has been held that where an extended credit was given on a claim it could not be said that the claim was entitled to be paid from the current income during the extension.[8]

If an issue is raised as to whether or not the receiver has any money in the "current expense" fund, the burden of proof is upon the claimant; but the fact is to be proved, as any other fact, under the ordinary rules of evidence.

5 John A. Roebling's Sons Co. v. Idaho Ry., etc., Co., 243 Fed. 527, 156 C. C. A. 225. In this case, as to one of the claims, it was stipulated that the material had been sold "in the belief and intention that, unless otherwise provided for, payment would be out of the operating or current income of the railway company." Though the decision against preference was on another ground, the court remarked that the claim might very well have been considered as not coming within the class of "current expense" claims.

6 Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347.

7 Ohio Falls Car Mfg. Co. v. Central Trust Co., 71 Fed. 916, 18 C. C. A. 386.

8 Bound v. South Carolina Ry. Co., 58 Fed. 473, 7 C. C. A. 322.

Such questions as the mingling of funds are treated as they would be in any other kind of a case.[9]

§ 418. Time of Accrual of Claim as an Essential Condition to Its Preference—The "Six Months Rule."

Besides the requirement that, to be preferred, a claim must have both of the qualities, or characteristics, above mentioned, it is also essential that it shall satisfy a certain condition with reference to the time when it accrued. This point has been stated as follows: "It is only necessary to show that the supplies that were furnished contributed to the creation of the current income, that it is looked to by the creditor, and that there was income in fact received by the railroad company equal in amount to what it currently cost to operate the railroad. There can be no net income until the current expense claims have first been deducted from the receipts of operation, and, as the security of the mortgagee is limited to net income, it follows that it has no equitable claim upon the receipts of operation until the supply creditors, who have contributed to the creation of such receipts, have been paid in full out of them. The equity of the rule lies in the manifest justice of paying those whose labor or material went to create the income which the mortgagee claims as part of his security, before the mortgagee receives it in payment of his debt. If the current expense could be specifically traced to the current income it creates, the application of the rule would be easy and definite. The impossibility of tracing each dollar of expense into the corresponding dollar of income created by it has made it necessary for the courts to fix an arbitrary period beyond which it will not be presumed that labor and material furnished the railroad will continue to produce income."[1]

[9] See Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 178.

[1] Texas Co. v. International & G. N. Ry. Co., 237 Fed. 921, 150 C. C. A. 571.

The above statement has reference only to priority over mortgagees, and in that respect is too narrow. Moreover, the word "arbitrary" in the last sentence must not be taken as meaning that the same period is fixed for all cases. The statement, however, clearly shows a reason for the rule and indicates clearly what the rule is. Current expense claims for a consideration bearing directly upon operation are accorded a preference because it is assumed that they directly contributed toward producing the current income of the company, and would be paid out of that income if the company continued to manage its own affairs. Necessarily the influence of any particular consideration upon the current income would cease at some time, and after that the claim based on that consideration would, in theory, not share in the current income, because either it had been fully paid or had not earned its own worth. The receiver simply takes the place of the company, and in theory he should do what the company would do. There is a point of time anterior to the time of the appointment of the receiver in regard to which it can be said that any claim that accrued prior to it will not participate in producing any of the income that will come into the hands of the receiver. This point of time cannot be accurately determined by the court with reference to any one claim and, as a matter of pure convenience, a single time has to be set for all claims. The court therefore must, arbitrarily in one sense, but reasonably in another, fix a certain date and order that only current expense claims that accrued between that date and the date of the appointment of the receiver shall be placed as preferred.[2] Perhaps the most common period that has been chosen as the interval between these two dates is six months, and the rule has become known as the "six months

[2] Central Trust Co. v. East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30.

rule."[3] When it was considered necessary, however, it was said that "there is no six months rule," in the sense that no claim older than six months before the date of the receivership could be preferred.[4] Even when the court makes a general order fixing the period under this rule for a case it may, under compulsion of some special equity, give preference to an older claim.[5] It is probable, in fact, that the elaborate theory worked out in the above quotation is not necessary to explain the rule. More likely the rule is simply a corollary of the rule requiring a preferred claim to be a current expense claim. If it was not paid in a certain time, three, four, or six months, according to the usual practice of the particular company involved in the case, or according to the usual extent of time given for paying what might be called current bills, then the inference would be that it was not to be paid out of current income. But this inference might be offset by some special fact—some dispute about the claim or some unusual delay in the company's payment of current expenses. In the case cited in the last note it is said: "He [the trial judge] recognized it as a condition that the creditors shall not

[3] Title Insurance & Trust Co. v. Home Telephone Co. of Puget Sound, 200 Fed. 263.

It has been said that six months has been commonly chosen as the limit anterior to the receivership in which preferred claims must have accrued because of the fact that interest on bonds is usually made payable semi-annually and mortgages frequently require at the time of interest payment an assurance that current debts have all been paid. Crane Co. v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543. See Thomas v. Peoria, etc., R. Co., 36 Fed. 808.

[4] Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 33 Fed. 182.

[5] Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 173, 216 Fed. 458, 132 C. C. A. 518. In referring to this case we have frequently directed our citation to the report of the special master. This is for the reason that that report gave a very full and extensive review of the facts and the law, and both the District Judge and the Court of Appeals (216 Fed. 458, 132 C. C. A. 518), in affirming the report, contented themselves with brief statements of the law and a reference to the master's report for further information.

have relied merely on the personal credit of the company. They [the claims] must be of such a quantity and *to be paid for at such times* as to indicate that they are necessary for current operations and are to be met out of current earnings. The court may draw the inference that this was the expectation of the parties from the circumstances surrounding the transaction."[6]

§ 419. Funds to Which Preferred Claims Attach.

The orderly process through which a court passes in considering the matter of preferred claims in any case is, first, to examine claims presented for payment to determine which of them are entitled to preferential status, and, second, to examine the condition of the estate for the purpose of finding the money with which to pay them.[1] As was suggested above, this is perhaps the order in which, historically, the whole matter of preferred claims was called to the attention of courts as a practical problem; the court came in contact with claims that practically had to be paid, and then found the money to pay them, and then stated the judicial reasons for doing so.[2] It is to be remembered that the matter of

6 Following are some of the cases in which preference was allowed to claims older than the time fixed in the general order on the subject: Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347, 8 to 11 months; Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419, 33 months; Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675, 11 months; Virginia & A., etc., Co. v. Central R. R., etc., Co., 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657, 8 months; Central Trust Co. v. St. Louis, etc., Ry. Co., 41 Fed. 551, 1 year; Farmers' Loan & T. Co. v. Kansas City, etc., Ry. Co., 53 Fed. 182, 18 months. Where wages for labor were paid in script of a water company to be used in payment of water rights along parts of its canal still to be constructed, the claim based on the script is not a current debt claim. Atlantic Trust Co. v. Woodbridge Canal, etc., Co., 79 Fed. 501.

The period has been fixed by analogy to a state statute with reference to liens upon a railroad for work and material. Turner v. Indianapolis B., etc., Ry. Co., 8 Biss. 315, Fed. Cas. No. 14258.

1 See Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. at page 172.

2 See § 413 of this chapter.

settling claims against a receivership estate is not *in personam,* but *in rem.* A claim is considered with reference to its qualities, or characteristics, and without reference to the individual who owns it. The standing of a claim before the estate is not affected by a change in its ownership.[3] Having considered the conditions, or circumstances, that entitle claims to preference, we come now to inquire what funds in the estate may be employed to pay them in a preferential way.

§ 420. Unmortgaged Assets, Including Current Income Not Covered by Mortgage, as a Payment Fund.

The public utility mortgages that are involved in almost every utility receivership cover all the property of the company, both that owned at the time the mortgage is made and that to be acquired subsequently, together with the income, profits, etc. It has seldom happened, therefore, that there has been in the estate any unmortgaged assets. In one instance, however, spoken of at the time (1907) as unique, there were such assets. They were the assets of the New York City Railway Company, involved in the Metropolitan Railway Receivership Case. The New York City Company had never issued a mortgage.[1]

It has occasionally happened that there has come into the possession of the receiver at the outset of the receivership cash from the current revenue of the company. Moreover, the receivers have usually been appointed at the instance of creditors, and the mortgage foreclosures, with accompanying extensions of the receiverships to the foreclosures, instituted at some later period.

3 Union Trust Co. v. Walker, 107 U. S. 596, 27 L. Ed. 490, 2 Sup. Ct. 299; Northern Pac. R. Co. v. Lamont, 69 Fed. 23, 16 C. C. A. 364.

1 Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 173, 216 Fed. 458, 132 C. C. A. 518.

Where the current income is insufficient, resort may be had to the unmortgaged assets of the corporation. Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458 (at page 471), 132 C. C. A. 518.

It is to be remembered that, even though a mortgage pledges the income, the mortgagee has no lien upon it until he takes steps to secure one through the appointment of a receiver. Up to that time the company, if managing its own affairs, may use the income as it pleases, and such income as comes into the hands of the receiver goes into the general fund.[2] It is to be remembered also that if the mortgagee shares in the unmortgaged assets or income on the basis of a deficiency judgment, he does so simply as a general creditor.[3]

The general fund, made up from such sources as above mentioned, belongs to the general creditors, except in so far as it is used to pay expenses of the receivership itself. As above stated, simply because of the fortuitous circumstance that the estates did not contain such a fund, it has seldom happened that the question as to the priority of preferred claims over the claims of other general creditors as to participation in this fund has arisen. The question, however, has been determined in favor of the preferred claims. In the case just mentioned the point was very ably discussed by Special Master Turner as follows: "In the Whelan Case[4] Judge Lowell says in effect that it may seem anomalous that a claim superior to a mortgage debt is not preferred over general creditors, but that the priority rests on the duty of the mortgagee to contribute, and not upon priority in general distribution. In that case, in which the affairs of an insolvent steamship company were adjusted by the court, preference over general creditors was denied to a traffic balance due a connecting steamship line accruing prior to the receivership—a debt necessary to the business of the

2 Gilman v. Illinois, etc., Co., 91 U. S. 603, 23 L. Ed. 405; Galveston, etc., R. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. Ed. 199; Freedman's Saving, etc., Co. v. Shepherd, 127 U. S. 494, 32 L. Ed. 163, 8 Sup. Ct. 1250.

3 Westinghouse Electric & M. Co. v. Idaho Ry., etc., Co., 228 Fed. 972.

4 Whelan v. Enterprise Transportation Co., 175 Fed. 212.

company, which, even under the narrowed rule laid down in Gregg v. Metropolitan, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, by a sharply divided court, is with claims for labor held entitled to go against the corpus without proof of diversion of current income for its benefit. It was a claim superior even to claims for supplies necessary to current operation, which emphasizes the anomaly. But surely the fact that by the slow process of judicial development there has been evolved a doctrine which displaces vested liens in favor of supply creditors does not mean that the duty which lienors may be under is exclusive, and that general creditors who have contracted solely on the personal credit of the company are in a superior position. It implies the contrary. It is impossible to read the cases cited in the prevailing and dissenting opinions in the Gregg Case without concluding that their necessary implication is that unmortgaged assets not only may but must be resorted to before any attempt by supply creditors to displace liens created long prior to their debts can be made. The reason for the preference lies in the necessity of fulfilling a duty to the public by keeping a railroad in operation, and that necessity is as present and as urgent in the case of the railroad company with a large unsecured indebtedness as in the case of a company whose property is wholly covered by liens. If the doctrine in the Whelan Case is to be applied to railroad receiverships, a court charged with a duty to the public of keeping the railroad of an insolvent company in operation might be wholly unable to discharge it, for it would be unable to use the cash and quick assets of the insolvent in payment of old and new debts for supplies which are as essential to operation as labor itself. The opinion in the Whelan Case points to a possible distinction between a steamship and a railroad company receivership without deciding it. Since that decision the court in the same circuit has decided that supply creditors are preferred over general cred-

itors and has done it in a steamship receivership, but without referring to the prior decision, and it has been affirmed on appeal. Berwind White Coal Co. v. Metropolitan Steamship Co. (C. C.), 183 Fed. 250; American Trust Co. v. Same, 190 Fed. 113, 111 C. C. A. 376.''[5]

This report was confirmed by the District Court and its judgment affirmed by the Circuit Court of Appeals.[6]

Another possible source of revenue for the general fund also appears in this same case. The New York City Railway Company had been the lessee of the Metropolitan System. During the period that the receiver of the City Company was operating the Metropolitan System to determine whether or not he should adopt the lease, he had expended certain sums for construction work on lines belonging to the Metropolitan. It was held that the New York City Railway Company was entitled to be reimbursed for this expenditure, and in so far as the expenditure had been made from current income or unmortgaged assets the reimbursement should be credited by the receiver to the general fund.[7]

§ 421. What Constitutes Mortgaged Assets.

In the history of the doctrine of preferred claims the chief difficulties that have confronted the courts, due to the condition in which the receivership estates have, financially, happened to be, have been in connection with providing for their payment from funds that, as a matter of law, belonged in priority to mortgagees. These funds are current income produced by the receiver in his operation of the utility and the proceeds of the corpus of the property.[1]

5 Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. at 175.

6 Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 132 C. C. A. 518. See, also, Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379.

7 Pennsylvania Steel Co. v. New York City Ry. Co., 190 Fed. 609.

1 See discussion under following section.

§ 422. Status of Current Income from Operation of the Receivership Property.

As to the current income produced by the operation of the property while under the control of the company we have seen that, as a matter of law, the company had the right to use that as it saw fit, as far as the mortgagee was concerned, and therefore had the right to pay current expense debts out of its current income without giving cause for complaint on the part of the mortgagee.[1] It was comparatively easy, therefore, for the courts to hold that the mortgagee did not have a prior claim to such of the funds that came into the hands of the receiver as were belated collections of money actually earned by the company before the receivership began, or such as were earned by the receiver himself before his protection was extended to the interest of the mortgagee. The next step was to apply to the receiver's current income, derived from his operating of the public utility, the same practice, with the modification, however, that this receiver's income might be used, not to pay the receiver's own current expenses, simply, but those of the company

[1] We are not unmindful of the proposition that it may be held that a mortgagee may never be entitled to a lien on income, but we are not mentioning it because, generally speaking, courts do not have occasion to consider it in a utility receivership case. If it arose and it was decided that the mortgagee did not have a lien on the receiver's income, that income, as far as preferred claims are concerned, would probably be thrown into the general fund. See § 247 et seq., supra. It has been held that, though a mortgage does not expressly pledge the income of the utility as security, a provision giving the trustee the right, in the event of a default, to take possession and continue the business, operates to give the mortgagee a lien on the receiver's income if the trustee elects to foreclose. Central Trust Co. v. Chattanooga R. & C., etc., Co., 94 Fed. 275, 36 C. C. A. 241. Where there has been a diversion of income during receivership, a reimbursement of fund for payment of operating expenses is required, but otherwise, and in the absence of any surplus income, bondholders are protected by their contractual rights. Loveland & Hinyan Co. v. Blair, 222 Fed. 207.

as well arising within a limited period prior to the receivership. An explanation of this point is given in the same opinion from which we quoted above to show how the "six months rule" has sometimes been accounted for.[2] District Judge Grubb, writing for the Circuit Court of Appeals, continued the argument begun in that quotation as follows: "This accounts for the arbitrary period of six months fixed by rule of court. It depends upon the assumption that the period over which labor and supplies used by a railroad will continue to contribute to its earnings is a period of not exceeding six months. Under this rule, if a railroad ceased to be operated upon the appointment of a receiver, supplies and labor furnished at any time within six months prior thereto would share in earnings up to the time the receiver was appointed. If operations are continued by the receiver it would seem proper to assume that labor and supplies furnished the railroad company, during at least some period prior to the receivership, would continue to contribute to create earnings under the receivership; for it is clear that if the company's operations had not been interrupted by a receivership, such labor and supplies would have entered into future earnings as a creating factor. If the mortgagee is permitted to subject the entire surplus earnings of the receivership to his security, to the exclusion of labor and supply claimants, who furnished the railroad labor and material prior to the receivership, he would be receiving, in part at least, 'that which in equity belongs to the whole or a part of the general creditors.' He would be receiving as net income what would not be properly net income; the claims of the labor and supply creditors who contributed to its creation not having been deducted from it. He would in that event receive the benefit of the earnings of the

[2] Texas Co. v. International & G. N. Ry. Co., 237 Fed. 921, 150 C. C. A. 571.

See § 418, this chapter.

receivership, without paying the incidental burden of the expense by which they were created. If there had been no receivership, the supply creditors would receive payment, from the railroad company, out of the same earnings that went to the receiver after his appointment. It is inequitable that the mortgagee should profit in this respect at the expense of supply and labor claimants, through the placing of the mortgaged property in the hands of a receiver. The bondholders also profit by receiving the earnings of the railroad company on hand when the receiver was appointed, as well as earnings earned before the receivership and subsequently collected by the receiver, all of which would have gone to the supply and labor claimants but for the interruption of the company's operation by the receiver." The same point is put in the following form by Judge Dietrich in the United States Circuit Court of Appeals of the Ninth Circuit: "The equity of a person who has furnished labor or supplies necessary to operating an insolvent railroad company to preference over a prior mortgage flows from the fact that, in the ordinary course of business, he has performed labor or furnished necessary supplies to the company, with the reasonable expectation of being paid therefor from certain funds. His power to enforce his rights should not be made contingent upon the possibility that the secured creditor may apply to a court for the appointment of a receiver or for other equitable relief, a circumstance wholly fortuitous, or at least one over which he exercises no control. The real basis upon which the preference rests is the implied understanding on the part of all parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto."[3]

3 Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171. See, also, Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675; Virginia & A. Coal Co. v. Central R. R., etc., Co., 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657; First Trust Co. v. Ill. Cent. R. Co., 252 Fed. 965, 164 C. C. A. 473.

§ 423. Resort to the Corpus of the Mortgaged Property to Replace Diversions from Current Income.

Thus far in the analysis of the preferred claims doctrine we have found the following funds out of which such claims might be paid: (1) Unmortgaged assets of the company; (2) special funds to replace expenditures by the receiver from his own funds, unmortgaged assets or income, to the benefit of some interest other than that of his own utility; (3) remnants of the current income of the public utility turned over to the receiver upon his appointment or subsequently collected by him; (4) current income of the receiver earned before the mortgagee obtained an equitable lien upon income; (5) receiver's current income after the mortgagee had become interested therein. Using these funds involved very slight, if any, encroachment upon the strict legal rights of the mortgagee, as they would be regarded in any other kind of a receivership, except the last. These funds, however, were seldom adequate for the purpose. The next step to find money for the preferred claims required a real encroachment upon the mortgagee's rights as they were usually regarded to be. It involved a further scrutiny of the financial practices of public utilities in times of financial stress. The following facts were observed. The effort to save a struggling concern caused two things. To head off absolute disaster, fixed charges like interest and taxes had to be met, and likewise litigious and insistent creditors. Perhaps the prospects were that a struggling concern could be turned into a strong institution by securing an increase of business. Additional equipment to handle more business in the territory already being served or extensions of service to new territory might be effective. A strong financial concern could meet these charges without trouble, but a weak one, choosing between evils, had to let some obligations go. General claims, among them preferred

claims, had to be neglected. Money that would otherwise have gone to pay preferred claims was turned into other channels. For the most part, however, these expenditures inured to the benefit of the mortgagee. If disaster came his claim was smaller than it would have been because interest had been paid, and perhaps less complicated because litigious creditors had been paid. Since his mortgage covered after-acquired property, his security was greater than it would have been if new equipment had not been acquired and new construction made. These advantages to the mortgagee were acquired at the expense of the preferred claims. Hence the expenditures that created them were called diversions of current income.

Even under the management of the court it is often considered advisable to make expenditures from the receiver's current income that, as far as preferred claims are concerned, constitute diversions of current income. If the condition of the estate makes it necessary to do so, these diversions are restored to the current income fund from the proceeds of the property itself, in order to pay preferred claims.[1]

1 Union Trust Co. v. Souther, 107 U. S. 591, 27 L. Ed. 488, 2 Sup. Ct. 295; Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675; Morgan's L. & T., etc., Co. v. Texas, etc., R. Co., 137 U. S. 171, 34 L. Ed. 625, 11 Sup. Ct. 61; Virginia & A. Coal Co. v. Central R. R., etc., Co., 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347. Pending foreclosure of a second mortgage, the receiver's current income may not, as a settled policy of the court, be diverted to the payment of interest on first mortgage bonds for the purpose of heading off foreclosure of those bonds, if such policy tends to delay payment of a preferred claim and to make it probable that, if continued, the policy will make necessary resort to the corpus to pay such preferred claim. Texas Co. v. International, etc., Ry. Co., 237 Fed. 921, 150 C. C. A. 571.

In this case it was also held that the receiver might recover from the bondholders' trustee money already paid him if he had not distributed it among the bondholders. When, pending foreclosure of a second mortgage, diversions of receiver's income are

In this matter of reëstablishing the current income fund by restoration of diversions, several details are to be noticed.

If, without any restoration of diversions, there is money on hand in the current income fund, even though it be from earnings of the receiver after the extension of the receivership to the mortgagee's interest, the access of preferred claims to the fund is not limited, in the interest of the mortgagee, by the fact that there may have been, under the company's régime, diversions that did not inure to the benefit of the mortgagee. Notwithstanding the fact that because of such diversions the current income fund is less than it otherwise would have been, preferred claims, as against the mortgage, are entitled to all of it.[2]

Diversions occur only when current income is spent for other than current debts. They do not occur when

being made to the benefit of the first mortgagee and the disadvantage of a preferred claimant, the first mortgagee not being a party to the receivership proceedings, said claimant may commence an independent action, joining the first mortgage as defendant, to enjoin such diversions, the necessity for bringing in the first mortgagee as a party being the basis of the right to an independent action as compared with a motion in the proceedings themselves. As affecting the rights of a second mortgagee, foreclosing, a diversion to preserve the unity of the system, as, for instance, to prevent foreclosure of a mechanic's lien upon a portion of the road, might be justifiable; but a diversion to forestall foreclosure by a first mortgagee, which would not have a tendency to dismember the road, simply to enhance the security of the second mortgagee, is not justifiable. Idem.

[2] Virginia & A. Coal Co. v. Central R. R., etc., Co., 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657.

In Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347, Mr. Justice Harlan, while holding that each case must depend on its own special facts, said: "That a railroad mortgagee, when accepting his security, impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of the current receipts before he has any claim upon such income."

In this connection see Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171.

such other debts are paid without recourse to current income, as, for instance, from borrowed money or unmortgaged assets. The burden of showing the fact of diversions is on the preferred claimant. If diversions occur, but the amounts are restored to the current income fund from moneys derived from another source, the diversions are offset.[3]

The alleged diversion must have occurred during the "six months" period, or whatever period is established as the one during which current expense claims must have accrued to be preferred. A diversion during that period calls for restoration in favor of any claim accruing during the period; a diversion antedating the period does not. As to any claim in behalf of which the fixed period is, for special reasons, extended, a diversion, to call for restoration, must have occurred after, and not before, the accruing of the claim. Current debts are not affected by the use the utility makes of its current income before they come into being.[4]

The restoration is limited to the extent of the diversion. Restoration is not for the benefit of general creditors and is resorted to only when preferred claims can not be entirely satisfied out of other funds to which they have access.[5]

[3] St. Louis, etc., R. Co. v. Cleveland, etc., R. Co., 125 U. S. 658, 31 L. Ed. 832, 8 Sup. Ct. 1011; Central Trust Co. v. East Tennessee, etc., Co., 80 Fed. 624, 26 C. C. A. 30; Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. at 178; Gregg v. Metropolitan Trust Co., 124 Fed. 721, 59 C. C. A. 637.

[4] John A. Roebling's Sons Co. v. Idaho Ry., etc., Co., 243 Fed. 527, 156 C. C. A. 225; Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 180; Central Trust Co. v. East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30.

[5] Fosdick v. Schall, supra; Chicago & A., etc., R. Co. v. United States & Mexican Trust Co., 225 Fed. 940, 941, 141 C. C. A. 64; Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 132 C. C. A. 518; Finance Co. of Pennsylvania v. Charleston, etc., R. Co., 48 Fed. 188.

Payments of interest to a mortgagee, and for equipment and construction not necessary to continue the existing business of the

To call for restoration it is essential that a diversion must have inured to the benefit of the mortgagee.[6]

company temporarily, but to insure its permanence or increase it, inure to the benefit of the mortgagee; the issuing of receivers' certificates having priority over a preferred claim for the purpose of borrowing money to make such payments is, as far as such preferred claim is concerned, equivalent to payment. Texas Co. v. International, etc., R. Co., 237 Fed. 921, 150 C. C. A. 571. Payment of taxes does not inure to the benefit of a mortgagee any more than to the benefit of a preferred claimant, since all parties are interested in preventing the danger to continued operation that failure to pay taxes would create. Idem.

6 Purchase of an extension of right of way inures to benefit of mortgagee. Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675. Where a system is made up of a number of companies consisting of a primary company, others owned by that company, and others leased by it, payment of interest on the bonds of the subsidiary companies, or of rentals to the leased companies, consisting in part of interest on bonds of the leased companies, all of which bonds are secured by a mortgage prior to the mortgage being foreclosed and covering the system, such payments being made for the primary purpose of preserving the unity of the system, inure to the benefit of the general mortgage. Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 173; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347. But see St. Louis, etc., R. Co. v. Cleveland, etc., R. Co., 125 U. S. 658, 31 L. Ed. 832, 8 Sup. Ct. 1011. See United States & Mexican Trust Co. v. Beaty, 240 Fed. 592, 153 C. C. A. 396.

In Chicago & Alton R. Co. v. United States & Mexican Trust Co., 225 Fed. 940, 141 C. C. A. 64, the court, speaking through Circuit Judge Sanborn, said: "It is true that a mortgagee of the property and income of an operating railroad company impliedly agrees that the current expenses of the ordinary operation of the railroad for wages, supplies, materials and such necessities of operation for six months before the impounding of the income for its benefit may be first paid out of the gross income of operation, before that net income arises which the mortgagee's lien holds fast, and that a court of equity administering railroad property in a foreclosure suit may prefer unpaid claims for such current expenses incurred within six months before the impounding of the income to the claims of bondholders secured by a prior mortgage in its distribution of the surplus income of the property, and that if income has been diverted from the payment of such current expenses, leaving some of them unpaid, to the payment of other debts of the mortgagor not in this preferential class, the court may restore from the proceeds of the corpus of the property the amount thus diverted and apply it to the payment of such current expenses. But if there has been no diversion there can be no restoration,

§ 424. Resort to the Corpus of the Property to an Amount Greater Than That of Diversions.

Up to the point that we have now reached, we think that there has not been any serious conflict of opinion among the decisions as far as the principles of the doctrine of preferred claims are concerned. We think there is no well-considered opinion that has denied that current expense claims—that is, claims that accrued within a reasonable time prior to the receivership, and whose consideration was directly related to the operation of the utility as a going concern or to the maintenance of its property in a condition safe for operation, and whose payment ought to have been made from current revenue coming to hand very shortly after the claims accrued—remaining unpaid at the time of the appointment of the receiver, are not entitled to preferential treatment against other general creditors as to unmortgaged assets or other

and the amount of the restoration can not exceed the amount of the diversion. Conceding, without admitting, that the consideration of the claim of the intervener is a part of the current expenses of the ordinary operation of the railroad for necessities of operation, such as wages and supplies, so that it might be preferred in payment out of surplus income, or out of moneys taken from the proceeds of the corpus of the property and restored to the place of moneys diverted from the payment of current expenses, yet there is no such surplus income in this case, and there was no such diversion, therefore there can be no restoration and no payment of this claim out of the proceeds of the sale of the property. It is only when current income has been diverted from the payment of current expenses of the ordinary operation of the railroad for wages, supplies and such necessities of operation, leaving a part of such current expenses unpaid, and applied to the payment of interest on bonds, or of claims for construction, or for unnecessary betterments and the like, which inure to the benefit of the bondholders, that claims for such current expenses may be paid out of the proceeds of the body of the property. Gregg v. Metropolitan Trust Co., 197 U. S. 183, 190, 49 L. Ed. 717, 25 Sup. Ct. 415; Carbon Fuel Co. v. Chicago C. & L. R. Co., 202 Fed. 172, 174, 120 C. C. A. 460; Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 131, 132, 148, 44 C. C. A. 389, 52 L. R. A. 481; Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co., 154 Fed. 629, 632, 83 C. C. A. 403."

funds on which the mortgagee has no lien; and, against the mortgagee, as to the current income fund in the hands of the receiver, derived under the régime of the company or the receiver, as that fund is made complete by restoration to it, so far as necessary, from the corpus of the property, of amounts diverted, for the benefit of the mortgagee, from the current income during the administration of the receiver or during a reasonably limited period of the administration of the company immediately preceding the receivership. There may, of course, at any time arise a difference of opinion as to whether a certain expenditure was for operating or permanent maintenance; whether a certain expenditure inured to the benefit of the mortgagee or of some other interest, and other like matters.[1] But these are differences of opinion as to fact, not as to principle or law. For the most part they grow out of differences of opinion as to the weight or proper interpretation of evidence or of the equitable consideration to be given to special circumstances, and do not relate to the underlying rules upon which decisions are based or by which they are controlled.

But it sometimes happens that the application of the doctrine of preferred claims up to the limit so far reached does not satisfy in full all claims of that class, and to accomplish this purpose it is necessary to resort to the corpus of the property to a greater extent than is sufficient simply to complete the current income fund by restorations on account of diversions, or to resort to the corpus when there have been no diversions either

1 See majority and minority opinions, Crane Co. v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543, and John A. Roebling's Sons Co. v. Idaho Ry., etc., Co., 243 Fed. 527, 156 C. C. A. 225. Compare also Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347, with Lackawanna Iron, etc., Co. v. Farmers' Loan & T. Co., 176 U. S. 298, 44 L. Ed. 475, 20 Sup. Ct. 363; also Southern Ry. Co. v. Carnegie Steel Co., supra, with St. Louis, etc., R. Co. v. Cleveland, etc., R. Co., 125 U. S. 658, 31 L. Ed. 832, 8 Sup. Ct. 1011.

under the company or under the receiver. Can this relief be accorded to preferred claimants, or are mortgagees protected against this further intrusion upon their legal rights?

It was on this point that the United States Supreme Court divided, by a majority of one, in the Gregg Case,[2] and it is the Gregg Case that has caused most of the difficulty for the lower courts. In that case the majority of the court spoke with approval of the preceding cases that had gone to the length of restoring to the current debt fund, for the purpose of paying preferred claims, sufficient money to make up for previous diversions and expressly declared that if the claimant in the instant case could in that way find money for his claim he was entitled to it. Since that case, however, lower courts have frequently declared that it restricted the doctrine within narrower limits than had formerly been considered necessary, and, following the admonition given to lower courts in the Kneeland Case,[3] it has undoubtedly made lower courts somewhat timid in carrying the doctrine even to the extent recognized by the case itself. It may be repeated, in passing, that the majority decision affirmed a ruling of a court of appeals that in this very case itself boasted that, no matter what other courts may have done, it had always followed the decisions of the United States Supreme Court.[4]

§ 425. Discussion of the Gregg Case and Its Results.

Two things are necessary to be said about the Gregg Case.[1]

[2] Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415.

[3] Kneeland v. American L. & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950.

[4] Gregg v. Metropolitan Trust Co., 121 Fed. 721, 59 C. C. A. 637.

[1] Gregg v. Metropolitan Trust Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415.

In connection with the Gregg Case see the following cases: Taylor v. Delaware & E. R. Co., 213 Fed. 622, 130 C. C. A. 214; Pennsylvania Steel Co. v. New York

The claim was for coal that had been ordered by the company. The entire order amounted to something over four thousand dollars. It had been delivered during the last month or so of the company's régime, and part of it the day on which the receiver was appointed. Something over three thousand dollars' worth was on hand when the receiver took possession, including the amount delivered the day he was appointed, and he used it in operating the road.

The claim was treated expressly as one accruing before the receivership, as a "very meritorious claim,"[2] and as one fully entitled to be paid out of current income, either of the company or of the receiver or of restorations for diversions. There was not any current income fund and there had not been any diversions from that fund either by the company or by the receiver. To pay it money would have to be taken from the corpus of the property even in the absence of diversion. The majority opinion says: "The case stands as one in which there has been no diversion of income by which the mortgagees have profited, or otherwise, and the main question is the general one, whether in such a case, a claim for necessary supplies furnished within six months before the receiver was appointed should be charged on the corpus of the fund. There are no special circumstances affecting the claim as a whole and if it is charged on the corpus it can be only by laying down a general rule that such claims for supplies are entitled to precedence over a lien expressly created by a mortgage recorded before the contracts for supplies were made."

The minority were of the opinion that the gates should

City Ry. Co. 216 Fed. 558, 132 C. C. A. 518; Texas Co. v. International, etc., Ry. Co., 237 Fed. 921, 150 C. C. A. 571; Crane Co. v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543; New York Trust Co. v. Detroit, etc., Ry. Co., 251 Fed. 514, 163 C. C. A. 508.

[2] See Gregg v. Metropolitan Trust Co., 124 Fed. 721, 59 C. C. A. 637.

be thrown wide open and that there was no substantial equitable support at all for the doctrine of preferred claims unless it could be carried to the extreme limit of paying all preferred claims before the mortgagee received anything at all from the estate. The majority ruled that the doctrine should be and always had been, stopped short of this final inroad upon the legal rights of the mortgagee. Preference to the claim in issue over the rights of the mortgagee in the corpus in the absence of beneficial diversions from the current income was denied.

It is to be noticed that the majority ruled that such was the general rule and held that there was in the instant claim no circumstance that gave it an enhanced equity as compared with current debt claims in general. There is in this ruling at least an inference that special equities might give such a claim a right to payment out of the corpus of the fund. This inference is strengthened by the way in which the majority referred to contain former decisions of the court.

Of the Supreme Court preferred claim cases, prior to the Gregg Case, we have observed only two in which payment of claims out of the corpus of the fund had been involved and in both of these the payment had been approved.[3] In the later one of them a few small claims for labor had been favorably included, without special mention, in an order directing the payment of a number of receiver's claims, to the proper equitable payment of which the court had given practically all of its consideration in its opinion. Concerning the preferential payment of these labor claims the majority in the Gregg Case said: "The payment of the employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred

3 Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809; Miltenberger v. Logansport, etc., Ry. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140.

debts." As to this suggestion the minority could not see that, in equity, as far as their necessity to the business of the road is concerned, there is any difference between the engineer in the cab of the locomotive and the coal in its tender. We think it must be said on this point that the minority were right, unless equitable consideration is to be given to the compelling force of such a thing as a threatened or anticipated labor strike, a matter, however, which the majority did not mention. Quoting the majority's explanation of the payment of these labor claims a lower court subsequently remarked, parenthetically, "But for what reason is not stated." We think that holding that there was a limit to taking money from the corpus of the fund for paying current debt funds, the majority should have said that the earlier payment of labor claims was through inadvertence—that the claims got through by reason of mass of detail.

The same explanation that was given for the approved payment of these labor claims could not be used with reference to the claims involved in the other early case, the Miltenberger Case, for the reason that in that case the Supreme Court had expressly given a reason for its approval of the payment. This reason, according to the majority, was "not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road—a very different proposition." It is also said: "In the later cases the wholly exceptional character of the allowance is observed and marked;" but in none of the cases mentioned in connection with this statement was anything said about the Miltenberger Case necessary to the decision. There is to be noticed in our first quotation from the majority opinion in the Gregg Case, in which was stated the precise question before the court, the statement: "There are no special circumstances affecting the case as a whole." Of course the minority of the court, under its view of the extreme limit to which the doctrine

should be extended, would have had no difficulty in expressly approving the Miltenberger Case. The majority certainly did not do that. Did it approve that case inferentially? It has been said that it, at least, did not overrule that case, though it limited the doctrine as there laid down.[4] But we find this statement about the matter in one of the later cases,[5] the court saying: "Moreover, there are two grounds—(1) the diversion of income; and (2) the necessity or business policy of immediate payment—on which claims for current expenses for necessities of operation have been paid out of the corpus of the property. Miltenberger v. Logansport Railway Co., 106 U. S. 286, 308, 311, 1 Sup. Ct. 140, 27 L. Ed. 117; Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 457, 6 Sup. Ct. 809, 29 L. Ed. 963. But the decisions of the Supreme Court in the cases in which such claims were allowed on the second ground were rendered more than 15 years ago, before the series of decisions found in Kneeland v. American Loan & Trust Co., 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379; Morgan's Co. v. Texas Central Railway, 137 U. S. 171, 196, 198, 11 Sup. Ct. 61, 34 L. Ed. 625; Thompson v. Valley Railroad Co., 132 U. S. 68, 71, 73, 10 Sup. Ct. 29, 33 L. Ed. 256; Thomas v. Western Car Co., 149 U. S. 95, 110, 13 Sup. Ct. 824, 37 L. Ed. 663; Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257, 296, 20 Sup. Ct. 347, 44 L. Ed. 458; Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475; and Gregg v. Metropolitan Trust Co., 197 U. S. 183, 190, 25 Sup. Ct. 415, 49 L. Ed. 717, which so narrowly limit and clearly define preferential claims, were rendered, and the earlier cases were largely controlled by the element of estoppel. A thoughtful consideration of those cases and others which have followed them, and of the opinions in

[4] United States and Mexican Trust Co. v. Beaty, 243 Fed. 544, 156 C. C. A. 242.

[5] Chicago & A., etc., R. Co. v. United States & Mexican Trust Co., 225 Fed. 940; 141 C. C. A. 64.

the later cases in the Supreme Court which have been cited, convinces that if claims of the nature of those allowed as preferential in the Miltenberger and Union Trust Company cases were now presented, under objection of bondholders under no estoppel, to the Supreme Court, they would be denied preference over the claims of the bondholders in payment out of the corpus of the mortgaged property.

"Again, if a claim for the current expenses of the necessities of the operation of a railroad is payable in preference to the claims of secured bondholders out of the corpus of the property in any case in the absence of diversion of the income from such expenses, it is only when such preferential payment is necessary to keep the railroad a going concern, or when its preferential payment is necessary to prevent a loss at least equal to the amount of the payment. Gregg v. Metropolitan Trust Co., 197 U. S. 186, 187, 25 Sup. Ct. 415, 49 L. Ed. 717; Moore v. Donahoo, 217 Fed. 177, 181-183, 133 C. C. A. 171; Taylor v. Delaware & E. R. Co., 213 Fed. 622, 624, 130 C. C. A. 214. The evidence in this case goes no farther than the testimony of one witness that it was not necessary for the mortgagor company, or the receivers, to ship freight on the railroads of other companies, but that they could take it on junction settlement, instead of on interstate account, although they generally have such interline accounts with connecting carriers as that out of which the intervener's claim for the balances arose, and that if these claims for balances were unpaid, and the connecting carriers refused to carry their freight, this would disrupt their freight, and be a serious detriment to their business. This evidence falls far short of proof that the preferential payment of the intervener's claim was either necessary to keep the Orient Company a going concern or to prevent a loss at least equal to the amount of the payment." It is evident that this court did think that the Gregg Case overruled the Miltenberger Case as far as its particular

facts are concerned, but that it did not overrule it in the sense of holding that no claim could arise of sufficient equity to warrant its being paid out of the corpus of the fund in the absence of diversion. In the case from which we have just quoted it was held that claims for the "balances for car repairs, loss and damage claims, and overcharges" arising through interchange of business between two roads can not be paid out of the corpus of the fund. The statement is made that such items are not traffic balances, although the claims there involved are in another case decided by the same Circuit Court of Appeals stated to have been for traffic balances.[6] We might add also that we do not see anything in the Gregg Case that can be translated into the proposition that a claim can not be paid out of the corpus of the fund unless its payment "is necessary to prevent a loss at least equal to the amount of the payment."

In the last case cited in the above quotation, it was contended, on behalf of a claim for coal, that, on the principle that equality is equity, it should be preferred because certain claims for "wages, station rentals and balances due connecting lines" had been paid, the contention being that "these charges were entitled to no greater consideration than was the bill for coal." The court responded: "This may be so, but it is entirely within the discretion of the court to determine which, if any, of such claims shall be paid by receivers, and it is those which are not only necessary but whose payment is necessary to keep the road a going concern which should be paid out of the corpus of the property [citing Gregg Case]. It is to be presumed that the court found payment of these claims necessary." We think there is nothing in the Gregg Case that placed the matter of carrying the preferred claims doctrine to the extreme limit in the discretion of

[6] United States & Mexican Trust Co. v. Beaty, 240 Fed. 592, 153 C. C. A. 396.

the court; and we think that, if the Gregg Case is to be followed, it might better have been said in this Delaware Case,[7] at least as far as the claim for wages was concerned, as was said in effect in the Gregg Case, in answer to a similar contention, that two wrongs do not make a right. Certainly the Gregg and the Delaware cases are not identical because both ruled that claims for coal could not be preferred.

We think, however, that the Gregg Case did not overrule the Miltenberger Case and that, without going as far as the minority of the court did in the Gregg Case, it may be said that there is a class of claims that could be paid out of the corpus of the fund without going contrary to anything said by the majority in the Gregg Case. We think that if, contrary to the holding of the minority in that case, preferred claims may be compared among themselves in respect to their equitable power, there is a class of claims having greater force than the ordinary claims for labor, supplies, or material; and that the line between this class and the others can be as distinctly drawn as it is possible sometimes to draw the line between operating repairs and permanent construction.

In a recent case in a United States District Court in Kansas,[8] a claim was presented by the State Public Service Commission, on behalf of shippers, for an excess in freight rates that had been collected by the company over and above those that had been established by the commission, pending litigation over an order of the commission reducing rates below those being charged by the company. The claim was for the excess that had been collected by the company prior to the receivership, the order of the commission having been sustained. The matter was treated as a preferred claims case. In an

7 Taylor v. Delaware & E. R. Co., 213 Fed. 622, 130 C. C. A. 214.

8 United States & Mexican Trust Co. v. Kansas City, etc., Co., supra.

earlier case[9] the court had found it easy to allow an identical claim, based on the same order of the commission, for the reason that there happened to be money in the current income fund. In the instant case there was no money in any fund except the corpus fund and there had been no diversions and the court felt compelled to say that there was no basis for a preferential treatment of the claim unless a "right to preferential payment inheres in the very nature of the claim itself." However, the court found in an argument employed in the other case, sufficient ground to warrant a decree preferring the claim to that of the bondholders. It quoted as follows: "(2) There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the Supreme Court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity, that has taken over the business of the public carrier by means of a receivership, ought to be equally careful to enforce.

"(3) Petitioners' claim also comes within the rule which underlies the right to a preferential payment. Freight rates are the lifeblood of a railroad operation. It will not be contradicted that if there were no freight rates paid in the United States, not a wheel would turn on any road. What does the law say in regard to the allowance of preferences? We accept the law as established by the Supreme Court of the United States, and by this court, as follows: The class of claims which under the

9 Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379.

decisions of the Supreme Court may lawfuly receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage is limited to claims incurred for the current expenses of the ordinary operation of the mortgaged property in the usual course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business, for labor, supplies, and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment, otherwise it may not be. Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 124, 129, 44 C. C. A. 389, 390, 395, 52 L. R. A. 481; Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co., 154 Fed. 629, 632, 83 C. C. A. 403, 406; Blair v. R. R. Co. (C. C.), 23 Fed. 523; Whiteley v. Central Trust Co., 76 Fed. 74, 75, 77, 22 C. C. A. 67, 34 L. R. A. 303; Gay v. Hudson River Electric Power Co. (C. C.), 182 Fed. 904, 907, 909; Penn. Steel Co. v. New York City R. Co. (C. C.), 165 Fed. 485; Farmers' Loan & Trust Co. v. Northern P. R. R. Co. (C. C.), 68 Fed. 36, 41, 42; Fordyce v. Omaha City & E. Ry. Co. (C. C.), 145 Fed. 544, 556, 557; Chicago & A. R. Co. v. U. S. & Mex. Trust Co., 225 Fed. 940, 141 C. C. A. 64; Martin Metal Mfg. Co. v. Same, 225 Fed. 961, 141 C. C. A. 85.

"We think that what has been heretofore said establishes that the claim of the shippers is a claim incurred 'for the current expenses of the ordinary operation of the railroad in the usual course of business of the road.' On principal it can not be distinguished from payments to sureties who have signed bonds to stay the execution of judgments and claims for holders of unused tickets for refunds, and many other like charges which are

habitually allowed, and have been allowed in the receivership of the Frisco Company."

We think a better view of the underlying equities of the matter may be obtained in another way. At the outset the court, in permitting the company to collect the excess rates pending the litigation over the commission's order, had exacted a bond from the company to secure the repayment of the money to the shippers in the event that the order was sustained. It turned out that the bond was seriously inadequate in amount. The court might, however, have ordered the entire excess collections to have been impounded in some depositary until the controversy was settled.[10] In that event the actual money would have been on hand for the party declared to be the real owner, and there probably would have been on hand at least some of the interest allowed by the court to the real owner. In other words when the company was spending the excess collections, it was spending money that did not belong to it and that, strictly speaking, was not part of its own current income but a trust fund.

Part of the claims preferred in the Miltenberger Case were for traffic balances. In theory, when two roads operate under an interchange of traffic agreement, the initial carrier collecting the charge for the through service, that carrier should immediately turn over to the connecting company the latter's share of the collection or at least hold the money until it had been offset by a like amount in the hands of the connecting line collected on business going the other way. If the initial line pursues a different policy and uses the entire collections before an accounting is had it is using money, if the balance turns out to be against it, that is not its own and does not belong to its own current income. In two recent

[10] Spring Valley Water Co. v. City and County of San Francisco, 225 Fed. 728, 140 C. C. A. 209.

cases[11] claims for traffic balances arose, growing out of business during a time when the bondholders were in control of the insolvent company and when they diverted the traffic balances to improving the road in a manner that inured to their own benefit. These cases were determined on principles not related to the doctrine of preferred claims but on principles relating to fraud in general. However, in one of the cases[12] it is said: "Though there may have been no diversion by the Anamosa Company of its own current income during the time Myers and Caldwell were so operating the road, it is not disputed that it did during such time receive and use the intervener's share of its earnings and appropriate the same to the improvement and betterment of the Anamosa road to keep it in a safe condition for operating."

In other words the insolvent company had been using money not its own. In the ordinary case, when such claims as excess rates and traffic balances arise, there are not special equities present to take the case outside of principles peculiar to public utility receiverships, and the matter has to be determined, as it was in the Miltenberger Case and the excess rates cases above mentioned, within the scope of the preferred claims doctrine. If, within that doctrine, a reason has to be given for according such claims a preference as to the corpus fund that would not be extended to the ordinary supplies and material claims, the reason would be that the court determines the matter on much the same grounds on which a court of equity always reasons when it places a necessary loss upon one of two innocent parties rather than the other.

Just how far in regard to matters covered by interchange of traffic arrangements shall this rule be carried?

11 Central Trust Co. v. Chicago A. & N. R. Co., 232 Fed. 936; First Trust Co. v. Crooked Creek R., etc., Co., 243 Fed. 450.

12 Central Trust Co. v. Chicago & A., etc., R. Co., supra.

In the Delaware Case,[13] preferment of claims for station rents was justified—after the event. In the Chicago and Alton Case, supra, claims for loss of and damage to freight, car repairs, and over-charges, not being considered as traffic balances, were denied preference. It is true that, as between the insolvent company and a party injured by its carelessness, a tort claimant is not allowed any preference at all, let alone access to the corpus fund.[14] But a balance in favor of one company against another, when the two under an interchange of traffic arrangement, have been mutually paying one another's bills, would seem to stand on a different basis. It has been held that a petition seeking preference for a claim against an insolvent company for its share of the cost of maintaining a crossing and the wages of a flagman at the crossing, which had been paid in full by the claimant company, is not obnoxious to general demurrer when the petition alleges diversions.[15] It does not sound equitable to say that the preferential status of these claims shall in each case be determined by the mere fortuity as to whether or not the receiver, being compelled to operate his road on a through service basis, can avoid payment by arranging for the through service on a plan different from the one that had been employed by the company and which has been in general vogue. Translating the matter into the terms usually employed by the courts in talking of the equities of preferred claims we think that it can very well be said that the matters usually covered by interchange of traffic arrangements and such a matter as the collection of excessive fares as involved in the cases above referred to are more intimately connected with the mere operation of a railroad than is the

[13] Taylor v. Delaware & E. R. Co., 213 Fed. 622, 130 C. C. A. 214.

[14] Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 132 C. C. A. 518.

[15] Missouri K. & T. R. Co. v. City Trust Co., 209 Fed. 45, 126 C. C. A. 187.

furnishing of ordinary operating supplies and material, or even of operating personal service. We think the Miltenberger Case was not inferentially overruled by the Gregg Case, though it may have been necessary to issue a warning against adopting the broad view suggested by the minority of the court by withholding express approval of it.

We come now to consider another view of the Gregg Case. As stated above the claim involved was presented to the court as one accruing before the receivership. That it was presented as such is shown by the fact that the petitioner waived, as far as this particular application was concerned, a claim for coal delivered on each of the two days respectively immediately after the appointment of the receiver. However, the coal was actually used by the receiver and if the claim could have been considered as arising under the receivership it certainly would have been paid out of the corpus fund.[16] A suggestion that it might be so considered was reviewed by the majority of the court with the remark that possibly the seller had the right to take the coal back but had not done so, and that the coal belonged to the company and that it was not only the right but even the duty of the receiver to use it. The minority considered this treatment of the suggestion as altogether inadequate and held that the fact that the receiver had used the coal was controlling. In a later case it was held that a claim for material on hand at the time of the appointment and used by the receiver is an operating claim in the sense that it arises under the company.[17] But in this case, as well as the one cited in support of the holding, the point was immaterial because the claims were protected by the fact that there was money in the current income fund and resort to the corpus fund

16 Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895.

17 Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 173, citing Virginia & A. Coal Co. v. Central R. R., etc., Co., 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657.

was not necessary. A later case[18] presents a clear cut ruling opposite to that of the majority in the Gregg Case. The claim was for coal. The following stipulation was entered into: "In order to dispense with the taking of evidence, it is agreed between the receivers of the Sans Bois Coal Company and the defendant, the Kansas City, Mexico & Orient Railway Company, and complainant, as follows:

"(1) Said receivers have the legal title to the claim (of the Sans Bois Coal Company) set up in their intervening petition, and the right to recover whatever may be due thereon.

"(2) Between November 15, 1911, and March 7, 1912, the Sans Bois Coal Company sold and delivered to said defendant railway company the cars of coal shown in Exhibit A attached to the intervening petition of said receivers, of the price and value of $27,388.44, no part of which has been paid.

"(3) Said coal was sold and delivered by said coal company to the defendant railway company for use as fuel in the daily operation of its locomotives and shops, and was necessary to the continued operation of said railway company as a going concern. All said coal was so used by said railway company during the time hereinbefore mentioned, except 92 cars thereof, which was on hand, unused, on March 7, 1912. Said 92 cars were taken possession of by the receivers of said defendant railway company, and were used by such receivers in their operation of the railroad of said Kansas City, Mexico & Orient Railway Company, subsequent to said March 7, 1912, and were of the value of $6900.

"(4) Said coal was furnished under a contract in writing (which has been lost) providing in substance that the

[18] United States & Mexican Trust Co. v. Beaty, 240 Fed. 592, 153 C. C. A. 396; on petition for rehearing, 243 Fed. 544, 156 C. C. A. 242.

coal company, beginning with June 1, 1911, and ending with July 31, 1912, should furnish to said railway company such quantities of screen lump coal (describing it and naming the price per ton) all f. o. b. cars at McCurtain, Okla., as the railway company might order for its use. Payments for said coal to be made on the ——— day of each month for coal furnished during the calendar month preceding. The 92 cars mentioned had been delivered to the railway company at McCurtain prior to said March 7, 1912, and were either en route or had actually reached the line of said Kansas company." The receiver was appointed on the 7th day of March, 1912.

Concerning the claim for the coal used by the receiver the court says: "We come, then, to consider the question directly involved in this appeal: Was the $6900 of the interveners' claim allowed as prior in point of equity to the claim of the bondholders such a claim as might properly be allowed as an operating expense of the receivership under the facts shown by this record?" In answering the question the court quotes from a Supreme Court case dealing exclusively with claims arising under the receiver;[19] quotes from two Circuit Courts of Appeal cases and cites another dealing with claims arising under the company.[20] The quotations simply state the doctrine of preferred claims but include the proposition, in a general way, that preferred claims "may, in proper cases be paid out of . . . the proceeds of the sale of the mortgaged property in preference to the mortgage debt." The case cited simply gave a claim for excess freight rates preferential priority in the distribution of the current income, but the opinion contained statements to the effect that resort might be had, if necessary, to the corpus

[19] Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895.

[20] St. Louis Trust Co. v. Riley, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456; Illinois Trust, etc., Co. v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379.

fund.[21] The court then says: "There has been no departure, so far as we can discover, from the principles so announced by the Supreme Court and the Court of Appeals for this circuit, especially where the claim is for wages, or supplies necessary to keep a road in the hands of a receiver in operation as a going concern, and the earnings of the receivership are insufficient to pay such claims. Certainly Gregg v. Metropolitan Trust Co. does not go to that extent." This is the only reference to the Gregg Case in this part of the original opinion. In considering the claim for the coal that had been used by the receiver the court quotes, with approval, from the opinion of the District Court on the matter as follows: "In many matters heretofore submitted and decreed on the same proofs as now before the court in this case, it has been held there was in this case no diversion of income derived from the operation out of which the claim of the intervener could or should have been paid prior to the receivership, and this for the all-sufficient reason that there was no such income from operation derived by the road to divert; on the contrary, the property, as operated by the railway company prior to receivership, was a losing venture. Since receivership intervened, when the receivers at any time have secured from operation more than the actual cost thereof, they have been compelled to expend the same at once in the protection of the property from an entire loss through fixed liens resting on the personal property of the road at the date of their appointment, taxes, charges, assessments, and burdens laid on them by the states through which the road runs, or in protecting the road from the ravages of floods and other disasters. Hence there is in this case no room for the application of the rule of diversion of income, and under the doctrine of the case of Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717,

[21] See this section, note 7, and quotation to which the note is appended.

and kindred cases, the power or right of a court of equity to decree payment out of the corpus of the property of the demand of intervener, in its entirety, in preference to the fixed lien of the mortgage securing the bonds resting thereon, must be denied."

On denying a rehearing, based on the contention that the decision with reference to the coal used by the receiver was directly contrary to the Gregg Case, the court went a little further into the matter. Of the facts in the Gregg Case it says:[22] "The petitioner Gregg made a claim on the funds in the hands of the receiver for the value of these ties because he had not been paid for them and they had not been returned to him by the receiver." It quotes the Gregg Case's statement of the problem involved and the portions of the opinion referring to the two earlier Supreme Court cases that had approved of the payment of preferred claims from the corpus fund. It then quotes a portion of the opinion in the Kneeland Case[23] that deals with claims arising under the receiver. It refers to the approval in the Gregg Case of former United States Supreme Court cases that had acknowledged the validity of securing money for preferred claims by restoring diversions. It then says: "This is sufficient to show that the majority opinion in the Gregg Case recognizes that there may be cases wherein the payment for labor rendered and supplies furnished necessary to keep the road in operation and preserve its property and business from sacrifice, deterioration, or waste during the six months' period preceding the appointment of the receivers, or thereafter, may be allowed from the corpus of the property in the hands of the receiver."

Nothing is anywhere said of the treatment accorded in the Gregg Case to the fact that the receiver had used the ties. The court concludes: "The receivers were ac-

22 United States & Mexican Trust Co. v. Beaty, 243 Fed. 544 (on rehearing), 156 C. C. A. 242.

23 Kneeland v. American Loan & T. Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950.

cordingly appointed and almost simultaneously with their appointment the 92 cars of coal in question came into their custody or it may be the possession of the road; but this coal was received by the receivers and used by them in the operation of the road thereafter and they were authorized under the order of the court appointing them to pay therefor. Even under the majority opinion in the Gregg Case and the cases cited therein with approval we are of opinion that the trial court was clearly justified in directing its receivers, under the special circumstances shown, to pay for such coal from income in their hands, and, if none, then from the proceeds of the property arising from the sale thereof, as a proper and necessary expense of the receivership, in as much as they used the coal in lieu of purchasing other coal to take its place in keeping the road in operation."

This last statement is certainly reminiscent of what the minority of the court had said in the Gregg Case and is what usually happens to a bare majority decision on a close point. The claim in the Gregg Case was not based on the fact that the receiver had not returned the supplies to the claimant; it was based on the fact that he had used them. Neither was there, in the Gregg Case or this Beaty Case, any splitting of hairs as to whether the deliveries were a minute before, a minute after, or simultaneous with the receiver's taking hold; in both cases the admitted and accepted fact was that the supplies were on hand when the receiver took hold. The fact is that the court treated the Beaty claim as one against the receiver, and in doing so took the view that the minority, disagreeing with the majority, took as to what view should have been taken of the claim in the Gregg Case.

In speaking of the equities of the matter the court in the Beaty Case, said: "It is quite true that the receivers might have procured other coal in lieu of this; but, had they done so, they would have been compelled to pay for the coal so procured, and the result would have been the

same to the bondholders." This statement overlooks the proposition that, if the Gregg Case had been followed and the receiver allowed to use the coal without paying for it, the bondholders would have profited to the extent of the value of the coal. If the receiver had not used the coal, what would have been done with it? The equities of the matter would certainly not have been altered by the receiver's holding on to the coal against a demand for its return, even though he did not actually put it to beneficial use. The Gregg Case does not rule that the dealer had the right to take the supplies back after the receiver took hold but it is stated that he may have had that right. If he had, did not the receiver have the right and the duty to return them if he did not intend to pay for them?

In both the Gregg and the Beaty cases the sales were made under executory contracts. While the company was running its own affairs the sale was completed upon acceptance of delivery. Thereafter neither the vendor nor the vendee could rescind the transaction without the consent of the other. The real meaning of the Gregg Case is that, in equity, this rule survived the company and controlled under the receivership, even though the vendor lost his claim entirely. On the other hand, a receiver, in equity, is not bound by the executory contracts of the company.[24] He may or may not adopt them. He is entitled to a reasonable time in which to test his need for them, in the meantime, however, paying for such benefit as he derives from them. The real meaning of the minority ruling in the Gregg Case and of the ruling in the Beaty Case is that this equity extends back to supplies delivered to, but not used by the company; the receiver may return them if he pleases, but if he uses them he must pay for them.

Since the Gregg Case the courts have with practical

[24] See § 391, supra.

unanimity held that the ordinary claim for supplies and materials actually used by the company may not be given priority over the bondholders as to the corpus fund.[25]

While, as we have said, the mere service itself that forms the consideration of a claim does not indicate whether or not the claim may be preferred, an examination of cases with reference to the service and the circumstances under which it was rendered tends to give one an understanding of the doctrine of preferred claims.[26]

[25] Carbon Fuel Co. v. Chicago, etc., R. Co., 202 Fed. 172, 120 C. C. A. 460; United States & Mexican Trust Co. v. Beaty, 240 Fed. 592, 153 C. C. A. 396; Chicago & A., etc., R. Co. v. United States & Mexican Trust Co., 225 Fed. 940, 141 C. C. A. 64 [claims for balances of car repairs, loss and damage to freight, and overcharges on freight in interchange of traffic business]; Martin Metal Mfg. Co. v. United States & Mexican Trust Co., 225 Fed. 961, 141 C. C. A. 85; United States Fidelity, etc., Co. v. United States & Mex., etc., Co., 234 Fed. 238, 148 C. C. A. 140, L. R. A. 1916F, 1067; International Trust Co. v. T. B. Townsend, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171; Spencer v. Taylor, etc., Co., 194 Fed. 635, 114 C. C. A. 407; Westinghouse Air, etc., Co. v. Kansan, etc., R. Co., 137 Fed. 26, 71 C. C. A. 1; Taylor v. Delaware, etc., R. Co., 213 Fed. 622, 130 C. C. A. 214; Illinois Trust & S. Co. v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

Delay on the part of the mortgagee to commence foreclosure after default does not count as laches to give preference to a supply claim arising after default. Carbon Fuel Co. v. Chicago, etc., R. Co., supra; Spencer, et al. v. Taylor, etc., Co., 194 Fed. 635, 114 C. C. A. 407; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339.

[26] A. Claims possessing both essential characteristics and allowed (see § 425, supra):

Fees of general attorney, regularly employed, giving counsel to all departments and supervising litigation. Blair v. St. Louis, etc., R. Co., 23 Fed. 521; Seaboard Air Line Ry. v. Continental Trust Co., 166 Fed. 597.

Portion of work on a bridge considered to be necessary operating repairs. Guaranty Trust Co., etc. v. Philadelphia & L., etc., Co., 160 Fed. 761.

Excessive freight charges collected pending litigation over Public Service Commission's order fixing rates. Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379; United States & Mexican Trust Co. v. Kansas City, etc., Co., 240 Fed. 511.

Coal furnished in such quantities and under such terms regarding payment as to show that it was to be used for operation and to be paid for out of current income.

Virginia & A. Coal Co. v. Central R. R., etc., Co., 170 U. S. 355, 42 L. Ed. 1068, 18 Sup. Ct. 657; Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675; United States & Mexican Trust Co. v. Beaty, 240 Fed. 592, 153 C. C. A. 396 (not paid because no fund, except corpus fund, and there had been no diversions); Pennsylvania Steel Co. v. New York C. Ry. Co., 208 Fed. 173, 216 Fed. 458, 472, 132 C. C. A. 518; Taylor v. Delaware, etc., Co., 213 Fed. 622, 130 C. C. A. 214 (not allowed against corpus fund; no diversion).

Accommodations for waiting rooms, ticket offices, etc. Northern Pac. R. Co. v. Lamont, 69 Fed. 23, 28, 16 C. C. A. 364.

Sand to be sprinkled on tracks of electric street car road to prevent cars from slipping; lamps, globes, etc., used in cars and on track-work; lubricating and dynamo oils used in power houses; shoveling snow off tracks. Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 173; 216 Fed. 472, 132 C. C. A. 518.

Labor on operating work. Union Trust Co. v. Illinois M., etc., Co., 117 U. S. 434, 29 L. Ed. 963, 6 Sup. Ct. 809.

Steel rails in such quantities as to indicate they were to be used for operating repairs. Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347.

Coupling links, pins, and tank steel for daily use. Wood v. New York, etc., R. Co., 70 Fed. 741.

Supplies to machinery room: Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419.

Wages of flagman at crossing and maintenance of crossing. Missouri, K. & T. R. Co. v. City Trust Co., 209 Fed. 45, 126 C. C. A. 187.

Traffic balances and other expenses connected with interchange of business with connecting line. Miltenberger v. Logansport, etc., Ry. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140.

Loss and damage to freight, car repairs, overcharges, all growing out of interchange of business. Chicago & A. R. Co. v. United States & Mexican Trust Co., 225 Fed. 940, 141 C. C. A. 64 (not allowed against corpus fund; no diversion).

B. Claims not allowed preference because not founded on operating consideration:

Claims for original construction (there is no "going concern to be kept going"). Porter v. Pittsburg, etc., Co., 120 U. S. 649, 30 L. Ed. 830, 7 Sup. Ct. 741; Savings & Trust Co. v. Bear Valley Irr. Co., 93 Fed. 339.

New construction and extension. Atlantic Trust Co. v. Woodbridge, etc., Co., 86 Fed. 975; Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419.

Building a dock on railroad property; regarded as new construction or equipment. Toledo, etc., R. Co. v. Hamilton, 134 U. S. 296, 33 L. Ed. 905, 10 Sup. Ct. 546.

Steel rails in such quantities as to indicate reconstruction, not ordinary repairs. Lackawanna Iron, etc., Co. v. Farmers' Loan & T. Co., 176 U. S. 298, 44 L. Ed. 475, 20 Sup. Ct. 363.

Portion of work on a bridge not regarded as necessary repairs. Guaranty Trust Co. v. Philadelphia & L., etc., Co., 160 Fed. 761.

Pipe, wire, and other material furnished a gas, electric light and

power company for service extensions, reconstruction beyond ordinary repairs, improvements on system, etc. Crane Co. v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543, and John A. Roebling's Sons Co. v. Idaho Ry., etc., Co., 243 Fed. 527, 156 C. C. A. 225. (See dissenting opinion in both cases.)

Meters regarded as permanent equipment. Reyburn v. Consumers', etc., Co., 29 Fed. 561.

Clocks regarded as permanent equipment. United States Trust Co. v. New York, W. S., etc., R. Co., 25 Fed. 800.

Claim of city against street car company for street work (on involuntary indebtedness for permanent maintenance). Pennsylvania Steel Co. v. New York C. Ry. Co., 208 Fed. 173, 216 Fed. 472, 132 C. C. A. 518, 119 Fed. 216.

Breach of executory contract to purchase operating material (did not assist operation). Pennsylvania Steel Co. v. New York C. Ry. Co., supra.

Breach of contract to grant express privileges over the line (did not necessarily prevent public from being given the same service in some other way). Pennsylvania Steel Co. v. New York C. Ry. Co., supra.

Breach of contract to gather freight at particular place. Central Trust Co. v. Wabash, etc., Co., 32 Fed. 566.

Rations furnished to laborers on construction work and paid for as part of wages by company. Finance Company of Pennsylvania v. Charleston, etc., R. Co., 49 Fed. 693.

Advertising to attract business. Central Trust Co. v. East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30.

Services of attorney in special matter and not connected with operation. Chadbourne v. Equitable Trust Co., 225 Fed. 981, 141 C. C. A. 103; Finance Co. v. Charleston, etc., R. Co., 52 Fed. 678; Bound v. South Carolina, etc., Co., 51 Fed. 58.

Tort claims (such claims may be counted as part of operating expense for purpose of determining net income for taxes, etc., but not for purpose of giving preferred status in receivership matter; they do not assist operation but add to difficulties). Pennsylvania Steel Co. v. New York City Ry. Co., 165 Fed. 457, 208 Fed. 173, 216 Fed. 472, 132 C. C. A. 518; Easton v. Houston, etc., R. Co., 38 Fed. 12; Finance Company of Pennsylvania v. Charleston, etc., R. Co., 46 Fed. 508; Hiles v. Case, 14 Fed. 141, 9 Biss. 549; St. Louis Trust Co. v. Riley, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456; Farmers', etc., Co. v. Detroit, etc., R. Co., 71 Fed. 29.

C. Claims not accorded preference because not to be paid from current income:

Claims growing out of obligations under leases, such as rent, obligation to pay taxes and interest on bonds, etc., obligation to make repairs, etc. Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 173, 216 Fed. 472, 132 C. C. A. 518. (The lessor relies on the personal credit of the company and the protection given by right of re-entry in case of default.) Louisville, etc., R. Co. v. Central Trust Co., 87 Fed. 500, 31 C. C. A. 89; Gregg v. Mercantile

§ 426. Equitable Ground of the Doctrine of Preferred Claims.

On the first occasion on which the Supreme Court of the United States stated the doctrine of preferred claims[1] it did so for the purpose of explaining a decision to the effect that reasonable rental of cars for six months prior to the receivership could not be paid out of the proceeds of the sale of the property, which was the only money in the estate. It may be noticed in passing that this decision reversed an order of the lower court directing that such payment be made.[2] The cars had been in the possession

Trust Co., 109 Fed. 220, 48 C. C. A. 318.

Claims arising under car trusts; these are conditional sales or leases of rolling stock, title remaining in seller or lessor, the company making periodical payments and taking title when the payments amount to the price of the equipment. The seller or lessor is regarded as relying on the personal credit of the company and the fact that he retains title. Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Kneeland v. American, etc., Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950; Thomas v. Western Car Co., 149 U. S. 95, 37 L. Ed. 663, 13 Sup. Ct. 824; Huidekoper v. Hinckley Locomotive Wks., 99 U. S. 258; 25 L. Ed. 344; Rodger Ballast Car Co. v. Omaha, etc., Co., 154 Fed. 629, 83 C. C. A. 403.

In these cases, of course, the rolling stock is returned to the seller.

In Fosdick v. Southwestern Car Company, 99 U. S. 256, 25 L. Ed. 344, cars involved were sold with the mortgaged property and a price agreed upon between the vendor and the receiver was paid out of the proceeds of the sale.

Where a company is operating its own line and a number of leased lines as a single system, preferred claims, based upon obligations of the operating company, are allowed against its estate whether the consideration therefore inured to the benefit of its own or a leased line. Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347; Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 173.

In order not to embarrass the receiver, the court may in its discretion order receivers' certificates to be issued for the purpose of raising money to pay preferred claims of laborers and supply men and make the certificates payable out of proper funds at such times as the receiver may designate. Taylor v. Philadelphia & R. R. Co., 7 Fed. 377.

1 Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339.

2 This case had been begun in a state foreclosure suit instituted by bondholders, the trustee being made defendant. A state receiver was appointed and the order appointing him authorized him to pay—

of the company and used by it for sometime under a contract of purchase calling for monthly installments toward the purchase price and leaving title in the seller until the price had been fully paid. The federal receiver used the cars, paying a monthly rental agreed upon with the seller, until the property was sold. The trial court then ordered the receiver to return the cars and pay the same amount of rental for the time the state receiver had used them and for six months prior to that time. Nothing is said by the Supreme Court as to any possible difference between the time the state receiver was in charge and the period prior to that. The entire order directing payment to the seller was reversed. The mortgage covered the income. The court reasoned as follows:

The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross income "what is required for necessary operating and managing expenses, proper equipment, and useful improvements." The mortgagee is not entitled to the income until he has a receiver appointed. He may stand on his strict rights; but, if he asks the assistance of a court of equity, he must do equity in order to receive equity.[3] Terms might be imposed in the order granting

(1) Necessary expenses of carrying out said trust;

(2) All debts now due and owing by said railroad company for labor and services rendered in operating the railroad within the last three months, and all indebtedness for engines, iron, wood, supplies, cars, or other property purchased within said three months for use of the company.

(3) Taxes, insurance, and charges of litigation; and

(4) Liability for animals killed by engines or cars upon the line of the road.

The action was moved to the federal court and a federal receiver appointed, but no special order concerning payments by him was made. The trustee under the mortgage began a foreclosure suit in the federal court, the receivership was extended to it, and the bondholders intervened.

3 It may be noticed here that it has been held that one who has sold necessary rails in reliance upon the promise of the company's officers that they should be paid for out of the earnings is entitled, in equity, to be paid out of the earnings in the hands of a receiver, appointed in a foreclosure

him the relief of a receivership. But, even without any such terms in the order, if it appears in the progress of the action that "bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receiver to discharge obligations which but for the diversion of funds would have been paid in the ordinary course of business." This proposition is not because of any lien that the claimant has on the income but because the officers of the corporation are in a sense trustees for the creditors and stockholders. There is an analogy here to the rule of expenditures under the receiver, "where usually consent of the parties must be obtained." "No fixed and inflexible rule can be laid down for the government of courts in all cases. Each case will necessarily have its own peculiarities which must to a greater or less extent influence the court when he comes to act." If there has been no diversion there can be no restoration. The amount of the restoration may not exceed the diversion. "All depends on a proper application of well settled rules of equity jurisdiction to the facts of the case as established by the evidence." Any errors may be corrected on appeal.

No authorities are cited in connection with this argument except to the point that the mortgagee is not entitled to the income until he has a receiver appointed. That is, of course, a general proposition that applies to all foreclosure receiverships.[4]

suit by the second mortgagees, in preference to the latter's claims, but not to those of first mortgagees, and other lienors superior to the second mortgage, who have only come into equity by crossbills after being made defendants. Bound v. South Carolina R. Co., 47 Fed. 30.

It is to be remembered also that there are cases in which the road has been sold subject to a mortgage.

[4] See § 247, supra.

The court's application of this reasoning to the facts was that Schall had no agreement for rent; none of the money on hand came from the cars; no income remained to be applied toward the bonded debt; Schall had no equity in the fund on hand and was simply a general creditor.

It seems apparent that this explanation of the practice of preferring certain claims in a public utility receivership is more or less tentative and framed with reference to the particular case, although intended to be a justification of a general practice. As the court itself remarked, the problems presented by the foreclosure of a public utility mortgage were comparatively new to it. The definition of the net income to which the mortgagee is entitled does not seem to explain the fact that none but preferred claims are paid before the mortgage is satisfied.[5] The statement that none of the money on hand came from the cars does not seem to be very forceful in face of the fact that its converse is not true; and that, in the case of a mortgage covering after acquired property, a very large part of the money used to pay for it may have come from extensive construction, the labor and material for which are left unpaid. There does not seem to be in this reasoning any explanation of the fact that it is not applied in the foreclosure of every mortgage that covers income or rents. In a later case[6] it is said: "One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and con-

[5] A judgment creditor of a railroad for damages for personal injuries acquires no superior equity over a mortgage in funds paid by the company to its receiver from earnings prior to his appointment, where he has acquired no lien and obtained no injunction before the commencement of the suit to foreclose the mortgage although payment of such sum to the receiver could not have been enforced against the objection of the mortgagor, as the right to make such objection is personal to the latter. Farmers' Loan & T. Co. v. Detroit, B. C. & A. R. Co., 71 Fed. 29.

[6] Kneeland v. American Loan & Trust Co., 136 U. S. 89, 34 L. Ed. 379, 10 Sup. Ct. 950.

tracted priority as the holder of a mortgage on a farm or lot." A mortgagor who leases his farm counts as his net rent the money that is left after he pays for necessary repairs of its buildings; but when a receiver is appointed under a farm mortgage covering rents he does not pay for the material used to put a new roof on the barn just before his appointment, if the bill is unpaid, until after the mortgage is satisfied.

The real force of the argument in the Fosdick Case is contained in its pointing out that there is an analogy between the payment of claims incurred by the receiver and the payment of preferred claims. This point is repeated and emphasized in the Miltenberger Case,[7] in which it was held, going a step beyond the Fosdick Case, that preferred claims, of a certain class at least, might be paid out of the corpus fund. It was later said: "The payment of such claims *prima facie* stands on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. The probable results of nonpayment should be taken into consideration, together with the interests and accommodation of the traveling public." Even before the Fosdick Case, it had been said by the Supreme Court[8] that the principles and rules that governed the payment of claims against the receiver had become so well established as to be beyond question. In connection with the payment of such claims the underlying reason for the differences between the distribution of the property in a public utility receivership and any other receivership has been very clearly stated. It is not any implied or tacit agreement on the part of a utility mortgagee. It is a matter of public policy—the necessity for continuing on behalf of the public the service that the utility has been giving. It is the same public

[7] Miltenberger v. Logansport, etc., Ry. Co., 106 U. S. 286, 27 L. Ed. 117, 1 Sup. Ct. 140.

[8] See Wallace v. Loomis, 91 U. S. 146, 24 L. Ed. 895.

policy that furnishes the court with a reason for appointing a receiver and for adopting, as its method of selling on foreclosure the process of reorganization[9] as the most fair way of closing the receivership.

§ 427. Status of Preference as Dependent Upon Estoppel Against Mortgagee.

Where the bondholders, under the mortgage, through their representatives were in fact in control of the railroad and operating it and applied the income of the road to improvements and betterments, the claim for the price of such supplies will be entitled to a preference over the indebtedness of the bondholders.[1] The question whether the bondholders have operated the property during the period when the indebtedness arose is one of fact for the court to determine.[2]

No equity as against a mortgagee or in favor of a general creditor arises from the mere fact that the mortgagee may be under the necessity of invoking the aid of the courts to enforce his lien. The mortgagee's lien is such as by fair implication he has contracted for, and he can not justly be required to barter a measure of his rights for a measure of the relief which it is the duty of the courts to accord to one in his situation. And likewise with the unsecured creditor. Such equity as he has flows from the fact that in the ordinary course of business he has performed labor or furnished necessary supplies to the railroad company with the reasonable expectation

9 See § 378.

1 Central Trust Co. v. Chicago, A. & N. Ry. Co., 232 Fed. 936.

In Burnham v. Bowen, 111 U. S. 776, 28 L. Ed. 596, 4 Sup. Ct. 675, Mr. Chief Justice Waite, in referring to Fosdick v. Schall, said: "All we then decided, and all we now decide, is that, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

2 First Trust Co. v. Illinois Central R. Co., 252 Fed. 965, 164 C. C. A. 473.

of being paid therefor from certain funds. His power to enforce his rights should not be made contingent upon the possibility that the secured creditor may apply to a court for the appointment of a receiver or for other equitable relief, or circumstance wholly fortuitous, or at least one over which he exercised no control.[3]

§ 423. Interest on Preferred Claims.

Usually the condition of a receivership estate is such that the matter of allowing interest on claims does not arise as a practical question. When interest is not allowed the usual reason assigned is that delay in making payments after litigation has been begun is due to the slowness of the law's processes and that one claimant should not be allowed to profit by the situation at the expense of another. It has been said[1]—though the statement seems to have been prompted by the facts of the case in which it was made and to have been based upon the usual practice due to the usual conditions rather than on any underlying rule of equity—that the general rule is not to allow interest as against the corpus fund. Interest has been allowed in certain cases on the ground of special equities.[2]

3 Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171.

1 Thomas v. Western Car Co., 149 U. S. 95, 37 L. Ed. 663, 13 Sup. Ct. 824.

In New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219, a preferred claim, under special provisions of the decree of foreclosure, was ordered paid by the purchaser. Other preferred claims had been paid on distribution in the estate; but the sale was made before this particular claim had been settled. Interest was not allowed on the score that interest is not allowed against the corpus.

Interest will not be allowed on open accounts against a receiver of a railroad in the absence of a contract or course of dealing. South Carolina v. Port Royal, etc., R. Co., 89 Fed. 565.

The general rule is that where property of an insolvent debtor passes into the hands of a receiver interest is not ordinarily allowed to claimants to cover the delay incident to the settlement of the estate. Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171.

2 Where in receivership proceedings the property of an insolvent railroad is sold upon the condition and upon their implied agree-

However, the underlying equitable rule of distribution in corporation receivership cases is that equality is equity.

ment to pay preferred claims against the estate up to a certain amount, incurred previous to the receivership, the purchaser is liable for interest on the claims from the date of his purchase since the amount of the claims was part of the purchase price. Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171.

In Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379, interest on preferred claims for excessive freight rates, collected contrary to an order of the State Public Service Commission, was allowed against the current income fund because of the special equities of the case; and in Southern Ry. Co. v. Carnegie, etc., Co., 176 U. S. 257, 44 L. Ed. 458, 20 Sup. Ct. 347, interest was allowed as against the restoration fund on the ground that the delay in payment was due to the diversions from which the mortgagee had profited.

Where the payment of the debt was agreed to, by the receiver on condition that interest be paid subject to the determination of the court, the right to recover it is not barred. New York Trust Co. v. Detroit, etc., Ry. Co., 251 Fed. 514, 163 C. C. A. 508.

In the above case the Circuit Court of Appeals, through Judge Sater, went into the allowance of interest quite exhaustively. In discussing this question he said: "Under the general rule that interest on debts of an insolvent corporation in the hands of a receiver will be calculated only to the date of his appointment, the holders of the six months' claims are entitled to interest down to that time. Thomas v. Western Car Co., 149 U. S. 95, 116, 117, 13 Sup. Ct. 824, 37 L. Ed. 663; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C.), 91 Fed. 569; Tredegar Co. v. Seaboard Air Line Ry. Co., supra [183 Fed. 289, 105 C. C. A. 501]; New York Security & Trust Co. v. Lombard Inv. Co. (C. C.), 73 Fed. 537; Malcomson v. Wappoo Mills (C. C.), 99 Fed. 633; Thompson, Corp. (2nd ed.), §§ 6446, 6616; Solomons v. Am. Bldg. & Loan Ass'n (C. C.), 116 Fed. 676; Huff v. Bidwell, 218 Fed. 6, 9, 133 C. C. A. 646 (C. C. A. 5); Spring Coal Co. v. Keech, 239 Fed. 48, 51, 152 C. C. A. 98, L. R. A. 1917D, 1152 (C. C. A. 4). The rule is analogous to that in bankruptcy which allows interest on claims down to the filing of the petition only, excepting in certain cases claims of the highest dignity. Loveland, Bank. (4th ed.) 628-630, 1110; Barton v. Barbour, 104 U. S. 126, 134, 26 L. Ed. 672; American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry. Co., 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 261. . . .

"The right to payment of the principal sum of appellants' claims is conceded and, as we have seen, the six months' claims under the general rule bear interest from their maturity to the date of the receivers' appointment; but the same rule disallows interest on them after that date and also on debts incurred by the receivers, as against the fund arising from the sale of the insolvent's property, for the reason the delay in dis-

Under this rule, the general rule in regard to allowing interest on preferred claims is that, if the condition of

tribution is the act of the law and a necessary incident to the settlement of the estate. Thomas v. Western Car Co., 149 U. S. at pp. 116, 117, 13 Sup. Ct. 824, 37 L. Ed. 663. An analysis of that case shows that disposition was made of the question involved on the ground that the unsecured claim of the car company for car rentals was against a fund in the hands of the court, that the delay in distribution was the delay of the law, and that the fund brought into court fell short of paying the mortgage debt (Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. 237, 250, 9 C. C. A. 468 [C. C. A. 1]), all of which features are present in each of the present appeals. The general rule there stated applies, however, only to a case where the fund is insufficient to pay all of the claims and the creditors are all of the same rank. Richmond & I. Const. Co. v. Richmond N. I. & B. R. Co., 68 Fed. 105, 116, 15 C. C. A. 289, 34 L. R. A. 625 (C. C. A. 6). Had there been any claims of the standing of receivers' certificates considered in that case, as in this, on which, before liability therefor was incurred, the court had directed that interest should be paid, it would doubtless have been allowed. The rule announced in the Thomas Case still subsists—American Iron Co. v. Seaboard Air Line Ry., 233 U. S. 261, 266, 267, 58 L. Ed. 949, 34 Sup. Ct. 502; Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 471, 132 C. C. A. 518 (C. C. A. 2)—and binds the appellants unless they come within some exception to it. They appeal to the announcement in National Bank v. Mechanics National Bank, 94 U. S. 437, 439, 24 L. Ed. 176, that interest lawfully accruing upon a claim is as much a part of it as the original debt, and that a creditor has the same right to the payment of the one as of the other. That was a case in which the debts were against an insolvent national bank and were all of the same footing and funds were available for the payment of interest. But cases arising out of the settlement of insolvent national banks are inapplicable. They have proceeded according to the construction placed by the courts on the national banking act, and not in accordance with the general principles of equity. Spring Coal Co. v. Keech, 239 Fed. 48, 50, 51, 152 C. C. A. 98, L. R. A. 1917D, 1152 (C. C. A. 4).

"It is urged, however, that this court is committed to the allowance of interest on claims, such as appellants have, by the decisions rendered by it in Central Trust Co. v. Condon, 67 Fed. 84, 98, 14 C. C. A. 314, Richmond & I. Const. Co. v. Richmond N. I. & B. R. Co., 68 Fed. 105, 114, 15 C. C. A. 289, 34 L. R. A. 625, and Jourolmon v. Ewing, 85 Fed. 103, 29 C. C. A. 41. These cases on their facts and in the character of the claims considered in them on which interest was allowed are readily distinguishable from the cases made by appellants. Each of the three cases had been before the court on a prior occasion. An examination of the first of the cases in

the estate is such that there is sufficient money in any fund on which any class of claims has the first call to allow

connection with Central Trust Co. v. Bridges, 57 Fed. 753, 6 C. C. A. 539, and of the second in connection with Central Trust Co. v. Richmond N. I. & B. R. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, discloses that in each instance the debt on which interest was allowed was a mechanic's lien arising out of the construction of the road, which, in the first case under the statute of Tennessee and in the second under the statute of Kentucky, was prior and superior to that of the mortgage whose foreclosure was sought. Debts contracted for original construction do not fall within the same class as preferential claims necessarily incurred to keep the road a going concern—Thompson, Corp., § 6450, and cases cited; First Nat. Bank v. Ewing, 103 Fed. 168, 186, 43 C. C. A. 130 (C. C. A. 5)—and it was due to statutory provisions that in the two above-mentioned cases priority was given to construction claims with interest (Cook, Corp. [7th Ed.], vol. 4, §§ 859, 860, at page 3260). The rule applied in those cases was approved in American Iron Co. v. Seaboard Air Line Ry. Co., 233 U. S. 261, 267, 58 L. Ed. 949, 34 Sup. Ct. 502, and Spring Coal Co. v. Keech, 239 Fed. 50, 62, 152 C. C. A. 98, L. R. A. 1917D, 1152 (C. C. A. 4). The notes on which interest was allowed in the Jourolmon Case, the first report of which is found in 80 Fed. 604, expressly called for interest and were secured by a prior lien on the premises sold, and, as appears from Judge Severens' statement (85 Fed. at page 106, 29 C. C. A. 41), disposition of all three of the cases was made in accordance with the rule that where there are claims with liens of different priorities the holders of such liers are entitled to interest down to the date of the decree. The lien involved in each of the three cases on which interest was allowed was not merely an equitable priority declared by the court, but had an absolute priority over other existing liens.

"It was said in Redfield v. Ystalyfera Iron Co., 110 U. S. 176, 28 L. Ed. 109, 3 Sup. Ct. 570, that the allowance of interest as damages is often a matter of discretion, and in Jourolmon v. Ewing, 80 Fed. 604, 607, 26 C. C. A. 23, 27, Judge Severens, speaking for this court regarding the rule that interest, when not stipulated, will generally be allowed as damages, said:

" 'The rule has its exceptions, and as in other cases where there are reasons founded on the conduct of the plaintiff, or other special circumstances existing in the case, and the justice of the situation requires it, interest will be denied.'

"See, also, New Orleans v. Fisher, 180 U. S. 185, 198, 45 L. Ed. 485, 21 Sup. Ct. 347.

"The property of the insolvent railway company passed into and was retained in the hands of the court's receivers until it could be converted into cash to satisfy the debts whose equitable priority was recognized, and when so converted the proceeds of the sale were insuf-

interest on all claims in the class, interest will be allowed, no matter what the effect may be upon inferior claims; otherwise interest will not be allowed.[3]

ficient to pay any part of the mortgage debt. The strong equity mentioned in Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. 251, 9 C. C. A. 468, which will stop the running of interest in exceptional cases, even where it is ordinarily given as a matter of right, was present."

3 Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 132 C. C. A. 518. In American Iron, etc., Mfg. Co. v. Seaboard Air Line Ry., 233 U. S. 261, 58 L. Ed. 949, 34 Sup. Ct. 502, Mr. Justice Lamar, in stating the reasons for the general rule and also its exceptions, said: "In the discussion as to the answer which should be given that question, the railway company insists that, whether treated as part of the debt or allowed as damages, interest can only be charged against the railway because of delay due to its own fault, while here the failure to pay was due to the act of the law in taking its property into custody and operating the same by receivers in order to prevent the disruption of a great public utility. And it is true, as held in Tredegar Co. v. Seaboard Air Line R. Co., 183 Fed. 290, 105 C. C. A. 501, that as a general rule, after property of an insolvent is in custodia legis, interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss. For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt. But that rule did not prevent the running of interest during the receivership; and if, as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid. Even in bankruptcy, and in the face of the argument that the debtor's liability on the debt and its incidents terminated at the date of adjudication, and as a fixed liability was transferred to the fund, it has been held, in the rare instances where the assets ultimately proved sufficient for the purpose, that creditors were enti-

§ 429. Effect of Provisions Concerning Payment of Preferred Claims in Order Appointing the Receiver.

It is the usual practice for the court to incorporate in the order appointing the receiver, provisions authorizing him to make certain classes of payments, usually including payments of preferred claims, without further order.[1] The order usually also fixed the period within which prior to the receivership a claim must have accrued to be preferred. The orders are usually in the form of an authorization; but whatever their form they are not mandatory in effect. They do not fix nor create any right which the claimant would not have without the order. The order is not necessary to establish any claim or class of claims as preferred. "Insertion of such provisions is not to be regarded as the condition upon which such claims are allowed preference or as an exercise of

tled to interest accruing after adjudication. 2 Bl. Com. 488; Cf. Johnson v. Norris, 190 Fed. 460, L. R. A. 1915B, 884, 111 C. C. A. 291.

"The principle is not limited to cases of technical bankruptcy, where the assets ultimately proved sufficient to pay all debts in full, but principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full. Central Trust Co. v. Condon, 67 Fed. 84, 14 C. C. A. 314, 31 U. S. App. 387; Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co., 68 Fed. 116, 34 L. R. A. 625, 15 C. C. A. 289, 31 U. S. App. 704; First Nat. Bank v. Ewing, 103 Fed. 190, 43 C. C. A. 150."

1 The order in the case of Gregg v. Metropolitan, etc., Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415, was as follows: "To pay employees, officials, and other persons having claims for wages, services, materials, and supplies due and to become due and unpaid growing out of the operation of the railroad of the defendant, including current and unpaid vouchers; to settle accounts incurred in the operation of the railroad of the defendant company; to pay any and all obligations accrued or accruing upon any equipment trust made by defendant company, and for such purpose, as well as for the purpose of meeting the obligations of the pay rolls, in his discretion, to borrow such sum of money as may be necessary for such purpose not exceeding $35,000. But said receiver will pay no claims against the said railroad company which have accrued more than six months prior to the date of this order."

discretion, but as a recognition of a preëxisting right given without regard to such a discretion."[2] If a receiver pays a claim that comes within the terms of the order he is protected by the order even though the claim may not be entitled to preference. But he need not pay a claim even though it does not come within the terms of the order and may leave the question of the proper status of the claim to be determined by the court.[3] The fact that the receiver has without objection paid certain claims under the order does not make it necessary that other claims should be paid out of a fund in which they have not equitable preference.[4]

7. Receivers of Public Utility Corporations Appointed by State Courts.

§ 430. General Extent of the Powers and Duties of Receivers Appointed by State Courts.

The foregoing consideration of the powers and duties of receivers over the property of public utility corpora-

2 Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 180. See, also, Fosdick v. Schall, supra; Wood v. New York, etc., R. Co., 70 Fed. 741.

3 Carbon Fuel Co. v. Chicago C., etc., Co., 202 Fed. 172, 120 C. C. A. 460. A petition for the payment of a judgment against the company for damages on account of loss of freight, which does not set forth any facts to show that the claim is entitled to preference and is based solely on the fact that the order authorized the receivers "to pay such loss and damage freight claims arising from the previous operation of said road as in their judgment on examination may properly be paid as expenses of operation," will be denied. The fact that the court that made the order denied such a petition showed that the order was intended not to be mandatory. Loveland & Himjan Co. v. Blair, 222 Fed. 207, 137 C. C. A. 521.

A purchaser who has bought the property of the company on a foreclosure sale under a decree imposing on the purchaser the obligation of paying preferred claims not settled in the estate may contest the status of any claim presented for settlement. Fordyce v. Omaha, etc., R. Co., 145 Fed. 544. See, also, Pennsylvania Steel Co. v. New York City Ry. Co., 208 Fed. 173.

4 Gregg v. Metropolitan T. Co., 197 U. S. 183, 49 L. Ed. 717, 25 Sup. Ct. 415; Taylor v. Delaware, etc., R. Co., 213 Fed. 622, 130 C. C. A. 214.

tions has been based upon the methods of our federal courts in administering the estates of such corporations when they have assumed control thereof for the purpose of continuing, in the interest of the public, a service that was in imminent danger of being interrupted because of the insolvency, or practical insolvency, of the companies. There are, however, numerous cases in which state courts have appointed general receivers over such institutions, that is receivers who have taken possession of all of the assets of the corporation to administer them in behalf of all those interested in the estates. Even a foreclosure receivership has the practical effect of bringing all of the assets of the company under the control of the court because utility mortgages usually cover at least all of the operative property. Questions as to the powers and duties of the receivers in these state cases of course arise. It is to be remembered however that these state cases are usually instituted under statutory provisions and are, of course, controlled by them. Inasmuch as the statutes can not, or at least, very frequently do not, cover all of the details of the administration of these estates, the courts, as we have seen in another connection,[1] have to rely on the broad principles of equity where the statutes are silent. It may be said generally, however, that even where they are at liberty to rely on purely equity principles, the state courts do not assume the extensive authority that has been exercised with such beneficial results by the federal courts. It may be said, too, that as a general rule, the decisions of state courts are of much more limited use as authority, or precedent, than are the federal decisions on account of the existence of many statutory limitations upon the exercise of their powers.

Such general rules as that the receiver is an officer of the court,[2] under its control, and possessed only of such

1 See § 311, supra.

2 Farmers' Loan & T. Co. v. Oregon, etc., R. Co., 31 Ore. 237, 65 Am. St. Rep. 822, 38 L. R. A. 424, 48 Pac. 706.

authority as the court may give him;[3] that the court has wide discretion in selecting the person appointed;[4] that the court will protect its receiver against unwarranted interference[5]—in fact, all such general rules as are referred to in a previous section[6] above apply to state utility receivers, even though statutory, as they do to federal utility receivers and receivers generally. However, a statutory receiver, unlike an equity receiver, may be the assignee of the corporation's title,[7] and if so naturally has certain powers which a chancery receiver does not possess.

3 Central Trust Co. v. Pittsburg S. & N. R. Co., 223 N. Y. 347, 119 N. E. 565.

The receiver may not agree that any claim may have priority over any other. State v. Eastline, etc., R. Co., (Tex. Dist. Ct.) 48 Am. & Eng. R. Cases 656.

The receiver and the court are bound by the company's charter and have no authority beyond what that gives the company. Safford v. People, 85 Ill. 558. See also, Ratcliff v. Adler, 71 Ark. 269, 72 S. W. 896.

4 Houston v. Redwine, 85 Ga. 130, 11 S. E. 662.

5 Smith v. Texas & N. O. R. Co., (Tex. Civ. App.) 127 S. W. 866.

6 See § 387, supra.

7 Whether or not the receiver is the assignee of the company determines such questions as to whether or not he may sue in his own name, or be sued in his own name with reference to matters affecting the estate. City of New York v. Montague, 145 App. Div. 172, 129 N. Y. Supp. 1084; City of Seattle v. Seattle R., etc., Co., 83 Wash. 94, 145 Pac. 54, 1167; Alabama Terminal R. Co. v. Benns, 189 Ala. 590, 66 So. 589; Jackson v. Dines, 13 Colo. 90, 21 Pac. 918; Morrison v. Forman, 177 Ill. 427, 53 N. E. 73; Jeffery v. Osborne, 145 Wis. 351, 129 N. W. 931.

The franchises of the company are at least practically transferred to the receiver. People v. New York City Ry. Co., 107 N. Y. Supp. 247; Brooklyn v. Jourdan, 7 Abb. N. C. (N. Y.) 23.

Since the receiver stands in the place of the company, existing rights of third parties are not affected by his appointment. Bush v. State, 128, Ark. 448, 194 S. W. 857.

When a railroad company takes a right-of-way subject to a vendor's lien, the company's title remains subject to the lien until that is satisfied and if the property passes under a receivership the lien is prior to that of certificates issued to cover the receiver's indebtedness. Hubbell v. Texas S. Ry. Co., 59 Tex. Civ. 185, 126 S. W. 313.

The rights of a lessee under a lease made prior to the making of a trust deed are not affected by a provision in the trust deed

§ 431. Operation of Public Utility by Receiver.

In almost any case a state court might be called upon to operate the utility, pendente lite.[1] If the property[2] is to

to the effect that a receiver may be appointed on default. Louisville and N. R. Co. v. Eakins, 100 Ky. 745, 39 S. W. 416.

In Radebaugh v. Tacoma & P. R. Co., 8 Wash. 570, 36 Pac. 460, it is held that, under the laws of Washington (Gen. Stat. 1646 et seq.), a mortgage upon the real estate of a railroad and purporting to cover the rolling stock also does not bind the latter class of property when the instrument is executed and recorded as a real estate mortgage and does not comply with the formalities in the execution of a chattel mortgage. It is also held that the appointment of a receiver of a railroad corporation has the same effect in law as though the creditors whom he represents had taken possession of the rolling stock under legal proceedings and the right of the mortgagee to take possession of the rolling stock does not give the mortgagee any priority over creditors when its right of possession accrues subsequent to the appointment of the receiver.

1 Though, in a foreclosure suit, it might be necessary, to prevent loss, to sell the property before final decree, it would not be proper to do so where an opportunity to have it operated by a lessee without loss to the estate offered itself. Webber v. Genesee Circuit Judge (Miner) 184 Mich. 112, 150 N. W. 305, 306.

Even in a dissolution proceeding the receiver may be authorized to execute and carry out existing contracts of the corporation, or to enter into and carry out new ones. Florence Gas, etc., Co. v. Hanby, 101 Ala. 15, 13 So. 343.

2 Receivers appointed in a foreclosure action at the instance of a mortgagee and, with his consent, given general authority to carry out or renew existing contracts, have power to renew car leases. Mercantile Trust, etc., Co. v. Southern Iron Car Line, 113 Ala. 543, 21 So. 373.

A receiver, under a general order, may make special rates of transportation. Bayles v. Kansas P. Ry. Co., 13 Colo. 181, 5 L. R. A. 480, 22 Pac. 341.

A receiver may make necessary repairs. Henry v. Prendergast, (Ind. App.) 94 N. E. 1015.

A receiver may make reasonable orders regulating the manner of performing their duties by employees. Morley v. Saginaw Circuit Judge (Snow), 117 Mich. 246, 41 L. R. A. 817, 75 N. W. 466.

He may contract for the use of necessary equipment for a special shipment of freight. San Antonio, etc., Ry. Co. v. Barnett, (Tex. Civ.) 44 S. W. 20.

In a foreclosure action a court of equity is authorized to do everything within the corporate power to preserve the property and make it of greater value. Gibert v. Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

Contracts of a receiver for labor and supplies are not binding upon

be operated the court has power to authorize the receiver to do so by general orders, giving him discretion to do whatever the company itself might do in the ordinary course of its business. Only a manifest abuse of authority, or fraud would warrant the review by the court of the conduct of a receiver acting under such a general order.[3]

§ 432. Preferred Claims Under State Statutes or in State Receivership Cases.

The doctrine of preferred claims is one that has been developed peculiarly by federal courts, exercising the inherent powers of equity, in the great volume of public utility receivership cases that have come before them in comparatively recent years. We find, however, a practice of preferring claims in receivership cases before state courts. This practice is largely controlled by statute, though it may be that occasionally a preference is allowed on purely equitable considerations, especially where the payment of some particular claim is imposed as a condition of the appointment of a receiver.[1] For the most

his successor. Lehigh Coal, etc., Co. v. Central R. Co., 41 N. J. Eq. 167, 3 Atl. 134.

[3] Morley v. Saginaw Circuit Judge (Snow), 117 Mich. 246, 41 L. R. A. 817, 75 N. W. 466.

[1] The right to object to the imposition of a condition to the appointment of a receiver to the effect that a judgment be paid out of the proceeds of the property may be lost through acquiescence. Union Trust Co. v. Atchison T., etc., Co., 8 N. M. 159, 42 Pac. 89.

On foreclosure of a railroad mortgage a court of equity may prefer unpaid current expense claims accruing in the ordinary operation of the road within a limited time, usually fixed six months before the receivership, to the claims of bondholders. Shugart & Barnes Bros. v. Atlantic N. & S. Ry. Co., 161 Iowa 351, 143 N. W. 90.

Claims of a connecting railroad line which have arisen out of current business incidental to through freight traffic, where the defendant company had diverted certain operating income to the payment of bonds, are entitled to priority to such amount over the claims of bondholders in the administration of the insolvent's property in receivership proceedings. Shugart & Barnes Bros. v.

part the state statutes relate to corporations generally and not to public utility corporations in particular.[2] Of course the statutes define in a very general way the claims that may be preferred and most of the controversies have revolved around the question as to whether or not certain claims come within the statutory definitions.[3] The statutes are strictly construed. For the most part the statutes

Atlantic N. & S. Ry. Co., 161 Iowa 351, 143 N. W. 90.

If labor and material furnished to keep a water and light company a going concern were not to be paid when furnished, but until they could be made from earnings, the lapse of more than six months before the appointment of a receiver will not defeat a right to priority of claims growing out of them over an existing mortgage, if earnings were diverted to betterments. Citizens' Trust Co. v. National Equipment & S. Co., 178 Ind. 167, 41 L. R. A. (N. S.) 695, 98 N. E. 865.

See also Central Sav. Bank v. Newton, 59 Colo. 150, 147 Pac. 690.

A final judgment against the receiver of a railroad company for damages growing out of a freight shipment is sufficient proof of the correctness of the amount to authorize the court to approve and classify it in directing a general distribution of the assets. St. Louis Union Trust Co. v. Missouri Pac. Ry. Co. (Tex. Civ.), 146 S. W. 346.

A committee appointed by bondholders, stockholders, and unsecured creditors of railroad corporation is authorized to employ counsel and burden the railroad property with a lien for their services which is entitled to priority over the claims of the bondholders in a subsequent receivership. Dolph v. Cincinnati, B. & C. R. Co., 56 Ind. App. 137, 103 N. E. 13.

The fact that the federal court, which appointed a receiver of the property of a railroad company, reserved jurisdiction over claims presented, on discharge of the receiver does not give it jurisdiction over claims not presented. Kansas City, M. & O. Ry. Co. of Texas v. Latham, (Tex. Civ.) 182 S. W. 717.

Where the court takes charge of quasi public corporations, operating them through a receiver, it may make the necessary debts of operation a prior lien upon the income or the property itself. Craver v. Greer, 107 Tex. 356, 179 S. W. 862.

Since receivers can only bind the property in their hands by acts which the court may authorize or approve, in order to charge the property after its redelivery by receivers, a claimant must prove the authority of the receivers. Kansas City, M. & O. Ry. Co. of Texas v. Weaver, (Tex. Civ.) 191 S. W. 591.

2 See §§ 244 and 310 et seq., supra. See, also, petition of Walker (Tenn.), 209 S. W. 739.

3 See the statutes of the various states.

fix a period anterior to the receivership during which claims must have accrued to be entitled to preference and the courts are not at liberty to extend or shorten the period. A statute may have the effect of enhancing the equity jurisdiction of federal courts, though they can not restrict it, and we occasionally find a preference given in a federal court under the provisions of some state statute.[4] It is to be remembered that, in this, as in other instances, state decisions are to be read in the light of the statutes and are not to be taken as of general application.[5]

[4] See Farmers' Loan, etc., Co. v. Central R. Co., 17 Fed. 758, 5 McCrary 421.

A federal court may be governed by a state statute with reference to preferred claims. Thus a telegraph company rendering services to a railroad company in operating a line along its road is a laborer within the Virginia statute giving laborers' claims priority over mortgages upon property in the hands of receivers. Newgass v. Atlantic, etc., R. Co., 72 Fed. 712.

Where the only property of an insolvent railroad company consists of a leasehold interest in a line of road extending into or through several states, and the rolling stock used in its operating, and creditors' suits are commenced in the federal courts in the different jurisdictions through which the line runs and judgment creditors are, by the local statutes, given a priority of lien on certain of the property of the company, in the distribution of assets the proceeds of such property, either of rolling stock or leasehold or both, will be apportioned according to the mileage in each state, and the judgments in the different states will be given priority as to the respective portions. Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 91 Fed. 195.

[5] Claims for work done in the original construction of a plant of a water company that has never been operated are not entitled to preference over bondholders. Martin v. Blytheville, etc., Co., 115 Ark. 230, 170 S. W. 1019.

To entitle claims to preference there must be evidence that they are valid obligations and against a public corporation. A railroad is not necessarily a public utility. Central Savings Bank v. Newton, 59 Colo. 150, 147 Pac. 690.

Only those supply creditors who established their liens in the manner provided in the statute may have a preference over a vendor whose lien attached before the supply claims accrued. Gulf Pipe Line Co. v. Lasater, (Tex. Civ. App.) 193 S. W. 773.

To be entitled to preference over a railroad mortgage a claim must have accrued within six months prior to the receivership.

The rules concerning the rank of various claims on distribution set forth in subdivision six of this chapter re-

Helm v. Smith, 62 Colo. 203, 162 Pac. 143.

An unpaid judgment based on a tort committed by a railroad company has priority over a mortgage covering income when a foreclosure receiver has been appointed and the income may not be diverted by the court for improvements to the disadvantage of the judgment creditor. Green v. Coast Line R. Co., 97 Ga. 15, 54 Am. St. Rep. 379, 33 L. R. A. 806, 24 S. E. 814.

Court held not to have erred in postponing adjudication of priorities between creditors of insolvent railroad corporation until the time for distribution of the proceeds of a sale of its property. Determination of priorities among creditors of a railroad corporation may be postponed until the proceeds of the sale of its property are about to be distributed. Union Trust Co. of Indianapolis v. Curtis, 182 Ind. 61, L. R. A. 1915A, 699, 105 N. E. 562.

Where current earnings have been diverted to betterments, the giving of preference to current operating claims may be made a condition of the appointment of a foreclosure receiver even where the mortgage covers the income. Citizens' Trust Co. v. National Equipment & Supply Co., 178 Ind. 167, 41 L. R. A. (N. S.) 695, 98 N. E. 865.

Preference of a claim for repairs to the plant of a quasi public corporation over the prior mortgage where current income has been diverted to improvements, is not waived by the filing of a mechanic's lien notice since the statute declares claims, for which there may be mechanic's liens, are to be preferred debts, whether or not notice of lien has been filed. Citizens' Trust Co. v. National Equipment & Supply Co., supra.

The debts for current supplies, materials, and operating expenses of a quasi public corporation need not have been contracted within six months before appointment of a receiver, that they may be given preference over a prior mortgage, where current income has been diverted to betterments.

Where current income has been diverted for betterments the six months limitation as to preference of current operating expenses does not apply. Citizens' Trust Co. v. National Equipment & Supply Co., 178 Ind. 167, 41 L. R. A. (N. S.) 695, 98 N. E. 865.

A public utility mortgagee who intervenes in a receivership proceeding and forecloses, has, as to a deficiency judgment, the standing of a general creditor with reference to the income prior to intervention. Homer v. Baltimore Refrigerating & Heating Co., 117 Md. 411, 84 Atl. 176.

A claim for the remainder due on a locomotive sold to a railroad company more than six months prior to the receivership is to be classed with the general corporate indebtedness. Manchester Locomotive Works v. Truesdale, 44 Minn. 115, 9 L. R. A. 140, 46 N. W. 301.

One who in a public utility fore-

lating to general equity receiverships of public utilities are applicable so far as the administration of the estate

closure receivership contends that there have been diversions of current income to the benefit of the mortgage and that the amount so diverted should be restored in order that his current operating claim might be paid has the burden of proving that there have been such diversions. Lincoln Trust Co. v. Missouri Water, etc., Co., 151 Mo. App. 322, 131 S. W. 889.

A claim growing out of an interchange of traffic agreement and accruing prior to the receivership is not entitled to preference at the hands of the receiver. Massey v. Camden & T. Ry. Co., 79 N. J. Eq. 652, 82 Atl. 917.

A direction contained in an order appointing a foreclosure receiver for a street railroad to pay "all current expenses incident to the administration of his trust, and to the condition and operation of said business, from time to time, as the same arises and accrues," does not relate to the payment of any debt that accrued prior to his appointment. McCornack v. Salem Ry. Co., 34 Ore. 543, 56 Pac. 1022, denying rehearing, 34 Ore. 543, 56 Pac. 518.

In a railroad receivership proceeding a mortgagee has the right to contest the allowance of, and giving preference to claim which on distribution will have a prior right to the mortgage as far as income is concerned. United States & Mexican Trust Co. v. Western, etc., Mfg. Co., (Tex. Civ.) 109 S. W. 377.

In the absence of a statute authorizing it to do so, a court can not give preference in distribution of the corpus fund to operating claims accruing before the receivership unless the current income has been diverted to the advantage of the mortgagee. Waters-Pierce Oil Co. v. United States & Mexican Trust Co., 44 Tex. Civ. 397, 99 S. W. 212.

In a railroad receivership, laborers' claims accruing prior to the receivership are under the statute superior to and material claims are inferior to a vendor's lien on part of the right of way, including an attorney's fee secured by the lien. Hubbell v. Texas St. Ry. Co., 59 Tex. Civ. 185, 126 S. W. 313.

One furnishing current supplies to an irrigation company, is entitled to priority over other unsecured creditors in funds in receiver's hands earned before receivership. First Nat. Bank v. Campbell (Tex. Civ.), 193 S. W. 197.

Laborers and other creditors who have been cut off from enforcing statutory liens upon railroad property by the appointment of a receiver are entitled to an equitable priority in the income derived during the receivership, and if that income has been depleted by expenditure for interest and betterments the court will make restoration from the proceeds of the property. McIlhenny v. Binz, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655.

Unless the claimant otherwise to be preferred has been guilty of laches his claim need not have

gives opportunity for their application. The receivers own claims for compensation, etc., have priority on general receivership principles[6] as well as the claims arising from the cost of operation.[7] If the receiver operates

accrued within the period fixed in the appointing order of the court as the time within which claims must have accrued to be entitled to preference. Idem.

Though construction claims are not usually given preference, claims for construction work and materials in completing a road after a mortgage evidently intended to secure money furnished for the completing work has been given, should be allowed a preference in the income earned during the receivership together with money from the corpus fund to replace diversions for the benefit of the mortgagee. Idem.

Operating employees' claims accruing within ninety days of a receivership over a railroad are entitled to preference over a mortgage upon the road. Litzenberger v. Jarvis-Conklin Trust Co., 8 Utah 15, 28 Pac. 871.

As a condition of the appoint ment the court in a foreclosure proceeding may order the receiver to pay such outstanding debts for labor, supplies, equipments, and permanent improvements as are reasonable. Central Trust Co. v. Utah C. R. Co., 16 Utah 12, 50 Pac. 813.

Only amounts actually expended by the receiver for operating purposes may be deducted from his gross income to determine the net income to which preferred claims attach. Bell v. St. Johnsbury & L. C. R. Co., 76 Vt. 42, 56 Atl. 105.

If during the company's management there have been diversions from the current revenue for improvements of the road, labor and material claims to the amount of these diversions may be paid from the proceeds of the property. Williamson's Adm'r v. Washington City, etc., R. Co., 33 Gratt. (Va.) 624; Douglas v. Cline, 12 Bush (Ky.) 608; Ellis v. Boston, etc., R. Co., 107 Mass. 1; McIlhenny v. Binz, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655.

Under a statute (Rev. St. 1911, art. 2135), giving a preference to certain claims out of moneys coming into the hands of the receiver by way of earnings of the property, gives no preference lien over prior liens on the corpus of the property, where there were no earnings. Gulf Pipe Line Co. v. Lasater, (Tex. Civ.) 193 S. W. 773.

Under the statute (Rev. St. 1908, §§6998-7000, first enacted by Laws 1903, p. 143), laborers' claims do not take precedence over a mortgage for a debt existing before the labor was performed. Central Savings Bank v. Newton, 59 Colo. 150, 147 Pac. 690.

6 Jeffers v. New Jersey, etc., R. Co., 86 N. J. Eq. 68, 97 Atl. 32; affirmed on this point, 86 N. J. Eq. 402, 99 Atl. 189.

7 See § 416, supra.

It has been held that statutory authority is necessary for the recognition of a class of preferred claims in a utility receivership.

the utility, operating claims against him are preferred as above stated. This rule is based, not on any contractual relation between the receiver and the claimant, but on the fact that the obligations are incurred under the order of the court.[8] The corpus fund is resorted to last for the payment of claims other than the mortgage

Metropolitan Trust Co. v. Tonawanda, etc., R. Co., 103 N. Y. 245, 8 N. E. 488.

8 Langdon v. Vermont, etc., R. Co., 54 Vt. 593. See also, McLane v. Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; International Trust Co. v. United Coal Co., 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; Hoover v. Montclair, etc., R. Co., 29 N. J. Eq. 4; Lehigh Coal & Nav. Co. v. Central R. Co., 41 N. J. Eq. 167, 3 Atl. 134; Woodruff v. Erie R. Co., 93 N. Y. 609; McIlhenny v. Binz, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655; Craver v. Greer, 107 Tex. 356, 179 S. W. 862; Gulf Pipe Line Co. v. Lasater, (Tex. Civ. App.) 193 S. W. 773.

Where all of the property of a railroad corporation is temporarily in the immediate control of a court of general jurisdiction and in the possession of a receiver, and it appears necessary to expend money not then available, to reasonably maintain the property in its integrity as a railroad, the court may not only authorize the receiver to borrow the money for such expenditure but exercise its equity power to make the certificates of indebtedness a lien on the property. Central Trust Co. v. Pittsburg S. & N. R. Co., 223 N. Y. 347, 119 N. E. 565.

A chattel mortgagee of rolling stock of a railroad intervened in the railroad receivership proceedings, and obtained a judgment for the amount of his debt with the right to foreclose his mortgage. The final decree of foreclosure in the receivership which arose over a mortgage foreclosure decreed the sale of all the railroad property subject to the lien of the chattel mortgage. The sale, however, failed and the court operated the railroad. Subsequently the chattel mortgagee applied for the payment of his judgment, and the court having found that the rolling stock had been used by the receiver and was necessary in the operation of the road, ordered that the judgment should be classed as court costs and expenses of operation by the receiver and directed its payment in installments, but reserved jurisdiction to classify the judgment as against the corpus of the property. The rolling stock passed to the receivership assets, and was sold with all the receivership property in bulk before the payment of the judgment in full. It was held, that the balance due on the judgment was properly classified by the court as an obligation of the receivership. St. Louis Union Trust Co. v. Texas Southern Ry. Co., 59 Tex. Civ. App. 176, 126 S. W. 306.

debt.[9] There is great reluctance to order expenditures without the consent of creditors, especially lien creditors,[10] and where some claims are paid which might be objectionable it may be that such claims were incurred with the consent of lien claimants. The order in which claims are presented to the court or settled does not affect their rank on distribution.[11] Generally, as in all receivership cases, the rank of certificates issued by a receiver depends upon the terms of the order authorizing their

9 Central Trust & Savings Co. v. Chester County Electric Co., 9 Del. Ch. 247, 80 Atl. 801.

Philadelphia Trust Co. v. Northumberland County Traction Co., 258 Pa. St. 152, 101 Atl. 970; Hand v. Savannah, etc., R. Co., 17 S. C. 219; St. Louis Union Trust Co. v. Texas Southern Ry. Co., 59 Tex. Civ. 157, 126 S. W. 296.

10 Meyer v. Johnston, 53 Ala. 237; Knickerbocker Trust Co. v. Tarrytown, W. P. & M. Ry. Co., 133 App. Div. 285, 117 N. Y. Supp. 871; Ex parte Mitchell, 12 S. C. 83; State v. Port Royal, etc., Ry. Co., 45 S. C. 464, 23 S. E. 380.

See Jeffers v. New Jersey, etc., R. Co., 86 N. J. Eq. 68, 97 Atl. 32.

A receiver's petition for permission to build additional line of railroad, based on the suggestion that to do so within a limited time was necessary under the law to prevent forfeiture of the franchise was denied in view of the opposition of the mortgagee and of the possibility that a sale could be made in time to permit the purchaser to comply with the law. Pueblo Traction, etc., Co. v. Allison, 30 Colo. 337, 70 Pac. 424.

Only expenditures that are directly beneficial to the mortgagee may be paid out of the proceeds of the sale of the property. Central Trust, etc., Co. v. Chester, etc., E. Co., 9 Del. Ch. 247, 80 Atl. 801.

A trustee for bondholders may be estopped by conduct from denying the priority of a receiver's debt over the mortgage. Lane v. Macon, etc., Ry. Co., 96 Ga. 630, 24 S. E. 157.

An order authorizing a receiver to incur indebtedness can not be collaterally attached and if not appealed from becomes binding upon a mortgagee. Knickerbocker Trust Co. v. Tarrytown, etc., Ry. Co., 133 App. Div. 285, 117 N. Y. Supp. 871.

Where the trustee and receiver agree with the approval of the court that the receiver may incur indebtedness for operation only up to a certain specified amount with priority over the mortgage the agreement is binding upon the receiver. Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 138 App. Div. 687, 123 N. Y. Supp. 822.

11 St. Louis Union Trust Co. v. Texas Southern Ry. Co., 59 Tex. Civ. 157, 126 S. W. 296.

issuance.[12] State courts have recognized the fact that the court's power to authorize receiver's expenditures at the cost of lien creditors is greater in public utility corporation cases than in others.[13]

12 Jeffers v. New Jersey, etc., R. Co., 86 N. J. Eq. 402, 99 Atl. 189, modifying 86 N. J. Eq. 68, 97 Atl. 32.

An order directing the issuance of certificates may be modified nunc pro tunc to remedy the inadvertent omission of certain claims to which it was intended they should have priority. Central Trust Co. v. Pittsburg, S. & N. R. Co., 93 Misc. Rep. 194, 156 N. Y. Supp. 1033.

The subject of Receiver's Certificates will be treated special in a subdivision by itself.

13 Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699.

Traffic balances against a receiver are allowed as receiver's operating expenses. Woodruff v. Erie R. Co., 93 N. Y. 609; Langdon v. Vermont, etc., R. Co., 54 Vt. 593; although it is held that the tolls collected on interchange of traffic do not constitute a trust fund out of which the other party is bound to be paid. East Tennessee Tel. Co. v. Watson, 147 Ky. 462, 144 S. W. 375.

Tort claims arising under the receiver are counted as receiver's operating expenses. Kloepher v. Osborne, 177 Ill. App. 384; Texas Pac. Ry. Co. v. Johnson, 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463.

A judgment decreeing that certain funds used by the receiver to pay operating expenses belonged specially to certain individuals and not to the company or general estate must be paid as receiver's operating expenses. St. Louis Union Trust Co. v. Texas So. Ry. Co., 59 Tex. Civ. 157, 126 S. W. 296.

When a receiver subleases leased cars, rental therefor must be paid as operating expenses of the receiver, if the sublessee does not pay the rent. Mercantile Trust, etc., Co. v. Southern Iron Car Line, 113 Ala. 543, 21 So. 373.

Where equipment subject to a chattel mortgage is used by the receiver and sold as part of the mortgaged property the court may order the chattel mortgage to be satisfied out of the proceeds of the sale. St. Louis Union Trust Co. v. Texas S. Ry. Co., 59 Tex. Civ. 176, 126 S. W. 306.

An order allowing the receiver to employ the president of the utility to assist in certain details of administering the estate, at a fixed compensation, does not warrant the president's employing assistance at an additional compensation to be paid out of the estate. St. Louis Union Trust Co. v. Newcomb, (Tex. Civ.) 146 S. W. 1196.

A mortgagee is not liable for any excess of the receiver's operating expenses over the proceeds of the sale. Farmers' Loan & Trust Co. v. Oregon, etc., R. Co., 31 Ore. 237, 65 Am. St. Rep. 822, 38 L. R. A. 424, 48 Pac. 706.

§ 433. Status of the Executory Contracts Belonging to Receivership.

A receiver over a public utility corporation, even though by statute made successor to the title of the company is not the assignee of, and compelled to perform the company's executory contracts. He may reject them if business necessity or advantage so dictates.[1] If the contract is one for the rental of equipment and the lessor is entitled to take back the property on default in payment of a stipulated sum periodically, the lessor may recover the property from a receiver in default, although, by the payment of a small sum, title, under the contract, would pass to the estate, when the receiver fails to show urgent need for the equipment in operating the road and some equitable excuse for not making the payment.[2] If a receiver rejects an executory contract, the other party, providing he is ready to perform his part,[3] is entitled to a claim for damages.[4] If a receiver adopts an executory contract he is bound by its terms.[5] If the obligation of a

1 Spencer v. Brooks, 97 Ga. 681, 25 S. E. 480; Maxwell v. Missouri Valley, etc., Storage Co., 181 Iowa 108, 164 N. W. 329.

Brown v. Warner, 78 Tex, 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032.

This case concerned an agreement of the company to pick up freight on a certain switch. The court said:

"The duty of the receivers was to hold and operate, and they were no more bound to carry out the company's contract to maintain the switch, than they were to discharge its obligations to pay money."

See Ellis v. Boston, etc., R. Co., 107 Mass. 1; Commonwealth v. Franklin Ins. Co., 115 Mass. 278; In re Brown, 3 Edw. Ch. (N. Y.) 384.

2 Central Locomotive, etc., Works v. Smith, 27 Colo. App. 449, 150 Pac. 241.

3 Diamond State Iron Co. v. San Antonio, etc., Ry. Co., 11 Tex. Civ. App. 587, 33 S. W. 987.

4 Brown v. Warner, 78 Tex. 543, 22 Am. St. Rep. 67, 11 L. R. A. 394, 14 S. W. 1032.

5 Mercantile Trust Co. v. Southern Iron Car Line, 113 Ala. 543, 21 So. 373; Seibert v. Minneapolis, etc., Ry. Co., 58 Minn. 53, 59 N. W. 879; Woodruff v. Erie R. Co., 93 N. Y. 609.

A contract concerning express privileges made with a group of railroads operated as a system, whereby an express company in

contract runs with the land, the receiver can not keep the land and refuse to perform the obligation.[6]

consideration of express privileges over the system agrees to pay a certain sum periodically which is divided among the roads by an agreement among themselves, is an indivisible contract; and when the system is disorganized by separate receiverships over various of its companies, the receiver of one can not maintain the right to continue the contract as to his line at the amount it had been receiving under the contract. Smith v. Wells, Fargo & Co., 96 Fed. 375.

[6] Howe v. Harding, 76 Tex. 17, 18 Am. St. Rep. 17, 13 S. W. 41.

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